

**AMICUS CURIAE COMMUNICATION TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS IN RE:**

**COMPLAINT ON BEHALF OF PATRICK GABAAKANYE WHO HAS BEEN SENTENCED TO DEATH IN BOTSWANA**

1. This is an amicus curiae brief.
2. This brief is filed in accordance with Rule 99(16) of the Rules of Procedure of the African Commission on Human and People's Rights.
3. The amicus begs leave for the admission and consideration of this brief and is willing to make oral submissions should the Commission so request.

**Introduction**

4. Christof Heyns is the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions pursuant to General Assembly resolution 65/208 and to Human Rights Council resolution 17/5.
5. This brief is submitted on a voluntary basis in the matter of Re: Patrick Gabaakanye for the Commission's consideration without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, including Mr. Christof Heyns, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with his independence, has neither been sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.
6. Pursuant to United Nations Human Rights Council resolution 17/5 (A/HRC/RES/17/5) and 26/12 (A/HRC/RES/26/12), Mr. Heyns acts under the aegis of the Human Rights Council without remuneration as an independent expert within the scope of his mandate which enables him to seek, receive, examine and act on information from numerous sources, including individuals, regarding issues and alleged cases concerning extrajudicial, summary or arbitrary executions.
7. Mr. Heyns is Professor of Human Rights Law and Co-director of the Institute for International and Comparative Law in Africa at the University of Pretoria. He is an adjunct professor at the Washington College of Law of the American University in Washington, DC and a Visiting Fellow at Kellogg College at Oxford University, UK, where he has been teaching in the masters' programme since 2005. He is a former Director of the Centre for Human Rights in the Faculty of Law, University of Pretoria, as well as former Dean of that faculty.
8. Mr. Heyns has received the Fulbright Fellowship (to Yale Law School) and the Humboldt Fellowship (to the Max Planck Institute for International and Comparative Public Law in Heidelberg, Germany), as well as the University of Pretoria's Chancellor's Award for

Teaching and Learning. In 2011-2012, Mr. Heyns was a Visiting Fellow with the Human Rights Program at Harvard Law School in Cambridge, MA.

9. Mr. Heyns has published widely in the field of international human rights law and has special expertise in human rights law in Africa. His publications include the books *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (with Frans Viljoen) and *Human Rights Law in Africa*.
10. Mr. Heyns has worked on the human rights implications of the death penalty for many years. In addition to collaborating with the African Commission's Working Group on the Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa in the development of the Draft Protocol to the African Charter on the Abolition of the Death Penalty, in 2012 both he and the UN Special Rapporteur on Torture (Mr Juan Méndez) submitted reports to the UN General Assembly on the question of the death penalty.<sup>1</sup> His publications include a chapter in the most recent edition of the United Nations' book on the death penalty on 'The right to life and the progressive abolition of the death penalty' (2015).<sup>2</sup>
11. In what follows, Mr. Heyns briefly explains the status of the right to seek clemency in international law. The brief begins by identifying the significant contribution the Commission has made to the development of international law in relation to the death penalty generally, and specifically, the law relating to clemency. The brief then goes on to elaborate the nascent, national and international jurisprudence regarding clemency procedures and, where relevant, discusses clemency procedures and practice at national level. It is intended that this brief will enable the Commission to place the issues of which it is seized in a global context, and thereby identify the significance of its role at this juncture.

### **The Commission's central role in the development of international law in relation to the death penalty**

12. The Commission has consistently played a leading and proactive role in the development of death penalty jurisprudence.
13. In 1999 the Commission urged African states to limit the imposition of the death penalty to the most serious cases, to consider establishing a moratorium on the death penalty and to reflect on the possibility of abolishing the death penalty<sup>3</sup> and in 2005 the Commission established the Working Group on the Death Penalty in Africa to develop a practical and legal framework on the abolition of the death penalty and to monitor the application of the death penalty in African states. In 2008 the Commission urged all African states to observe a moratorium on the death penalty and to take steps towards abolition.<sup>4</sup> Moreover, it has been

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<sup>1</sup> Christof Heyns *Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions* (6 August 2012) [A/67/275].

