Communication 319/06 - Interights & Ditshwanelo v. The Republic of Botswana

Summary of the Complaint

1. The Complaint is filed by the International Centre for Human Rights (Interights)[1], and Ditshwanelo-the Botswana Human Rights Centre (the Complainants), on behalf of Mr. Oteng Modisane Ping (the Victim), against the Republic of Botswana, (Respondent State), State Party to the African Charter.

2. The Complainants allege that the Victim was accused of the murder of his girlfriend and her son in 2002, and was accordingly convicted and sentenced by the High Court of the Respondent State to fifteen years imprisonment for the murder of his girlfriend, and to death by hanging for the murder of her 6 year old son.

3. In February 2005, the Victim appealed but the Court of the Appeal, which is the highest judicial authority in the country, dismissed the appeals in both cases. In dismissing the appeals, the Court of Appeal observed that the extenuating circumstances had already been considered with regard to the murder of the girlfriend and that the same did not apply in the murder of the son.

4. On 1 February 2006, the Victim submitted an appeal for clemency to the President of the Respondent State. At the time of making the Complaint, the Complainants believed that the decision to deny the Victim clemency had already been communicated to the prisons department and his warrant of death signed.

[1] International Centre for Human Rights (INTERIGHTS) IS A Non-government Organization which was granted Observer Status with the Commission during the 18th Ordinary Session in October 1990.

5. The Complainants also allege that despite the fact that the Prison's Act stipulates that a minimum of 24 hour notice should be given to the Prisoner before execution, the prison authorities have in practice used 'this requirement as a maximum requirement and proceeded to block access to the prisoner within that twenty-four (24) hour period.' In the present case, it is alleged that the Victim's mother and Ditshwanelo (appointed counsel for the Victim) had both been denied access to the Victim before his execution.

6. The Complainants further allege a continuous violation of the right to life in Botswana by the imposition of the death penalty in Botswana. Additionally, the manner in which the death penalty is carried out by hanging also constitutes cruel, inhuman and degrading punishment. Lastly, the secrecy of executions and the lack of proper notification before executions severely compromise the right to pursue all avenues of justice on behalf of a prisoner.

7. The Complainants aver that there are no local remedies which can be pursued in Botswana since the Court of Appeal has already made a ruling on the constitutionality of the death penalty in Botswana. [2]

Articles alleged to have been violated

8. The Complainants allege that the Respondent State has violated Articles 1, 4 and 5 of the African Charter.

The Procedure

9. The Secretariat received a Complaint from the Complainants on 31 March 2006 and acknowledged its receipt on 1 April 2006. Accompanying the Complaint

[2] In 2003, in The State vs Lehlohnonolo, the presiding Judge had ruled that Section 4 of the Botswana Constitution, permitting deprivation of life in execution of a sentence of the court, could not contravene section 7 of the Constitution, prohibiting inhumane punishment, since they both formed part of the same document.

was also a request for Provisional Measures in accordance with Rule 111 of the Commission's Rules of Procedure.

10. At its 39th Ordinary Session held from 11 to 25 May 2006 in Banjul, The Gambia, the Commission was seized of the Complaint and the parties were informed on 5 June 2006. Subsequently, the Complainants were requested to make their submissions on the Admissibility of the Communication. A copy of the Complaint and the decision on seizure was also transmitted to the Respondent State. On 10 October 2006, the Secretariat of the Commission sent reminders to the parties to submit their arguments on Admissibility by 25 October 2006. On 24 October 2006, the Secretariat of the Commission received the submissions of the Complainants on Admissibility by email.

11. At its 40th Ordinary Session held from 15 to 29 November 2006, in Banjul, The Gambia, the Commission decided to defer the consideration of the Communication on Admissibility to its 41st Ordinary Session, in order to allow the Respondent State make its submissions on Admissibility. On 7 February 2007, both parties were informed of the Commission's decision, and the Respondent State was urged to submit the requested submissions within one month of the reminder, that is, by 7 March 2007. By a Note Verbale dated 24 April 2007, the Commission reminded the Respondent State of its request for the latter's response to the Complainants submissions on Admissibility; and requested the State to make the required submission by 10 May 2007. By the same Note Verbale, the Commission informed the Respondent State that if the requested submission was not made, the Commission may be obliged to take a decision on Admissibility based on the facts before it, in line with Rule 117(4) of the old Rules of Procedure.

12. At its 41st Ordinary Session held from 16 to 30 May 2007, in Accra, Ghana, the Commission in the absence of any response from the Respondent State, acted

on the evidence before it in line with Rule 117(4) and declared the Communication Admissible. By way of a Note Verbale dated 25 June 2007, the Respondent State was informed of the decision of the Commission and was also requested to make its submissions on Merits by 24 August 2007. On 11 September 2007, the Respondent State was reminded to make its submissions before the end of September 2007. On 19 September 2007, the Complainant was also informed of the decision of the Commission, upon the Secretariat realising that the information had not yet been transmitted, and requested them to make their submissions on the Merits on or by 31 October 2007 in time for consideration during the 42nd Ordinary Session. In the letter, it was also stated that if the Complainants failed to meet the set deadline, the Communication will be deferred for consideration in May 2008 in time for consideration during the 43rd Ordinary Session but in any case, they were required to make their submissions within 3 months of receipt of the letter.

13. At its 42nd Ordinary Session held from 15 to 28 November 2007 in Brazzaville, Republic of Congo, the Commission deferred the Communication to its 43rd Ordinary Session of the Commission in order to allow both parties to submit on the Merits of the Communication. The parties were informed of the decision of the Commission on 19 December 2007. However, it was later realised that the letter and Note Verbale were wrongly drafted since it referred to making submissions on Admissibility instead of Merits. This was later corrected and on 22 October 2008, a reminder was sent to both parties to submit their arguments on the Merits of the Communication at their 'earliest convenience' in order to allow for its consideration during the 44th Ordinary Session.

