Tanzania and the African Court spar over the mandatory death penalty and hanging: *Kambole v Attorney General* (Tanzania Court of Appeal, 2022), *Ally Rajabu v Tanzania* and fourteen other African Court decisions

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ABSTRACT: In *Ally Rajabu v Tanzania*, the African Court on Human and Peoples' Rights in 2019 found that the mandatory imposition of the death penalty and hanging as a method of execution violate articles 4 and 5 of the African Charter on Human and Peoples' Rights. In 2022, the Tanzania Court of Appeal in *Kambole v Attorney General* upheld the constitutionality of the mandatory death penalty, a shoddily reasoned decision that misinterpreted the doctrine of *res judicata* to find the constitutional claims to be barred. In the meantime, *Ally Rajabu* generated numerous follow-up complaints against Tanzania at the African Court. Although Tanzania in 2020 withdrew its acceptance of the Court's jurisdiction over individual complaints submitted directly to the Court, cases filed by death row prisoners before that date continued to be heard. This case comment analyses both the *Kambole* decision by the Tanzanian Court of Appeal and the fourteen subsequent cases decided by the African Court, which all confirmed the holding in *Ally Rajabu* that the mandatory death penalty and hanging were Charter violations.

TITRE ET RÉSUMÉ EN FRANÇAIS

La Tanzanie face à la Cour africaine des droits de l'homme et des peuples : divergence sur la peine de mort obligatoire et la méthode d'exécution par pendaison: *Kambole c. Procureur général* (Cour d'appel de Tanzanie, 2022), *Ally Rajabu c. Tanzanie* et quatorze autres décisions de la Cour africaine

RÉSUMÉ: Dans l'arrêt *Ally Rajabu c. Tanzanie* (2019), la Cour africaine des droits de l'homme et des peuples a déclaré que l'imposition de la peine de mort obligatoire et la pendaison comme méthode d'exécution constituaient des violations des articles 4 et 5 de la Charte africaine des droits de l'homme et des peuples. Ces dispositions protègent respectivement le droit à la vie et l'intégrité physique et morale des individus. Toutefois, en 2022, la Cour d'appel de Tanzanie, dans l'affaire *Kambole c. Procureur général*, a confirmé la constitutionnalité de la peine de mort obligatoire en Tanzanie, s'appuyant sur une interprétation controversée de la doctrine de l'autorité de la chose jugée. Cette décision a exclu tout recours constitutionnel au motif que les revendications soulevées avaient déjà été traitées. Parallèlement, l'affaire Ally Rajabu a suscité une série de plaintes déposées contre la Tanzanie auprès de la Cour africaine. Bien que la Tanzanie ait, en 2020, retiré sa déclaration reconnaissant la compétence

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de la Cour pour les requêtes individuelles, les affaires initiées avant cette date ont poursuivi leur cours. Parmi celles-ci, quatorze affaires impliquant des condamnés à mort ont confirmé la position de la Cour africaine, qui considère que la peine de mort obligatoire et la méthode d'exécution par pendaison sont incompatibles avec les principes fondamentaux de la Charte africaine. Ce commentaire examine les implications des décisions divergentes entre la Cour d'appel tanzanienne et la Cour africaine. Il analyse les fondements juridiques et institutionnels de ces arrêts, en mettant en lumière les défis posés par l'interprétation et la mise en œuvre des normes internationales des droits de l'homme dans le cadre des systèmes juridiques nationaux. Cette étude souligne également les tensions croissantes entre la souveraineté des États et leurs obligations internationales, tout en proposant des pistes pour harmoniser les approches juridiques afin de garantir une meilleure protection des droits humains en Afrique.

KEY WORDS: Tanzania; mandatory death penalty; hanging; African Charter; African Court of Human and Peoples' Rights; *Kambole v Attorney General;* Tanzania Court of Appeal

CONTENT:

1 INTRODUCTION

Tanzania is a slippery target for advocates challenging the constitutionality of the mandatory death penalty. In 2019, the African Court on Human and Peoples' Rights (African Court) ruled in *Ally Rajabu and Others v Tanzania* that the imposition of the mandatory death penalty violated the rights to life and human dignity at articles 4 and 5 of the African Charter on Human and Peoples' Rights (African Charter).[1] In that decision, the African Court additionally ruled that hanging as a method of execution violated article 5, a surprising holding that found hanging to be inherently degrading because it caused undue suffering.[2] A residue of British colonial penal codes, the mandatory death penalty has been widely rejected by many national courts and regional tribunals owing to its arbitrary nature in sentencing all persons convicted of murder to death regardless of the circumstances of their offenses.[3] In *Ally Rajabu*, the African Court's determination that the mandatory death penalty was inconsistent with the African Charter accorded with decisions of the Inter-American Commission on

1 *Ally Rajabu and Ors v Tanzania*, Application 7/2015, African Court on Human and Peoples' Rights, Judgment (28 November 2019); *Rajabu and others v Tanzania (merits and reparations)* (2019) 3 AfCLR 539.