<sup>2</sup> Christof Heyns & Thomas Probert 'The right to life and the progressive abolition of the death penalty' in *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (New York: United Nations, 2015).

<sup>3</sup> 42: Resolution Urging States to Envisage a Moratorium on Death Penalty available at: <http://www.achpr.org/sessions/26th/resolutions/42/>

<sup>4</sup> 136: Resolution Calling on State Parties to Observe a Moratorium on the Death Penalty, available at: <http://www.achpr.org/sessions/44th/resolutions/136/>

recognised that the Commission also has a role in promoting abolition through its judicial function: “there is now developing jurisprudence by the African Commission [...] strongly suggesting that abolition of [the death] penalty is desirable.”<sup>5</sup>

14. In 2015, the Commission clarified that “[t]he African Charter does not include any provision recognising the death penalty, even in limited circumstances, and the Commission has on several occasions passed resolutions calling on States to abolish the death penalty or to establish a moratorium in line with the continental and global trend”<sup>6</sup>. It highlighted that this is in accordance with the fact that “[i]nternational law requires those States that have not yet abolished the death penalty to take steps towards its abolition in order to secure the rights to life and to dignity, in addition to other rights such as the right to be free from torture, and cruel, inhuman or degrading treatment.”<sup>7</sup>
15. The Commission has been particularly effective in underlining that a person may only be sentenced to death following a fair trial held in accordance of the requirements of due process and with adequate procedural safeguards. It has been noted that the Commission has “laid down procedural benchmarks in capital cases”<sup>8</sup>, recognising that sentencing a person to death after an unfair trial amounts to an arbitrary deprivation of life, in contravention of Article 4 of the African Charter on Human and People’s Rights (the “**African Charter**”). The Commission has held, for example, that “summary executions and deprivation of due process rights during the trial process would constitute a violation of not just the right to a fair trial but also the right to life...”<sup>9</sup> The Commission has previously stated that the right to life is “the fulcrum of all other rights. It is the fountain through which other rights flow”<sup>10</sup>
16. Further, the Commission has, in its jurisprudence, handed down influential rulings protecting various procedural and substantive rights. It has recognised, for example, the importance of legal representation in capital cases in *Amnesty International (on behalf of Orion and Vera Chirwa) v Malawi*<sup>11</sup> and, in *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* the Commission confirmed that “to foreclose any avenue of appeal to “competent national organs” in criminal cases bearing such penalties [the deprivation of the rights to life and liberty] clearly violates article 7(1)(a) of the African Charter.” The Commission also held that the rights to defence required that counsel representing the accused should not be intimidated or harassed during the trial and that the tribunal must be impartial. The

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<sup>5</sup> Anyangwe, *Emerging African jurisprudence suggesting the desirability of the abolition of capital punishment*, African Journal of International and Comparative Law, 2015

<sup>6</sup> General Comment No.3 on the African Charter on Human and People’s Rights: The Right to Life (Article 4), adopted during the 57<sup>th</sup> Ordinary Session on the African Commission on Human and People’s Rights held from 4 to 18 November 2015 in Banjul, The Gambia available at: [http://www.achpr.org/files/instruments/general-comments-right-to-life/generalcommentno.3\\_eng.pdf](http://www.achpr.org/files/instruments/general-comments-right-to-life/generalcommentno.3_eng.pdf) at paragraph 22

<sup>7</sup> Ibid.

<sup>8</sup> Chenwi, Lilian. "Taking The Death Penalty Debate Further: The African Commission On Human And People’S Rights". *Against The Death Penalty: International Initiatives And Implications*. Yorke, pages 81

<sup>9</sup> Chenwi, Lilian. "Taking The Death Penalty Debate Further: The African Commission On Human And People’S Rights". *Against The Death Penalty: International Initiatives And Implications*. Yorke. pages 81-82

<sup>10</sup> *Forum of Conscience v Sierra Leone*, paragraph 20, as cited by Yorke, *Against the Death Penalty: International Initiatives and Implications*, p.89

<sup>11</sup> Chenwi, Lilian. "Taking The Death Penalty Debate Further: The African Commission On Human And People’S Rights". *Against The Death Penalty: International Initiatives And Implications*. Yorke. Page 83