14. At its 44th Ordinary Session held from 10 to 24 November 2008, in Abuja, Federal Democratic Republic of Nigeria, the Commission decided to defer its decision on the Communication to its 45th Ordinary Session in order to allow

both parties to make their submissions on the Merits of the Communication. On 11 December 2008, both parties were informed of the decision and subsequently requested to submit their arguments on the Merits of the Communication within three months on or before 11 March 2009.

15. On various dates between January and March 2009, the Complainants requested and were granted extension to make their submissions three weeks outside the set deadline. The Complainants submissions were therefore due on 1 April 2009. On 27 March 2009, the Commission requested the State to make its submissions on the Merits of the Communication 'without further delay' and subsequently informed it of its intention to take a decision at its 45th Ordinary Session scheduled from 13 to 28 May 2009 in Banjul, The Gambia and requested it to submit its arguments on the Merits of the Communication without further delay.

16. On 1 April 2009, the Secretariat of the Commission received an email from Complainants transmitting their submissions on the Merits of the Communication to the Commission. The Commission acknowledged receipt of the Complainants' submissions on 6 April 2009 and informed the Complainant of its decision to forward the same to the Respondent State for their comments. On 9 April 2009, the Respondent State acknowledged receipt of the Commission's Note Verbale of the 27 March 2009, and joined issues with the Commission on alleged procedural lapses, stating that the Admissibility decision was taken without the involvement of the Respondent State. On 16 April 2009, the Secretariat of the Commission acknowledged receipt of the Respondent State's Note Verbale dated 9 April 2009 and informed the Respondent State that the issues raised by the Respondent State would be tabled before the Commission during its 45th Ordinary Session scheduled for 13 to 28 May 2009, in Banjul, The Gambia.

17. At its 45th Ordinary Session held 13 to 27 May 2009, in Banjul, The Gambia, the Commission decided to defer the consideration of the Communication to the 46th Ordinary Session of the Commission and informed both parties appropriately on 3 June 2009.

18. On 12 August 2009, the Respondent State acknowledged receipt of the Commission's Note Verbale and requested for a further extension of time to the 30 September 2009 to enable the Government finalise its submissions. On 18 August 2009, the Respondent State further requested for a copy of the Admissibility decision which was forwarded to it on 20 August 2009.

19. The request for extension of time was granted on 6 May 2013 and the Respondent State was requested to submit its argument on Merits on or before 8 June 2013 in time for consideration during the 54th Ordinary Session.

20. At its 46th Ordinary Session held from 11-25 November 2009, in Banjul, The Gambia, the Commission further decided to defer the consideration of the Communication to its 47th Ordinary Session. Both parties were informed of the Commission's decision on 14 December 2009 and also the decision to give the Respondent State another chance to make its submissions on the Admissibility (there was a mistake in this regard since the pending submissions were on Merits and not Admissibility) of the Communication. By Note Verbale dated 9 March 2010, the Respondent State acknowledged receipt of the Commission's Note Verbale of 14 December 2009. In their Note Verbale, the Respondent State noted that the Commission may be well intentioned in trying to accommodate the Respondent State however it reiterated its concern that it was not heard with regards to the Admissibility decision. It subsequently pointed out that the deferral to allow it one last chance to make submission on Admissibility was not understood since the Commission had already ruled that the Communication was Admissible. It also stated that leaving the Republic of

Botswana out of the Admissibility decision was a serious procedural mistake. In this regard, the process before the Commission lack legitimacy and it would not acquiesce to the proposition put forward by the Commission.

21. At its 47th Ordinary Session held from 12-26 May 2010, in Banjul, The Gambia, the Commission decided to defer the consideration of the Communication to its 48th Ordinary Session to allow the Respondent State one last chance to make its submissions on the Merits. On 25 June 2010, both parties were informed of the decision of the Commission and the Respondent State was requested to submit its arguments on the Merits within two months on or before 29 August 2010. On 6 October 2010, the Respondent State sent an email to the Secretariat of the Commission indicating that it had not received responses from the Commission regarding its previous notes particularly the note dated 16 July 2010, which was faxed to the Commission.

22. On 23 May 2011, the Commission notified both parties that it intends to decide the Communication on Merits based on the submissions of the Complainants only, as the Respondent State had failed to make its submissions despite repeated appeals. Similar reminders were sent on 3 May 2012, 9 September 2012 and 7 November 2012.

23. During its 52nd Ordinary Session held from 9 to 22 October 2012, the Commission decided to defer the consideration of the Communication and informed both parties on 8 December 2012. Other correspondences to the Respondent State were made on 23 May 2013 and 24 August 2015.

Provisional Measures

24. At the time of their original submission, the Complainants also invoked the powers of the African Commission under rule 111 to the effect that it requests the Government of Botswana not to take any action that will cause irreparable

harm to Mr. Ping, until his case had been heard by the Commission. Due to technical difficulties it was experiencing in transmitting the request for Provisional Measures by fax to the Office of the President of the Republic of Botswana, a scanned copy of the request for Provisional Measures was attached to the letter sent to the Complainants with a request to forward it to the Office of the President of Botswana. However, before the transmittal happened, the Secretariat of the Commission was regretfully informed by the Complainants through telephone that the victim had been executed that morning of 1 April 2006. On 4 April 2006, the Secretariat of the Commission received an email from the Complainants confirming the execution of the victim by the Government of Botswana on the Morning of Saturday 1 April 2006.