2 *Rajabu* (n 1) para 115.

3 A Novak *The global decline of the mandatory death penalty: constitutional jurisprudence and legislative reform in Africa, Asia, and the Caribbean* (2014) 3-4.

Human Rights and United Nations Human Rights Committee, which found automatic death sentences incompatible with other international human rights instruments.[4] The decision in *Ally Rajabu* was the subject of an earlier case comment in the *African Human Rights Yearbook*.[5]

At first glance, Tanzania should be receptive to a challenge to the mandatory death penalty. In East Africa alone, the Supreme Courts of Kenya and Uganda and the Constitutional Court of Malawi had previously found the mandatory death penalty incompatible with their constitutions in coordinated challenges based on similar penal codes.[6] In addition, Tanzania has a more modern constitutional framework than those countries. When the Union of Tanzania was formed in 1964, its Constitution did not originally contain a bill of rights. A bill of rights was added by a constitutional amendment enacted in 1985.[7] For this reason, the Tanzanian Constitution, as amended, contains a more progressive right to life provision, without an explicit savings clause that allows for the death penalty. The Constitution provides simply that '[e]very person has the right to live and to the protection of his life by the society in accordance with law'.[8] Yet, in 1993, the Tanzanian Court of Appeal upheld the constitutionality of the death penalty *per se* in *Mbushuu v Republic*, finding that notwithstanding the expansive right to life provision, article 30 of the Tanzanian Constitution contains a broad limitations clause that allows the government to pass laws that promote or preserve 'the national interest in general'.[9] Over the following three decades, this decision has been roundly criticised because its reasoning was circular, arguing that the existence of the death penalty was the justification for retaining it, and because the Court of Appeal read a right narrowly and a limitation broadly contrary to ordinary principles of constitutional interpretation.[10]

On 15 June 2022, the Tanzania Court of Appeal upheld the mandatory death penalty in *Kambole v Attorney General.*[11] This decision cursorily dismissed the comparative jurisprudence from Kenya, Uganda, and Malawi, among other jurisdictions, and neglected

4 *Thompson v Saint Vincent & the Grenadines* Communication 806/1998, UNHR Committee, UN Doc CCPR/C/70/D/806/1998 (2000); *Edwards v Bahamas* case 12.067, Inter-American Commission on Human Rights, Report No 48/01, OEA/SerL/V/II.111, doc 20 (2000).

5 A Novak, 'Hanging and the mandatory death penalty in Africa: the significance of *Rajabu v Tanzania*' (2021) 5 *African Human Rights Yearbook* 401-419.

6 *Kafantayeni v Attorney General* [2007] MWHC 1 (Malawi); *Attorney General v Kigula* [2009] 2 EALR 1 (Uganda SC); *Muruatetu v Republic* (14 December 2017) Petitions 15/2015 and 16/2015 (Kenya SC).

7 CM Peter 'Civil and political rights in Tanzania: the bill of rights of 1985' (1995) 22 *African Review* 45-72.

8 Tanzania Constitution art 14.

9 Tanzania Constitution art 30(2)(f); *Mbushuu alias Dominic Mnyaroje and Kalai Sangula v Republic*, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal 142 of 1994; [1995] LRC 216.

10 A Gaitan & B Kuschnik 'Tanzania's death penalty debate: an epilogue on *Republic v Mbushuu*' (2009) 9(2) *African Human Rights Law Journal* 459 at 474-75.

11 *Kambole v Attorney General* [2022] TZCA 377 (15 June 2022).

to interpret the Tanzanian Constitution consistently with the African Charter. Rather, the decision relied exclusively on the faulty reasoning of *Mbushuu v Republic* and misapplied the doctrine of *res judicata* to find that the constitutionality of the mandatory death penalty had been previously determined to be in the national interest. This is true even though *Mbushuu* was a challenge to the death penalty per se, not a challenge to the mandatory nature of the death penalty, and therefore was easily distinguishable from the appellants' arguments in *Kambole*. The decision in *Kambole* was shoddily reasoned and ultimately incompatible with Tanzania's international obligations.

Shortly after *Ally Rajabu* was decided, Tanzania ousted jurisdiction of the African Court to hear individual complaints by withdrawing the Declaration it had filed in terms of article 34(6) of the African Court Protocol.[12] Tanzania's withdrawal became effective on 22 November 2020, one year after it deposited notice of its intention to withdraw.[13] However, the African Court may still hear complaints filed against Tanzania before its withdrawal became effective, which included numerous similar challenges to Tanzania's mandatory death penalty. The African Court has repeatedly reinforced its decision in *Ally Rajabu* in its follow-up jurisprudence. In fourteen separate decisions since *Ally Rajabu* was decided, the Court confirmed violations of articles 4 and 5 of the African Charter for the mandatory nature of the death penalty and hanging as a method of execution, respectively. These cases were all brought by death row prisoners who received automatic death sentences upon conviction for murder, although the facts and prayers varied slightly.[14]

This case comment will briefly summarise these decisions, emphasising the aspects that go beyond the African Court's decision in *Ally Rajabu* and contribute to the Court's death penalty jurisprudence. Several other applications against Tanzania alleging similar violations remain pending. As a result of Tanzania's withdrawal from the individual complaints mechanism, however, the significant line of jurisprudence that the African Court has generated on this question in respect of Tanzania is coming to an end. Hopefully, the African Court's

12 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

13 V Mtavangu & A Mbilinyi 'Tanzania's "withdrawal" from the African Court and its effects on the enforcement of human rights' (2023) 1(2) *Journal of Contemporary African Legal Studies* 19-36.