Commission held that if the composition of a tribunal “creates the appearance, if not actual lack, of impartiality” there will be a violation of Article 7(1)(d) of the African Charter.<sup>12</sup>

17. Since the beginning of the Commission’s concerted work on the question of the death penalty, significant changes have taken place. In 1999, 10 African states had abolished the death penalty and 11 had *de facto* moratoria<sup>13</sup> whereas, as of March 2016, 42 state parties to the African Charter have abolished the death penalty in law or in practice, with 19 enacting legislation abolishing the death penalty (of which 10 have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty). Moreover, 23 state parties have not carried out an execution for 10 years.<sup>14</sup> The work of the Commission clearly correlates with a marked decline in the use of the death penalty in Africa, as well as with a global trend away from the practice.
18. Moreover, the jurisprudence of the Commission is influential at both regional and national levels. In *Campbell v Zimbabwe*, the South African Development Community Tribunal cited the African Commission’s decisions in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* and *Zimbabwe Human Rights NGO Forum v Zimbabwe*<sup>15</sup> and “[n]ational courts are increasingly influenced by and use the Charter and the Commission’s findings to assist them in interpreting national law. Prominent examples are the Constitutional Court of Benin, which in numerous cases made reference to the African Charter, and in some applied it directly; and the Supreme Court of Lesotho, which relied on the African Charter together with other international human rights treaties in *Molefi Ts’epe v The Independent Electoral Commission*.”<sup>16</sup>
19. Indeed, the jurisprudence of the Commission was used as an interpretative tool by the International Court of Justice in *Republic of Guinea v Democratic Republic of the Congo*.. The Court held that “when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the Treaty in question. In the present case, the interpretation given above of Article 12, paragraph 4 of the African Charter is consonant with the case law of the African Commission on Human and People’s Rights established by Article 30 of the said Charter (see for example, *Kenneth Good v Republic of Botswana*, No.313/05, para.204; *World Organization against Torture and*

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<sup>12</sup> *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*, Communication 87/93, 8<sup>th</sup> Annual Activity Report: 1994-1995 (African Commission); 2000 AHRLR 183 (ACJPR 1995) cited in Chenwi, Lilian.

"Taking The Death Penalty Debate Further: The African Commission On Human And People’S Rights". *Against The Death Penalty: International Initiatives And Implications*. Yorke. Page 84

<sup>13</sup> United Nations General Assembly Human Rights Council, High-level panel discussion on the question of the death penalty, Report of the United Nations High Commissioner for Human Rights, 16 July 2015, A/HRC/30/21 available at: [http://www.ohchr.org/Documents/Issues/DeathPenalty/A-HRC-30-21\\_en.pdf](http://www.ohchr.org/Documents/Issues/DeathPenalty/A-HRC-30-21_en.pdf) at paragraph 9

<sup>14</sup> 58<sup>th</sup> Ordinary Session of the African Commission on Human and People’s Rights, Inter-Session Activity Report (November 2015 – April 2016) available at: [http://www.achpr.org/files/sessions/58th/inter-act-reps/255/58os\\_inter\\_session\\_report\\_kayitesi\\_eng.pdf](http://www.achpr.org/files/sessions/58th/inter-act-reps/255/58os_inter_session_report_kayitesi_eng.pdf) at paragraph 18

<sup>15</sup> Southern African Development Community Tribunal, Case No. 2/2007, available at: <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf> at page 31

<sup>16</sup> African Commission on Human and People’s Rights, *Impact of the African Charter on domestic human rights in Africa*, available at: <http://www.achpr.org/instruments/achpr/impact-on-domestic-human-rights/>

*International Association of Democratic Lawyers, International Commission of Jurists, Inter-African Union for Human Rights v Rwanda, No.27/89, 49/91, 99/93).*"<sup>17</sup>

20. It is to be hoped that the Commission may build further on its work protecting those facing the death penalty by creating persuasive jurisprudence safeguarding and elaborating the procedural elements of the right to seek clemency which may be used to guide other jurisdictions in the global movement towards the restriction in the use of the death penalty and the protection of the right to life.