The Law on Admissibility

The Complainants' Submissions on Admissibility

25. In accordance with Article 56 of the African Charter on Human and Peoples' Rights (the Charter) read with Rule 103 of the old Rules of Procedure of the Commission, the Complainants submit that all of the criteria for the admissibility of this Communication have been satisfied as follows:

a. The Complainants have been identified and their relevant details provided to the Commission;

b. The Communication is compatible with the Constitutive Act of the African Union and with the Charter;

c. The Communication is presented in polite and respectful language, and is based on information provided by the applicants and on a judgment of the Court of Appeal of Botswana;

d. The Complainants confirm that they have exhausted local remedies. The execution of their client, Mr Oteng Modisane Ping, on 1 April 2006 was based on the judgment of the Court of Appeal of Botswana dated 26 January 2006.[3] The Court of Appeal is the highest Judicial Authority in the Country, from which there are no other avenues of Appeal;

e. The Communication was submitted to the Commission on 31 March 2006, that is, 3 months and 5 days after their client's appeal before the Court of Appeal was dismissed.

f. The Communication has not been submitted to any other procedure of international investigation or settlement.

26. For the reasons stated above, the Complainants submitted that the Commission should declare the present Communication admissible.

The Respondent State's Submissions on Admissibility

27. The Respondent State failed to respond to the Commission's request to make submissions on the Admissibility of the Communication, within the stipulated time, despite several reminders.

28. Therefore, in line with Rule 117(2), the Respondent State had been given the opportunity to submit its own observations and information on the Admissibility of the Communication but failed to do so.

The Commission's Decision on Admissibility

29. Rule 117(1) of the Rules of Procedure of the Commission provides that:

"the Commission...may request the State Party concerned...to submit in writing additional information or observations relating to the issue of admissibility of the Communication. The Commission...shall fix a time limit for the submission of the information or observations to avoid the issue dragging on too long".

[3] Court of Appeal Criminal Appeal No 045 of 2005, Judgment Oteng Modisane PING v. The State, 26 January 2006

30. On this basis, the Secretariat wrote letters dated 5 June 2006, 10 October 2006, 7 February 2007, and 24 April 2007, requesting the Respondent State to make its submissions on the admissibility and stipulating time limits within which the State was to make the requisite submission.

31. Rule 117(2) of the Rules of Procedure of the Commission provides that:

"a Communication may be declared Admissible if the State Party concerned has been given the opportunity to submit the information and observations pursuant to [Rule 117(1)]".

32. From the Notes Verbale sent to the Respondent State, it is clear that the Respondent State had been given the opportunity to make its submissions on the issue of Admissibility, and in particular, to respond to the Complainants submissions on same.

33. Rule 117(4) provides that: "the Commission shall decide on the issue of Admissibility if the State Party fails to send a written response within three (3) months from the date of notification of the text of Communication. The Communication was first attached and sent to the Respondent State with a Note Verbale dated 5 June 2006.

34. In the absence of any submission from the Respondent State, the Commission hereby makes a decision on the Admissibility of the Communication in line with its Rules 117(1), (2) and (4).

35. The Commission holds that on the basis of the Complainants' submission, all the requirements of Article 56(1) to (7) of the African Charter governing the Admissibility of Communications have been sufficiently fulfilled.

36. For these reasons, the Commission declares this Communication Admissible.

Merits

Preliminary Objection by the Respondent State

37. Both the Complainants' and the Respondent State did not adhere strictly to the timeframes provided for by the Commission in accordance with its Rules of Procedure. Notwithstanding, the Commission extended its own deadlines in order to allow both parties submit in accordance with the relevant Rules of Procedure. The Complainants took advantage of these extensions and made their Submissions on Admissibility. However, the Respondent State despite several extensions and accompanying reminders failed to submit. In line with its rule 117(4), the Commission made its decision on the Admissibility of the Communication during its 41st Ordinary Session held from 16 to 30 May 2007, in Accra, Ghana and informed both parties subsequently.

38. The Respondent State raised an objection that the Commission did not hear them during the Admissibility stage. According to the Respondent State, the procedure leading to the decision on Admissibility therefore lacked legitimacy. The Commission had erred in sending conflicting information to the state regarding the status of the Communication. This error was however corrected in good time after it was discovered. The Commission finds the allegations made by the Respondent State unwarranted since on 12 August 2009, the Respondent State had indicated it was ready to make its submissions on Merits and as such it requested for a further extension of time to 'enable the government to finalise its submissions.' This request was granted by the Commission on 6 May 2013. What is more, under the old Rules of Procedure, Rule 117(1) in particular, the Commission had the discretion to fix the time limit for submissions but it should ensure that the matter does not drag for too long. The Respondent State objection also fails to show how the procedure has been contravened in specific detail. The Complainants' in the view of the Commission have met the technical requirements set in order for the Communication to be admissible. No

observations have been made either by the Complainant itself or by the Respondent State to contravene the decision arrived at. For these reasons, the Respondent State's preliminary objection cannot stand and the Commission will therefore proceed with the Merits of this Communication.

The Complainants' Submissions on the Merits

39. The Complainants submits that: the death penalty is *per se* in violation of Article 4 of the African Charter; moreover, the imposition of the death penalty in the Respondent State's jurisdiction is arbitrary and is therefore in violation of Article 4 of the African Charter; the death penalty is a cruel, inhuman or degrading in contravention of Articles 1 and 5 of the African Charter; the specific manner in which condemned persons in the Respondent State's jurisdiction are executed in secret after clemency has been denied, without informing the family or legal representatives of the condemned person is cruel, inhuman or degrading treatment in violation of Article 5 of the African Charter; the manner in which the warrant of execution is served in the jurisdiction of the Respondent State acts to deny the prisoner the protection of the African Commission on Human on Peoples' Rights in violation of Article 1 of the African Charter.

That the Death Penalty is *per se* in Violation of Article 4 of the African Charter

40. The Complainants submit that a generous and purposive interpretation of Article 4 should find that the death penalty is inherently arbitrary and therefore *per se* a violation of the Charter.

41. The Complainants submit that national courts including in the South African case of ***S v. Mkwanyane & Anor***[4] , the Tanzanian case of ***The Republic v. Mbushuu &***

[4] (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 (6 June 1995).