14 *Amini Juma v Tanzania*, Application 24/2016 (30 September 2021); *Gozbert Henerico v Tanzania*, Application 56/2016 (10 January 2022); *Ghati Mwita v Tanzania*, Application 12/2019 (1 December 2022); *Marthine Christian Msuguri v Tanzania*, Application 52/2016 (1 December 2022); *Chrizant John v Tanzania*, Application 49/2016 (7 November 2023); *Makungu Misalaba v Tanzania*, Application 33/2016 (7 November 2023); *John Lazaro v Tanzania*, Application 3/2016 (7 November 2023); *Ibrahim Yusuf Calist Bonge & Ors v Tanzania*, Application 36/2016 (4 December 2023); *Kachukura Nshekanabo Kakobeka v Tanzania*, Application 29/2016 (4 December 2023); *Deogratius Nicholaus Jeshi v Tanzania*, Application 17/2016 (13 February 2024); *Crospery Gabriel & Ernest Mutakyawa*, Application 50/2016 (13 February 2024); *Romward William v Tanzania*, Application 30/2016 (13 February 2024); *Nzigiymana Zabron v Tanzania*, Application 51/2016 (4 June 2024); *Dominick Damian v Tanzania*, Application 48/2016 (4 June 2024).

strong and repeated statements that the mandatory death penalty violates the African Charter will increase pressure on Tanzania to resolve the conflict between its domestic law and its international obligations.

2 THE TANZANIA COURT OF APPEAL UPHOLDS THE MANDATORY DEATH PENALTY IN *KAMBOLE V ATTORNEY GENERAL* (2022)

In *Kambole*, the appellants challenged the mandatory nature of the death penalty on several constitutional grounds including right to a fair trial in article 13(6)(a) of Tanzania's Constitution, non-discrimination in article 13(1), human dignity in article 12(2) and article 13(6)(d), freedom from inhuman or degrading treatment or punishment in article 13(6)(e), and life in article 14.[15] As these provisions suggest, the appellants' arguments against the mandatory death penalty included (a) that it is arbitrary since it does not distinguish between more serious and less serious murders, hence the grounds of non-discrimination and right to human dignity; (b) that it potentially over-punishes and does not accord with the worst of the worst, and therefore is inhuman and degrading; and (c) that it deprives death row inmates of a sentencing hearing to present mitigating evidence, which is a fair trial violation.

The respondents argued that the death penalty per se had been upheld previously in *Mbushuu*. The state's attorney argued that there was 'no line of distinction between challenging the constitutionality of the death penalty and challenging the mandatory imposition of the death penalty'.[16] This line of argument was accepted by the lower court decision in *Kambole* in 2019, which found the constitutionality of the death penalty had been settled in *Mbushuu* and the challenge to the mandatory death penalty presented 'nothing new'.[17] The High Court in that decision found the matter was *res judicata* since it had already been pleaded and affirmed by the Court of Appeal in *Mbushuu*, writing that the petitioners were 'at liberty to move the Court of Appeal through review if he strongly feels that Mbushuu's case was determined wrongly'.[18]

At the Court of Appeal, the appellants in *Kambole* insisted that a challenge to the mandatory death penalty was distinct from a challenge to the death penalty per se as in *Mbushuu*. The constitutional questions were different. The appellants also argued that Tanzania's bill of rights and international human rights instruments had evolved since 1993 on the permissibility of the mandatory death penalty.[19] This included the

15 *Kambole* (CA) (n 10) at 5-6.
16 *Kambole* (CA) (n 10) at 6.
17 *Kambole v Attorney General*, [2019] TZHC 6 (18 July 2019), at 17.
18 *Kambole* (HC) (n 13) at 17.
19 *Kambole* (CA) (n 10) at 8-10.

African Court's decision in *Ally Rajabu*, as well as Commonwealth jurisprudence from India, Uganda, Kenya, and Malawi, among others, which post dated *Mbushuu*. Placing special emphasis on the Ugandan Supreme Court's decision in *Attorney General v Kigula*, the appellants clarified that replacing a mandatory death penalty with a discretionary system was not tantamount to entirely striking down the death penalty. The Court of Appeal simply needed to replace 'shall' with 'may' in the Penal Code.[20]

In rejecting the appellants' contentions, the Court of Appeal used a strange avoidance strategy: it found that the challenge to the mandatory death penalty was *res judicata*. According to the Court, Tanzania's Code of Criminal Procedure was designed to bar repeated lawsuits on the same matter or claims that should have been raised in earlier litigation.[21] The appellants objected that the purpose of *res judicata* and collateral estoppel was to prohibit the re-litigation of settled cases where the parties and issues were substantially similar, not to prevent a final court of appeal from revisiting precedents after thirty years had passed in a case of substantial public interest.[22]

The appellants were objectively correct on this point: the Court of Appeal misunderstood the doctrine of *res judicata* and did violence to its core purpose. According to one particularly authoritative text, the *Restatement (Second) of Judgments* (1982) published by the American Law Institute, even if the issues at stake in *Mbushuu* and *Kambole* were substantially similar, an exception to the rule of preclusion applies when '[t]he issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context'.[23] An additional and even more liberal exception applies when the parties are entirely different. *In casu,* 'the issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based'.[24] In this case, the Court of Appeal foreclosed the possibility of revisiting a much-maligned precedent in a case involving different parties and raising different issues, despite *three decades* of monumental legal changes in comparable common law jurisdictions and at international tribunals. And this, even though the issues at stake are among the most important individual rights including life and dignity.

20 *Kambole* (CA) (n 10) at 15.

21 *Kambole* (CA) (n 10) at 28-29.

22 *Kambole* (CA) (n 10) at 16.

23 American Law Institute, *Restatement (Second) of Judgments* (1982), para 28(2). See also G Hazard 'Preclusion as to issues of law: the legal system's interest' (1984) 70 *Iowa Law Review* 81-94.

24 American Law Institute, *Restatement (Second) of Judgments* (1982) para 29(7).

The Court gives away the ballgame in a reference to another, unreported lower court decision: *Tete Mwamtenga Kafunja*.[25] In that case, Kafunja had raised the possibility that the mandatory death penalty was unconstitutional, and the lower court dismissed the argument based on *Mbushuu*. However, *Kafunja* was never appealed because the defendant in that case won at the lower court level on other grounds and was released after 18 years in prison for a murder he did not commit.[26] The Court of Appeal was essentially saying that *res judicata* should apply because of 'the fact that the counsel in that case was the same counsel ... in the present appeal'.[27] To state this in different words, the Court of Appeal found the claims in *Kambole res judicata* because the lawyer for Kambole failed to appeal an earlier decision that they could have used to bar the claims in *Kambole*. The implication here is astonishing: the Court found that the claims in *Kambole* were barred because of a case that the Court never decided but wished it had. To sum up, *Kambole* was an all-around judicial disaster. It does not withstand the most superficial scrutiny.

3 THE AFRICAN COURT'S TURN: FOURTEEN JUDGMENTS AGAINST TANZANIA ON THE MANDATORY DEATH PENALTY AND HANGING

Although the Tanzanian Court of Appeal upheld the mandatory death penalty, the African Court has repeatedly reinforced its decision in *Ally Rajabu* of finding the sentence a violation of the African Charter. Since *Ally Rajabu* was decided in 2019, the African Court has issued fourteen judgments confirming that the mandatory death penalty violates article 4 of the African Charter (right to life) and hanging as a method of execution violates article 5 (right to dignity). This does not include several additional decisions, some of which are cited below, in which the Court mentioned the *Ally Rajabu* holding in *dicta*. Of the fourteen decisions, most raise other claims as well, usually alleged violations of other components of the right to a fair trial. However, they all contain the core claims of *Ally Rajabu*: first, that the mandatory death penalty arbitrarily fails to separate the worst murders from the rest and denies defendants a sentencing hearing; and additionally, that hanging as a method of execution causes excessive pain, and, therefore, constitutes cruel and degrading punishment.

25 This decision is apparently unreported and cannot be found. See *Tete Mwamtenga Kafunja & 2 Ors v Republic*, CAT Criminal Appeal No. 102 of 2005, cited in *Republic v Malimi Elisha*, Case 164/2015 (Tanzania High Court, 8 June 2020).

26 'Former death row inmate shares story of pain, horror and miracles' (9 October 2022) *Daily News*, https://dailynews.co.tz/former-death-row-inmate-shares-story-of-pain-horror-and-miracles.

27 *Kambole* (CA) (n 10) at 31.