Anor[5] and the House of Lord's case of ***Pepper v. Hart***[6] to demonstrate the use of the generous and purposive interpretation at the domestic level.

42. The Complainants also submitted that purposive interpretation applies under international pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties (1969). In this regard, they refer to the case of ***Soering v. United Kingdom***[7] where the European Court of Human Rights held that all the provisions of the European Convention on Human Rights should be read harmoniously (specifically that Article 3 of the ECHR should be construed in harmony with Article 2), and that the most appropriate interpretation will that which realises the aims and objectives of the treaty. Illustratively, the Complainants also refer to the decisions of the Commission in ***Media Rights Agenda and Constitutional Rights Project v. Nigeria***[8]***, Interights & Others v. Islamic Republic of Mauritania***[9]***, Social and Economic Rights Action Center & The Centre for Economic and Social Rights v. NIGERIA***[10]***,*** wherein the Commission has upheld and utilized the purposive and generous interpretation approach even without expressly saying so.

43. The Complainants submit that Article 4 of the African Charter neither expressly permit nor prohibit the death penalty. It protects the right to life without any limitations. The interpretation given to the word 'arbitrary' is important. In addition, Article 4 should also be interpreted 'in accordance' with Article 5. In this regard, the Complainants submit that the two articles interpreted in a holistic, generous and purposive manner would reveal that 'the right to life and dignity are inherent to all individuals under the African Charter.'

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[5] 1994 TLR 146 (HC)
[6] (1993) AC 573
[7] 11 Eur. Ct. H.R. (ser. A) (1989)
[8] Communications 105/93, 124/94 and 152/96
[9] Communication 242/2001
[10] Communication 155/95

44. The Complainants make reference to the South African case of ***S v Mkwanyane & Anor*** where the death penalty was found to be a violation of the right to life under section 9 of the South African Interim Constitution. The Complainants note that Section 9 of the South African Interim Constitution offers 'absolute unqualified' protection to the right to life while the African Charter prohibits the deprivation of life 'arbitrarily.' There is however a general limitation clause in the South African Constitution.

45. The Complainants submit that there is no general limitation clause in the African Charter and that all limitations are contained in the Articles themselves. They also referred to the ***Media Rights Agenda and Others v. Nigeria*** that 'a limitation may never have a consequence that the right itself becomes illusory.' Therefore the interpretation of the African Charter should be exercised to ensure that the rights are realised as this is the overall purpose of the African Charter. Consequently, the word 'arbitrarily' should not be interpreted so as to limit the protection of Article 4 so as to make the right to life illusory. According to the Complainants, in ***S v Mkwanyane & Anor,*** the Judges observed that the death penalty would not be a reasonable limitation on the right to life because the application of the death penalty is inherently arbitrary.

46. The Complainants submit that there are circumstances in which life may lawfully be taken, for example acts of self-defence, and that such deprivations of life would not be arbitrary. In this case, the state could legislate to determine the circumstances which an individual could kill, for instance, in self-defence. However, the Complainants submit, the same cannot be true of the death penalty, which is *inherently* arbitrary. In other words, it is impossible to apply the death penalty other than in an unequal and unfair manner. This is particularly significant given the finality of the death penalty itself.

47. The Complainants submit that the interpretation of the word 'arbitrarily' as being synonymous with the absence of fair trial guarantees is unneccesary since Article 7 of the African Charter has already provided for the same and hence submit that the ***S v. Mkwanyane & Anor*** approach should be adopted. The Complainants also highlight a decision of the Hungarian Constitutional Court, where it was held that the death penalty violated Article 54 of the Hungarian Constitution, in which no limitation clause was provided.[11]

48. The Complainants submit that the application of the death penalty, in general and in Botswana in particular, is inherently arbitrary and unequal because it is *per se* dependent on the discretion of the judge with other antecedent problems such as underfunded or non-existent legal aid and the reliance on junior lawyers for *pro deo* representation in capital cases. Under these circumstances, the imposition of the death penalty cannot escape the fact that it is not unfair or unequal.

49. The Complainants submit that there exists an unambiguous protection of the right to life under the African Charter and that any intention to limit this right through the death penalty would have been expressly stated as is the case under Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR).

That the Death Penalty as Imposed in the Republic of Botswana is Arbitrary

50. The Complainants submit that should the Commission hold that the prohibition of the arbitrary deprivation of life in Article 4 of the African Charter permits the imposition of the death penalty, the clemency procedure is arbitrary since it is a discretionary power of the Executive exercised by the President which is not subject to judicial review process.

51. The Complainants also submit that the death penalty is arbitrary in Botswana since executions are often enforced after trials in which the accused persons are

[11] Ruling 23/1990 (X31) AB, Constitutional Court of Hungary, Judgment of 24 October 1990, Magyar Kozlony

represented by junior and inexperienced lawyers. The Complainants submit that since many people are poor in Botswana they cannot afford legal representation and therefore rely on the *pro deo* system of legal representation which often results in miscarriages of justice, as illustrated by ***Maauwe and Motswella v. the State***.[12] The many weaknesses of the *pro deo* system were made clear in the appeal case, ***Ditshwanelo v. Attorney General***.[13] The Complainants submit that the *pro deo* counsel appointed by the Registrar in the above case failed to effectively represent the accused person leading to his conviction and sentence to death. Based on the inadequate legal assistance during the trial at the court below, the convicts repeatedly requested for new lawyers when the matter went on appeal, but the Registrar refused to act on these requests. They submitted that it took the intervention of a Ditshwanelo appointed counsel for an order of stay of execution to be issued. Subsequently, a mistrial was subsequently ordered. Without the intervention of Ditshwanelo, the Complainants submit that the two accused persons would have been executed.