One common approach in these decisions is the reliance on international and comparative law, for the purpose of showing a growing consensus to move away from the mandatory death penalty in favor of a capital sentencing system with guided discretion. In *Amini Juma v Tanzania*, the Court explained that the arbitrariness of the mandatory death penalty and the denial of fair trial rights were 'affirmed by relevant international case law,' citing the Judicial Committee of the Privy Council in cases from the Commonwealth Caribbean.[28] The Court went further to observe that 'domestic courts in some African countries have adopted the same interpretation in finding the mandatory imposition of the death penalty arbitrary and in violation of due process', specifically quoting the Supreme Court of Kenya at length.[29] In a later case, *Chrizant John v Tanzania*, the African Court made reference to the decisions and resolutions of the United Nations Human Rights Committee and statements from the UN Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions.[30] The comparative aspects became more sophisticated over time, going beyond a counting of heads of other jurisdictions. In a 2024 case, *Nzigiyimana Zabron v Tanzania*, the African Court cited decisions of the Inter-American Court of Human Rights, Constitutional Courts of Malawi and South Africa, Supreme Court of Uganda, and Eastern Caribbean Court of Appeal to make comparative reference at each stage of its analysis.[31]

Most of the discussions on the mandatory death penalty and hanging in these fourteen cases were brief and nearly boilerplate copies of each other. In several cases, the Court even raised the issues of mandatory capital sentencing and hanging *sua sponte*. For instance, in *Kachukura Nshekanabo Kakobeka v Tanzania*, the Court observed as follows: 'While the Applicant did not make any submissions on the right to dignity, the Court notes from the record that the Applicant was sentenced to death by hanging.'[32] It, therefore, found a violation of article 5 of the African Charter. This also occurred in *Deogratius Nicholaus Jeshi v Tanzania*, where the applicant did not make any

28 *Amini Juma v Tanzania*, Application 24/2016, African Court of Human and Peoples' Rights (30 September 2021) at 30, citing *Hughes v Queen*, [2002] UKPC 12 (appeal arising from Saint Lucia).

29 *Amini Juma* (n 28) at 31, citing *Muruatetu v Republic*, Petitions 15/2015 and 16/2015, Kenya Supreme Court, 14 December 2017.

30 *Chrizant John v Tanzania*, Application 49/2016, African Court of Human and Peoples' Rights (7 November 2023) para 129.

31 *Nzigiyimana Zabron v Tanzania*, Application 51/2016, African Court of Human and Peoples' Rights (4 June 2024) paras 138-142, citing, inter alia, *Attorney General v Kigula*, [2009] 2 EALR 1 (Uganda SC); *State v Makwanyane*, 1995 (3) S.A. 391 (CC); *Mitcham v Director of Public Prosecutions*, Crim App Nos 10/2002, 11/2002, 12/2002 (3 November 2003) (E Carib Ct App); *Kafantayeni v Attorney General*, [2007] MWHC 1; *Boyce v Barbados*, Inter-Am Ct HR (ser C) No 1969 (20 November 2007). This analysis was substantially identical to another decision dated the same day and raising the same claims, *Dominick Damian v Tanzania*, Application 48/2016, African Court of Human and Peoples' Rights (4 June 2024).

32 *Kachukura Nshekanabo Kakobeka v Tanzania*, Application 29/2016, African Court of Human and Peoples' Rights (4 December 2023) para 79.

submissions on either the mandatory death penalty or hanging. Again, the Court found violations of articles 4 and 5.[33]

Occasionally in these decisions, the African Court elaborated on its reasoning. In *Romward William v Tanzania*, the Court reiterated that the mandatory death penalty was an arbitrary deprivation of life under article 4 but added an extensive analysis that sentencing a defendant to death without consideration of mitigating factors caused 'psychological and emotional distress which constitute[d] a violation of his right to dignity'.[34] Even more importantly, the African Court extended *Ally Rajabu* to apply to prisoners who were originally sentenced to death but had their sentences subsequently commuted to life imprisonment. In *Nzigiyimana Zabron*, the Court rejected the state's contention that the commutation rectified the defect of the original mandatory death sentence. The Court explained that the problem with a mandatory death sentence was not the sentence itself but the lack of opportunity for a defendant to submit evidence in mitigation, which was not satisfied by a commutation to life.[35]

In the fourteen 'post-*Rajabu*' decisions finding violations against Tanzania, the African Court took care not to cast doubt on the lawfulness of the death penalty per se, but rather only collateral aspects of it. In *Ibrahim Yusuf Calist Bonge & Others v Tanzania*, the Court observed both 'global trends' and 'continent-wide developments' that have resulted in progressive abolition of the death penalty. The Court explained that the death penalty 'should, exceptionally, be reserved only for the most heinous of offences committed in seriously aggravating circumstances', but added that the circumstances in which the death penalty is appropriate 'must be left to domestic courts on a case-by-case basis'.[36] This statement is consistent with the view that the death penalty is permissible currently in international law, but increasingly subject to constraint and with a view toward long-term abolition. Conceptually, this would not prevent the Court from taking a stronger position against the death penalty in a future case. Indeed, this line of jurisprudence contains nuggets that eventually could be useful in a frontal assault on the death penalty per se. One example is this statement tying together the human dignity arguments against the mandatory death penalty, hanging, and conditions of death row into a single analysis:[37]

> The Court observes that the concept of human dignity is of profound significance in the realm of individual rights. It serves as an essential foundation upon which the edifice of human rights is constructed. The right to dignity captures the very essence of the inherent worth and value that resides within every individual, irrespective of their circumstances,

33 *Deogratius Nicholaus Jeshi v Tanzania*, Application 17/2016, African Court of Human and Peoples' Rights (13 February 2024).

34 *Romward William v Tanzania*, Application 30/2016, African Court of Human and Peoples' Rights (13 February 2024).

35 *Nzigiyimana Zabron* (n 31) paras 144-146.

36 *Ibrahim Yusuf Calist Bonge & Ors v Tanzania*, Application 36/2016, African Court of Human and Peoples' Rights (4 December 2023).

37 *Romward William* (n 34) paras 69-71.

> background, or choices. At its core, it embodies and upholds the principle of respect for the intrinsic humanity of each person and forms the bedrock of what it means to be truly human. It is in this sense that Article 5 absolutely prohibits all forms of treatment that undermines the inherent dignity of an individual.
>
> The Court recalls its judgment that the time spent awaiting execution can distress persons sentenced to death particularly when the duration is long. The Court emphasises that detention on death row is inherently inhuman and encroaches upon human dignity. This Court reiterates that the distress associated with detention awaiting execution of the death sentence stems from the natural fear of death and the uncertainty that a condemned prisoner has to live with. In such a case, States such as the Respondent are encouraged to determine appropriate sentences that remove the constant possibility of the enforcement of the death penalty for persons originally sentenced to death.
>
> The Court notes, in the present case, that the situation is exacerbated by the fact that the Applicant was sentenced to death without consideration of mitigating circumstances including an alternative sentence, as the domestic court's discretion was removed by law, in contravention of the Charter. Given these circumstances, the Applicant invariably suffered psychological and emotional distress which constitutes a violation of his right to dignity.

This decision, in *Romward William*, is notable because it transforms *Ally Rajabu*'s emphasis that the mandatory death penalty violated the right to a fair trial into an analysis centred on human dignity under article 5. This could be a signal for future death penalty challenges that dignity, even more than life, is foundational to the Court's reasoning.

Just as the African Court was careful to distinguish between a challenge to mandatory death penalty or hanging and death penalty per se, it also drew a line between the death penalty and life imprisonment without the possibility of parole. The Court rejected the contention that life was tantamount to death. In *Makungu Misalaba v Tanzania*, the Court found a violation of the right to life and right to dignity due to the mandatory death sentence imposed on the Applicant and delays in executing the death penalty. However, the Court rejected the contention that the commutation of his sentence to life imprisonment without parole was also a violation of the African Charter on the same grounds, noting that nothing in Tanzanian law prevented him from receiving further commutations.[38] According to the Court, 'the imposition of life imprisonment for the most serious offences, on its own, may not necessarily constitute inhuman or degrading treatment, especially where there is a possibility of parole'.[39] The African Court is not closing the door here; hopefully, it will revisit the question of life imprisonment in the future as international legal developments evolve. For instance, the European Court of Human Rights has ruled that the

38 *Makungu Misalaba v Tanzania*, Application 33/2016, African Court on Human and Peoples' Rights (7 November 2023) paras 156, 174-175.

39 *Makungu Misalaba* (n 38) para 173.

possibility of executive clemency does not provide a sufficient possibility of release for an inmate sentenced to life without parole.[40]

4 DISSENTING OPINIONS BY JUSTICES BLAISE TCHIKAYA AND DUMISA BUHLE NTSEBEZA: A MINORITY VIEW THAT THE AFRICAN CHARTER PROHIBITS THE DEATH PENALTY

In *Ally Rajabu* in 2019, Justice Blaise Tchikaya had issued a concurrence that cast doubt on the permissibility of the death penalty altogether under the African Charter.[41] In the fourteen subsequent cases at the African Court concerning section 197 of Tanzania's Penal Code, Justice Tchikaya again issued a series of declarations, concurrences, and dissenting opinions that elaborated on his view that the death penalty was not permissible in international law. In most of these cases, he was joined by Justice Dumisa Buhle Ntsebeza of South Africa. Justice Ntsebeza's view was relatively straightforward. In a series of brief and nearly identical opinions, he explained that the death penalty was inherently cruel, degrading, and inhuman, with too great a potential for error and discriminatory application.[42]

The declarations and dissenting opinions by Justice Tchikaya were much more comprehensive and provide a far-reaching roadmap for a future challenge to the death penalty. In his declaration in *Gozbert Henrico v Tanzania*, Justice Tchikaya called the decision of the African Court 'partial' when it 'could have taken this reasoning to its logical conclusion by purely and simply banishing this punishment in all its forms from the African legal order'.[43] He argued that the death penalty had the same defect regardless of whether it was discretionary or mandatory.

Justice Tchikaya issued a consolidated dissenting opinion to the cases of *John Lazaro*, *Makungu Misalaba*, and *Chrizrant John*, which were decided 7 November 2023. He explained that the African Court had 'confined itself to a minimalist approach' and missed an

40 *Hutchinson v United Kingdom*, Application 57592/08, [2016] ECHR 021 (January 2017).

41 *Ally Rajabu and Ors v Tanzania*, Application 7/2015, African Court on Human and Peoples' Rights, Concurring Opinion of Blaise Tchikaya (28 November 2019).