52. The Complainants submit that the poor quality of legal representation for capital offence cases in Botswana has attracted concerns from the United Nations Human Rights Committee. As such the Complainants submit that it is not sufficient to simply assign lawyers to capital offence cases as the *pro deo* system relies to a great degree on inexperienced and underpaid young attorneys. The Complainants therefore submit that to the extent that the *pro deo* system relies on inexperienced and underpaid attorneys whereas wealthier defendants can engage experienced and competent lawyers means that the decision whether or not to impose the death penalty is arbitrary.

53. The Complainants also submits that the mandatory imposition of the death penalty where there are no extenuating circumstances is arbitrary. In support of

[12] Court of Appeal Criminal Appeal No. 9 of 1997
[13] MISCRA Case No. 2 of 1999 (14 April 1999)

this submission the Complainant refers the Commission to the UN Human Rights Committee decision in ***Rolando v. Philippines***[14] where it was held *inter alia* that the mandatory and automatic imposition of the death penalty violates Article 6 of the ICCPR.

54. Complainants submit that Section 203 (2) of the Penal Code of Botswana does not allow the trial Court to consider the personal circumstances of the accused as mitigating factors in deciding whether or not to impose the death sentence. They contended that the imposition of the death penalty without reference to the personal circumstances of the accused would be arbitrary as it fails to ensure the protection of due process rights. The Complainants refer to the Unreported Eastern Caribbean Court of Appeal case of ***Spence v. The Queen***,[15] where it was held that the Court must have the discretion to take into account the individual circumstances of an accused in determining whether the death penalty should be imposed or not. Failure to do so, the Complainants contend, would result in the death penalty amounting to an arbitrary deprivation of life. The above position has been reiterated in several other jurisdictions including in American cases of ***Furman v. Georgia***[16] and ***Gregg v. Georgia***[17] as well as the Uganda Supreme Court case of ***Ag v. Susan Kigula & Ors***[18]***.***

That the Death Penalty is Cruel and Inhuman in Violation of Article 5 of the African Charter

55. The Complainants submit that the death penalty is cruel and inhuman treatment because it undermines the sanctity of human life and is against the modern judicial attitude of substituting the death penalty with other forms of punishment such as life imprisonment, as is the case in South Africa and Rwanda. They contend that the majority of countries in the world are abolitionist in law or

[14] Communication 1110/2002, Para 5.2; Reference is also made to the decision of the Inter-American Commission in ***EDWWARDS V BAHAMAS*** Report No. 48/01 of 4 April 2001.[14]
[15] Decision of 2 April 2001
[16] 408 U.S. 238, 290 (1972),
[17] 428 U.S. 153 (1976)
[18] (2009) UGSC 6 (21 January 2009)

practice and also refers to the UN General Assembly Resolutions calling for a worldwide moratorium on executions of the death penalty.

56. The Complainants also submit that national and international judicial and quasi-judicial forums have held that the death penalty constitutes cruel, inhuman and degrading treatment. In ***Ng v. Canada,***[19] the UN Human Rights Committee held that the execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of Article 7 of the Covenant. In ***Interights & Ors (on behalf of Bosch) v. Botswana,***[20] the Commission concluded by encouraging all state parties to take all measures to refrain from exercising the death penalty. The complainants also rely on the case of ***S v. Makwanyane*** among others to emphasize the point above on various points.

57. The Complainants aver that the victim's execution by the unnecessarily painful method of hanging constituted a cruel, inhuman and degrading form of punishment. This averment is supported by the Complainants contention that the process of being blindfolded and pinioned, hanged by the neck, made to defecate and urinate and/or being subjected to a long drawn-out, extremely painful, and gruesome death amounts to inhuman and degrading treatment contrary to Article 5 of the African Charter. In further support of this averment, reference is made to UN Human Rights Committee[21] recommendation that where the death penalty is applied by a State party for the most serious crimes, it must be carried out in such a way as to cause the least possible physical and mental suffering.

That the Circumstances Surrounding the Republic of Botswana's Implementation of the Death Penalty is Cruel and Inhuman

[19] Communication No. 469/1991
[20] Communication No. 240/2001
[21] General Comment 20

58. The Complainants submit that section 26(1) of the Botswana's Penal Code prescribes death by hanging and that section 18 of the Prison Act requires that a prisoner should be given the death warrant at least 24 hours before execution. In Botswana, the Complainants submit that a warrant is usually given a few hours before the execution and that the body of the prisoner is usually not given back to the family instead they are buried in a grave inside the prison ground. In the present case, the Complainants contend that the mother of the prisoner and a representative of Ditshwanelo were denied access to the prisoner on 31 March 2006, a day before his execution which they learnt of via the radio.

59. The Complainants submit that the failure to inform the prisoner, his mother or his lawyer in advance of the scheduled execution constitutes inhuman treatment.[22] Similarly, the failure to release the body to the family for burial constitutes a violation of Article 5 of the Charter. The Complainants refer to the case of ***Interights & Ors (On Behalf Of Bosch) v Botswana*** (supra) to argue that the secrecy of the execution did not allow the Victim to receive the comfort of intimate family members and spiritual advice before his death.

That the Manner in which the Warrant is Served in the Republic of Botswana Acts to Deny the Prisoner the Protection of the African Commission on Human and Peoples' Rights

60. The Complainants submit that both the manner in which the warrant of execution is served (to the prisoner or family or legal representative) and the subsequent execution prevents the Complainants from finalising all available avenues for redress, in particular, the Complaints procedure under the African Charter. The Complainants submit that until the procedure for clemency has been exhausted, the prisoner is expected to wait for the exhaustion of local remedies. And therefore to inform the Prisoner about the denial of the Clemency

[22] See UN Human Rights Committee cases of *Mariya Staselovich v Belarus* Communication No 887/1999 para 9.2 and Communication 886/1999,*Natalia Shedko v Belarus* No. 886/1999 para 10.2.

application at the same time as issuing a warrant of execution prevents the prisoner from enjoying the protection of the Commission.