42 *Crospery Gabriel & Ernest Mutakyawa v Tanzania*, Application 50/2016, African Court on Human and Peoples' Rights, Declaration of Justice Dumisa Buhle Ntsebeza (13 February 2024); *Nzigiyimana Zabron* (n 30), Declaration of Justice Dumisa Buhle Ntsebeza (4 June 2024); *Romward William* (n 34), Declaration of Justice Dumisa Buhle Ntsebeza (13 February 2024); *Kachukura Nshekanabo Kakobeka* (n 31), Declaration of Justice Dumisa Buhle Ntsebeza (4 December 2023 2024); *Ibrahim Yusuf Calist Bonge & Ors* (n 36), Declaration of Justice Dumisa Buhle Ntsebeza (4 December 2023).

43 *Gozbert Henrico v Tanzania*, Application 56/2016, African Court of Human and Peoples' Rights, Declaration of Justice Blaise Tchikaya (10 January 2022) at para 3.

opportunity to confirm a solidifying consensus in international law prohibiting the death penalty.[44] And again, on 13 February 2024, he wrote a consolidated dissenting opinion in the cases of *Romward William*, *Deogratius Nicholaus Jeshi*, and *Crospery Gabriel and Ernest Mutakyawa*. The purpose of his dissenting opinion, he wrote, 'is to denounce, first, the inadequacy and inhumanity of the death penalty and second, the wait-and-see attitude of this Court'. He observed that 'the death penalty is incompatible with the right to life, and the sanctity and protection thereof,' and described the Court's position validating the lawfulness of the death penalty in principle as 'paradoxical'.[45] He made a similar argument against the Court's limited holding on hanging when he held that 'all methods of enforcing the death penalty, without exception, are cruel: the bullet to the head, stoning, the electric chair, lethal injection, asphyxiation, and hanging'.[46] His consolidated dissenting opinion on 4 December 2023 in the cases of *Ibrahim Yusuf Calist Bonge* and *Kachukura Nshekanabo Kakobeka* was similar, citing, among other sources, a 2022 decision of the UN Committee Against Torture finding that hanging in Botswana was inhumane.[47]

In the cases decided on 4 June 2024, *Nzigiyimana Zabron* and *Dominick Damian*, Justice Tchikaya dissented again. These cases involved significant questions of delay on death row in addition to the usual mandatory death penalty and hanging challenges. Justice Tchikaya reiterated his view that the African Court was taking 'positions which tend not towards abolishing the death penalty but rather towards relativising' it, as if to say that international law and domestic law existed in separate spheres and domestic legal systems could ignore international law.[48] It is worth mentioning that this argument has appeared in the academic literature on the death penalty as well. On this theory, striking down the most objectionable aspects of the death penalty in incremental challenges makes death penalty abolition harder because it validates the death penalty per se and pushes courts to confirm the punishment's lawfulness.[49]

Notably, Justice Tchikaya dissented from other cases filed against Tanzania involving the death penalty even when the African Court did

44 *John Lazaro v Tanzania*, Application 3/2016, *Makungu Misalaba v Tanzania*, Application 33/2016, *Chrizant John v Tanzania*, Application 49/2016, Consolidated Declaration of Justice Blaise Tchikaya (7 November 2023).

45 *Romward William v Tanzania*, Application 30/2016, *Deogratius Nicholaus Jeshi*, Application 17/2016, *Crospery Gabriel and Ernest Mutakyawa*, Application 50/2016, Consolidated Declaration of Justice Blaise Tchikaya (13 February 2024) para 8.

46 *Romward William, Deogratius Nicholaus Jeshi,* and *Crospery Gabriel and Ernest Mutakyawa*, Consolidated Declaration of Justice Tchikaya (n 43) para 18.

47 *Ibrahim Yusuf Calist Bonge v Tanzania*, Application 36/2016, *Kachukura Nshekanabo Kakobeka*, Application 29/2016, Consolidated Declaration of Justice Blaise Tchikaya (4 December 2023).

48 *Nzigiyimana Zabron v Tanzania,* Application 51/2016, *Dominick Damian v Tanzania*, Application 48/2016, Consolidated Declaration of Justice Blaise Tchikaya (4 June 2024) paras 41-42.