The Respondent State's Submissions on the Merits

61. The Respondent State has failed to respond to the Commission's request for its submissions on the Merits of the Communication, within the stipulated time, despite several reminders.

62. In accordance with Rules 119(4) and 120 of the previous Rules of Procedure, the Commission will proceed and decide the matter on the Merits.

Decision of the Commission on the Merits

63. The Commission reiterates from the onset that it did not receive submissions from the Respondent State on Merits and as such the following analysis relies principally on the submissions of the Complainants as well as the jurisprudence of the Commission.

Alleged Violation of Article 4

64. One of the questions before the Commission is whether the death penalty as such – however executed – is compatible with the Charter. In dealing with this question, the Commission has in the past established in its decisions that the imposition of a sentence of death after an unfair trial – or a trial that does not meet the requirements of fairness set out in Article 7 of the Charter - is necessarily a violation of Article 4 of the Charter. Thus in *Forum of Conscience v Sierra Leone*[23] the Commission ruled that:

> "*The right to life is the fulcrum of all other rights. It is the fountain through which all other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of law. Having found above that the trial of the 24 soldiers constituted a breach of due process of law as guaranteed under Article 7(1)(a) of the Charter, the Commission*

[23] Communication 223/98

consequently finds their execution an arbitrary deprivation of the right to life provided for in Article 4 of the Charter" (para. 20).

65. The same reasoning was applied in the *Ken Saro-Wiwa and others v. Nigeria*, where the Commission found that:

> *Given that the trial which ordered the executions itself violates Article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of article 4." (Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria*[24]

66. It would itself be arbitrary, given its previous decisions with respect to the death penalty, were the Commission suddenly to determine that the practice of the death penalty in Africa would in all cases be a violation of Article 4. However, given the "evolution of international human rights law and jurisprudence, and State practice", and cognisant of the progressive work undertaken by the Commission's own Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings in Africa, the Commission considers it increasingly difficult to envisage a case in which the death penalty can be found to have been applied in a way that is not in some way arbitrary. As a result it is difficult to conceive that, if called upon in future to do so, that the Commission will find that the death penalty, however it is executed, is any longer compatible with the African Charter.

67. In the present Communication, the Complainants wish to rely on three grounds upon which the imposition of the death penalty could be argued to have been arbitrary as follows: (i) the system of (*pro deo*) legal aid available to the defendant left him with inadequate legal representation and therefore no guarantee of a fair trial; (ii) the range of possible "extenuating circumstances" available to the trial judge rendered the sentence arbitrary; and (iii) the clemency system is arbitrary.

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[24] *137/94, 139/94, 154/96 and 161/970, para. 103) (See also the series of communications heard with Malawi African Association v Mauritania 54/91 at para. 120.)*

68. It is the submission of the Complainants that the application of the death penalty in Botswana is in inherently arbitrary and unequal because it is dependent on an underfunded or non-existent legal aid scheme which relies on junior lawyers for *pro deo* representation in capital cases.

69. As to the right to counsel and legal aid, it is worth noting that it is the responsibility of State Parties to ensure that legal assistance is available in capital cases and this is so even if the unavailability of private counsel is to some degree attributable to the victim, and even if the provision of legal assistance would entail an adjournment of proceedings. A competent, capacitated and committed defence team is indispensible to a fair, proper and efficient investigation and trial. This is true both in terms of the perceptions of fairness, and in terms of attaining individualised justice that is fair in substance (not just in form).

70. The Commission observes that the *pro deo* system in Botswana, as in most African Countries, is criticised for being handled by lawyers who lack the requisite skills, resources and commitment to handle such serious matters, which could result in a miscarriage of justice.[25] To buttress their submissions, the Complainants relied on number cases, including the case of the *United States v. Burns*[26] and South African case *S v. Makwanyane and Anor*.[27]

71. This notwithstanding, it is the view of this Commission that while this may be the case, the Complainants have not shown that the *pro deo* attorney assigned to the victim in this present case was a young and in-experienced counsel, and therefore lacked the requisite skills, resources and commitment. Consequently, the Commission cannot rely on their submission.

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[25] Page 14 of Complainants Submission

[26]

[27] State *v Makwanyane* and Another, [1995] ZACC *3*, 1995 (*3*) SA 391 (CC), 1995 (6) BCLR 665 (CC)

72. On the *pro deo* system, the Commission notes that, if the system or the use of inexperienced young defence lawyers had been so fundamental to the trial of Mr. Ping, so as to cause a miscarriage of justice and a violation of his fair trial rights, such miscarriage of justice ought to have formed a ground of appeal in the Court of Appeal. However from the evidences before this Commission including the judgements of the High Court and that of the Court of Appeal of the Respondent State, the Complainants did not mention that due process was not respected with regards to the *pro deo* system in the trial of Mr. Ping, as a result of which his trial was negatively affected. The Commission further notes that the issue of *pro deo* representation never arose at the Court of Appeal.

73. The Commission further holds the view that it is responsibility of the Courts of State Parties and not that of the Commission to evaluate the facts in a particular case submitted before such Courts, and unless it is shown that the Courts' evaluation of the facts are manifestly arbitrary or amounted to a denial of justice, the Commission cannot substitute the decision of the Courts with that of its own. It has not been shown that the Courts' evaluation of the evidence put before them was in anyway arbitrary or erroneous, as to result in a failure of justice in Mr Ping's case.[28]

74. The Commission finally holds the view that in the absence of the Respondent State's submissions, it is the duty of the Complainant to lead copious and cogent evidence to support each and every allegation of fact contained in their complaint. Relying on mere suspicion, no matter how strong the suspicion may be, cannot constitute the grounds for the violation of Charter rights. To hold otherwise would amount to speculation. The Commission finds that it is also not

[28] See Communication 240/01 at para 29

possible to rely on general reports about the *pro deo* legal aid scheme in the Respondent State without specifically applying them to the present case.

75. Therefore, since no evidence has been provided in the present case to show that the *pro deo* counsel allocated to Mr. Ping was young or inexperienced and therefore lacked the requisite skills, resources and commitment to defend him, resulting in the breach of his fair trial guarantees the Commission finds that the Complainants have failed to prove its case against the Respondent State in this respect.

76. On the extenuating circumstances, the Complainants submit that section 203(2) of the Penal Code of Botswana distinguishes extenuating from personal circumstances. According to the Complainant, the former refers to circumstances that go to the nature of the crime, which may be considered when deciding on the imposition of death penalty. The latter on the other hand relate to the circumstance of the accused and may not be considered during the imposition of the death penalty. In this regard, the Complainants argue that mitigating factors were not considered. The issue therefore is whether failure to consider personal circumstances of an individual while imposing death penalty could be deemed arbitrary as supported by the case laws provided by the Complainants.

77. From the appellate record available at the Commission, it is clear that the Victim had been protective to the son at one point.[29] The Court of Appeal also only dealt with the existence or not of extenuating circumstances and found them to be non-existent with respect to the murder of the child.[30] The issue of personal circumstances as explained by the Complainants was also dealt with under the extenuating circumstances part and found to be inapplicable with respect to the

[29] Court of Appeal of Botswana, Criminal Appeal No. 045 of 2005, para 4.
[30] As above, 41-42.

murder of the child. For the avoidance of doubt, the Commission rejects the distinction being relied upon by the Complainants.

78. From the totality of the submissions before the Commission, there is nothing to suggest that the imposition of the death penalty in Botswana is mandatory and therefore arbitrary. Accordingly, the Commission dismisses the arguments of the Complainants regarding the issue of extenuating circumstance and personal circumstances as discussed above.

79. On the clemency procedures, the Complainants submit that the clemency procedure as carried out in the Respondent State's jurisdiction is arbitrary. They further contend that the process even though involving the Clemency Committee is arbitrary since it is purely a preserve of the Executive exercised by the President and not subject to a judicial review process.

80. The Commission affirms its position that even though 'the doctrine of clemency is universally recognised [it] does not preclude the African Commission from making a determination on it, especially if it believed that its use has been abused to the extent that human rights as contained in the African Charter have been violated.'[31]

81. The Complainants' main argument in this part is that there is no system of judicial review and therefore the clemency procedure is arbitrary. The Commission finds that the non-existence of a judicial review process is also not a violation of the Charter since clemency procedures are prerogative powers exercised on behalf of the State.

[31] See Communication 245/2002: **Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 128 (ACHPR 2006)** paras 190, 212.

Alleged Violation of Article 5

82. Article 5 of the African Charter states that "every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

83. From the totality of submissions under this part from the Complainants, there are also three sub-issues to be considered by the Commission as follows: (i) hanging as a method of execution; (ii) "death row" phenomenon; (iii) secrecy of the execution and refusal to hand over body for burial. The Complainants aver that the victim's execution through the unnecessarily painful method of hanging, the secrecy of the execution and the refusal by the Respondent State to hand over the body of the victim to his family for burial, constituted a cruel, inhuman and degrading form of punishment which amounts to a violation of Article 5 of the African Charter.

84. On hanging, the Commission takes cognizance of the current position of international human rights law on the execution of the death penalty which is that, where a death sentence has been imposed, it must be carried out in such a way as to cause the least possible physical and mental suffering.[32] In its own jurisprudence the Commission has reiterated that executions may amount to cruel, inhuman and degrading treatment or punishment 'if the suffering caused in execution is excessive and goes beyond that is strictly necessary.'[33]

85. In the present case, the prisoner was executed via hanging. The issue therefore is whether hanging as a method of execution violates Article 5 of the Charter.

[32] Human Rights Committee, *General Comment No. 20*, Para. 6.
[33] Communication 277/03: *Spilg and mack & Ditshwanelo (Kobedi) v. Botswana* (ACHPR 2011) para 167.

Currently, no method of execution has been found to be acceptable under international law. This complicates the current inquiry since it seems that no method of execution is appropriate under international law.

86. In the present case, the Victim's execution was done in secrecy and therefore no specific details have been provided. Nevertheless, the Commission will rely on the following account provided by the Tanzanian High Court in order to appreciate the nature of executions by hanging as a matter of principle:

> *The prisoner is dropped through a trapdoor, to eight and a half feet with a rope around his neck. The intention is to break his neck so that he dies quickly. The length of the drop is determined on the basis of such factors as body weight and muscularity or fatness of the prisoner's neck. If the hangman gets it wrong and the prisoner is dropped too far, the prisoner's head can be decapitated or his face can be torn away. If the drop is too short then the neck will not be broken but instead the prisoner will die of strangulation. There are many documented cases of botched hangings in various countries including Tanzania. There are a few cases in which hangings have been messed up and the prison have had to pull on the prisoner's leg to speed up his death or use hammer to hit his head. The shock to the system causes the prisoner to lose control over his bowels and he will soil himself. In short the whole process is sordid and debasing. Not only is the process generally sordid and debasing, but also it is generally brutalizing…. It is my finding that the petitioners have managed to prove on a balance of probabilities that hanging in carrying out the death penalty is a cruel, inhuman and degrading punishment.*[34]

87. The above description, to say the least, is inhuman and degrading. The above case explains a general reality that happens during hangings. The conclusion by the sitting judge that the whole process is 'sordid and debasing' and that it is 'generally brutalizing' is telling. The Commission therefore finds that in line with the description of the Tanzanian High Court about hanging as a method of execution in Africa that hanging causes excessive suffering and is not strictly necessary; therefore, it constitutes a violation of Article 5 of the African Charter.