49 KA Akers & P Hodgkinson 'A critique of litigation and abolition strategies: a glass half empty' in P Hodgkinson (ed) *Capital punishment: new perspectives* (2013) 29-62 at 40.

not find a Charter violation.[50] In the case of *Igola Iguna v Tanzania*, the Court did not find a violation of the African Charter owing to lack of substantiation of the allegations, but did reiterate with caution 'its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State'.[51] Justice Tchikaya wrote a dissenting opinion to this case, consolidated a dissent to two others decided the same day that did find violations, *Ghati Mwita v Tanzania* and *Marthine Christian Msuguri v Tanzania*. He again deplored the African Court's reluctance to find that the death penalty violates the African Charter. Singling out hanging as an inhumane method of execution suggests that other methods were more humane; similarly, condemning only the length and conditions of confinement on death row 'indirectly validated' the death penalty, which by its very nature involved confinement on death row.[52]

In another case alleging violations of the right to a fair trial, Justices Tchikaya and Ntsebeza took the African Court to task for not finding Charter violations due to the mandatory nature of the death penalty and hanging. This was *Mulokozi Anatory v Tanzania*, decided 5 September 2023. In this case, the Court did not find violations of articles 4 or 5 but mentioned in *dicta* its prior jurisprudence on the mandatory death penalty and hanging.[53] A brief dissenting opinion by Justice Bensaoula Chafika argued that the Court should have found violations of the Charter based on the *Ally Rajabu* criteria.[54] The dissent by Justices Tchikaya and Ntsebeza was more comprehensive. In an opinion steeped in international legal theory, the authors argued generally that the abolition of the death penalty was a peremptory norm in international law and binding even on states that had not ratified the Second Optional Protocol of the International Covenant on Civil and Political Rights.[55]

5 CONCLUSION

The 2019 African Court decision in *Ally Rajabu v Tanzania* confirmed the global trend moving away from the mandatory death penalty and, in a novel holding, reasoned that hanging as a method of execution was

50 In addition to those cited below, see *Thomas Mgira v Tanzania*, Application 3/2019, *Umalo Masso v Tanzania*, Application 31/2016, Consolidated Declaration of Justice Blaise Tchikaya (13 June 2023).

51 *Igola Iguna v Tanzania*, Application 20/2017, African Court of Human and Peoples' Rights (1 December 2022).

52 *Marthine Christian Msuguri v Tanzania*, Application 52/2016, *Ghati Mwita v Tanzania*, Application 12/2019, *Igola Iguna v Tanzania*, Application 20/2017, Consolidated Declaration of Justice Blaise Tchikaya (1 December 2022).

53 *Mulokozo Anatory v Tanzania*, Application 57/2016, African Court of Human and Peoples' Rights (5 September 2023).

54 *Mulokozo Anatory* (n 53), Declaration of Justice Bensaoula Chafika (5 September 2023).

55 *Mulokozo Anatory* (n 53), Declaration of Justices Blaise Tchikaya and Dumisa Buhle Ntsebeza (5 September 2023).

an affront to human dignity. This was the first time the African Court had joined the chorus of international, regional, and domestic court decisions against the mandatory nature of capital punishment. Partly as a result of the decision, Tanzania withdrew from the African Court's individual complaints mechanism, but not before nearly two dozen other complaints from death row inmates were filed at the Court. Domestically, Tanzania refused to comply with *Ally Rajabu* and has so far avoided reconciling the protective terms of Tanzania's Constitution with the widely accepted flaws of a mandatory capital sentencing regime. As noted above, in 1993 the Tanzanian Court of Appeal upheld the country's death penalty statute in a much-criticised case, *Mbushuu v Republic*, which found that the Constitution's expansive right to life was modified by a broad limitations clause that allowed the government to restrict the right if in the 'national interest'. The refusal of the Tanzania Court of Appeal to revisit this holding is overly deferential to a poorly reasoned precedent and out of sync with the trend away from the death penalty in East Africa and the rest of the continent. The 2022 decision in *Kambole v Attorney General* missed an opportunity to read the right to life provision in Tanzania's Constitution consistently with international human rights law. That it did so by misinterpreting the legal concept of *res judicata* to a situation that does not fall within the ordinary understanding of issue or claim preclusion reveals that the Court of Appeal used motivated reasoning to come to its decision.

The African Court has responded to Tanzania's challenge by reinforcing and expanding its earlier decision in *Ally Rajabu*. Including *Ally Rajabu*, the African Court has now found Tanzania's mandatory death penalty law in violation of articles 4 and 5 of the African Charter in at least fifteen separate cases. Although many of these are copycat challenges, they elaborated on the reasoning in *Ally Rajabu* and, to the extent that they develop the African Court's human dignity jurisprudence, may provide a roadmap for a future challenge to the death penalty per se under the African Charter. Although we might expect that Tanzania will continue to resist the global trend toward death penalty abolition, recent experience from other countries in Sub-Saharan Africa shows that a political consensus in favor of capital punishment can quickly change. Possibly, the African Court's decisions will increase pressure on Tanzania to recognise the conflict between its domestic law and the African Charter on the issue of the death penalty.

Finally, to make a normative claim, Tanzania *should* abolish the death penalty. Its Constitution contains an unqualified right to life, which as a foundational right should be interpreted broadly. The country has not carried out an execution in nearly thirty years and likely never will again. The harms of death row generally, both physical and non-physical, are widely documented, as is the risk of wrongful convictions. By inevitably creating a large death row that must be controlled through periodic commutations of sentence, the mandatory death penalty exaggerates these harms and intolerably increases the risk of error. Luckily, the African Court has recognised these concerns and amplified them.