88. On the issue of death row phenomenon raised by the Complainants, the Commission wishes to draw inspiration from the European Court judgments on whether the death penalty is cruel inhuman or degrading form of punishment

[34] Republic v Mbushuu

and violates article 5 of the African Charter. The European Court in ***Soering vs. UK***[35], held that "[h]aving regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant..... would expose him to a real risk of treatment going beyond the threshold set by Article 3 of the European Convention on Human Rights which is the corresponding article to Article 5 of the African Charter". The Court also found that "(…) all of the victims in the present case live under the constant threat that they may be taken to be hanged at any moment. According to the report submitted by the expert Gaietry Pargass, the procedures leading up to the death by hanging of those convicted of murder terrorizes and depresses the prisoners; others cannot sleep due to nightmares, much less eat".

89. Similarly in ***Al-Saadoon and Mufdhi v. UK***[36]**,** the Court held that "the death penalty which involved the deliberate and premeditated destruction of a human being by the State authorities causing physical pain and intense psychological suffering as a result of the foreknowledge of death, could be considered inhumane and degrading and, as such, contrary to Article 3 of the European Convention on Human Rights".

90. The Commission acknowledges the landmark decision of the Supreme Court of Uganda in ***Attorney General v. Susan Kigula and 417 Others***[37] where it held that "to execute a person after a delay of three (3) years in conditions that were 'not acceptable by Ugandan standards' would amount to cruel, inhumane punishment".

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[35] Soering v. the United Kingdom (application no. 14038/88**)**

[36] Al-Saadoon and Mufdhi v the United Kingdom (application no. 61498/08)

[37] Attorney General v. Susan Kigula and 417 Others (Constitutional Appeal No. 3 of 2006) [2009] UGSC 6 (21 January 2009).

91. In the instance case it is not evident from the facts summarized above that as provided by the Complainants that Mr. Ping has been on death row for a prolonged period. The facts are as follows. The crimes leading to the death sentence in 2002 were committed on 24 December 2001. The Appeal process ended sometime on 26 January 2006 and the clemency process endedon the 31 March 2006, which according to the Complainants was a day before the execution of Mr. Ping. There is no indication or evidence from the Complainants that Mr Ping was liable for execution before the process had been concluded and especially the appeal process. In this regard, the Commission finds that Article 5 of the African Charter has not been violated by the Respondent State.

92. On the secrecy of the execution and refusal to hand over body for burial, the Commission notes that the lack of transparency concerning the refusal of petition of mercy and the serving of an execution warrant, combined with the denial of access to his lawyer and family during the intervening period between the serving of the warrant and the execution (in secret) constitutes a potential violation of Article 5 of the Charter.

93. The Commission holds the view that prisoners on death row must be promptly informed and be given adequate notice of their execution. The mere fact that a particular procedure has been stipulated in the rules is not enough to justify it, but rather, that procedure has to pass the further test of being fair, just and reasonable. In the present case, even the procedure set out in the State Parties own laws regarding the procedure for executing death row prisoners and established through its own practice was ignored. The Commission maintains that despite the outcome of the clemency procedure, the victim ought to be informed in advance of an impending execution.

94. The Respondent State, on its part, missed the opportunity to challenge the allegation that no reasonable notice or any notice at all was given of the date and time of execution of the victim. In that regard, this Commission has in many of its decisions[38] held that facts uncontested by the Respondent State shall be considered as established. In view of the foregoing, the Commission will therefore hold this fact as established.

95. In ***Communication 240/01 Interights et al. (on behalf of Bosch) v. Botswana***[39]**,** observed that a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best as he can, to face his ultimate ordeal.

96. In that regard, the Commission holds that the failure by the prison authorities of the Respondent State to inform the family and the lawyers of Mr Ping, of the date, the hour, the place of the execution as well as the exact place of the burial, violates article 5 of the African Charter, and by their conduct, have failed to respect the human dignity of both the family and the prisoner, which further violates Article 5.

Alleged Violation of Article 1

97. Article 1 of the African Charter requires States Parties to the African Charter to recognize the rights guaranteed therein and to adopt legislative and other measures to give effect to these rights, duties and freedoms. The Commission had decided in several Communications that Article 1 of the African Charter proclaims a fundamental principle that not only should the States Parties

[38] See Communications 25/89, 47/90, 56/91, 100/93; Free Legal Assistance Group et al. V. Zaire

[39] Para. 41

recognize the rights, duties and freedoms enshrined in the Charter, they also commit themselves to respect them and to take measures to give effect to them. In other words, if a State Party fails to ensure respect of the rights contained in the African Charter, this constitutes a violation of the African Charter. The Commission held in many cases that a violation of any of the provisions of the Charter automatically means a violation of Article 1.[40] In this regard and having found that the Respondent State violated Article 5 of the African Charter, for hanging as a method of execution and also for not affording the victim the opportunity to have a proper closure with his family and to receive spiritual advice and comfort to face his ultimate ordeal, the Commission finds that the Respondent State has violated Article 1 of the African Charter.

98. For these reasons, the African Commission holds as follows:

(a) That the Respondent State – Republic of Botswana has violated the provisions of Articles 5 and 1 of the African Charter;

(b) That there has been no violation of Article 4 of the African Charter;

99. The African Commission therefore;

1. Calls on the Respondent State to review relevant legislation to provide for the compensation of the family of the Victim;
2. Strongly urges the Respondent State to take all measures to comply with the Resolution urging State Parties to observe a Moratorium on the Death Penalty
3. Urges the Respondent state to take steps to abolish the death penalty;
4. Calls on the Respondent State to submit the African Commission within 180 days from the date of receipt of this decision (in line

[40] Communications 147/95 and 149/96, *Sir Dawda Jawara/The Gambia*, as in n 14 above.

with Rule 112(2) of the African Commissions Rules of Procedure) on the measures taken to give effect to these recommendations.

Done in Banjul, The Gambia, during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights, 4 – 18 November 2015.