### **The right to seek clemency in death penalty cases**

23. The right to seek clemency is a settled principle of international human rights law. The principal sources in international law for the right to seek clemency are the International Covenant on Civil and Political Rights ('ICCPR', to which Botswana acceded in 1974)<sup>18</sup> and the American Convention on Human Rights ('ACHR').<sup>19</sup> Each of these treaties specifically mandates a clemency process in all death penalty cases.
24. What follows is a summary of the instances in which clemency has been considered against international human rights law norms, including as part of the protection of Article 4 of the African Charter. It is hoped that the Commission can glean from the same, a developing global consensus as to the need for the clemency process to be meaningful and effective, as well as fair and transparent.

#### **(i) The right to seek clemency in international law, including the African Charter**

25. The right to seek clemency is a feature of a number of UN resolutions concerning the rights of those facing the death penalty. The Economic and Social Council of the United Nations ('ECOSOC') was established pursuant to Article 7 of the Charter of United Nations and is one of the six principal organs of the United Nations. Botswana is an elected member of ECOSOC. In 1984 the ECOSOC passed a series of nine safeguards ('the UN Safeguards') guaranteeing protection of the rights of those facing the death penalty and which contain express provision for the right to seek clemency.<sup>20</sup>
26. The UN Safeguards state at paragraph 7 that: "*Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.*" Paragraph 8 of the UN Safeguards further preserves the right to seek clemency pending execution: "*Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence*". The UN Safeguards were later adopted by the UN General Assembly<sup>21</sup> and resolutions concerning their implementation were passed in 1989

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<sup>17</sup> Republic of Guinea v Democratic Republic of the Congo (concerning Ahmadou Sadio Diallo), 30 November 2010, available at <http://www.icj-cij.org/docket/files/103/16244.pdf> at paragraph 67

<sup>18</sup> The ICCPR has 168 state parties.

<sup>19</sup> The ACHR has 23 state parties.

<sup>20</sup> Resolution 1984/50 of 25 May 1984.

<sup>21</sup> UN General Assembly (14 December 1984) Human Rights in the administration of justice, Resolution A/RES/39/118.

and 1996, respectively. The 1996 resolution *"Calls upon Member States in which the death penalty may be carried out to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency, in order to effectively apply rules 5 and 8 of the safeguards guaranteeing protection of the rights of those facing the death penalty."*<sup>22</sup>

27. Historically, there has been surprisingly little judicial guidance (both within Africa and internationally) regarding the clemency process itself. Article 6(4) of the International Covenant on Civil and Political Rights and the United Nations Safeguard No 7 both stipulate that "[a]nyone sentenced to death shall have the right to seek pardon or commutation of sentence"<sup>23</sup> but, few international or regional tribunals have had the opportunity to properly consider and rule on the procedural and substantive rights attendant in the clemency process. It would be desirable to establish a set of minimum standards governing the clemency process to ensure that the applicant's right to apply for clemency is meaningful. Given the African Commission's fundamental role in setting out the necessary procedural safeguards in capital cases, the Commission is particularly well placed to consider the minimum procedural requirements that ought to govern the clemency process.

28. The Commission's General Comment No.3, a document aimed at guiding States in understanding the *"range of application of Article 4 of the African Charter,"*<sup>24</sup> provides that Article 4 of the Charter should be interpreted (like Article 6 of the ICCPR) as including a right to seek clemency, underlining that

*"[t]hose sentenced to death have the right to seek clemency, pardon or commutation through a transparent process with due process of law."*<sup>25</sup>

26. The Commission further stated, in forceful terms, the limitations imposed by Article 4 of the Charter in respect of carrying out the death penalty on certain categories of person:

*"Whatever the offense or the circumstances of the trial, the execution of...persons with psycho-social or intellectual disabilities, will always amount to a violation of the right to life."*<sup>26</sup>

29. Following the adoption of General Comment No.3 by the Commission<sup>27</sup>, it is clear that the scope of Article 4 of the African Charter encompasses the existence of a clemency process, the requirements of which are transparency, fairness and due process.

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<sup>22</sup> Resolution 1996/15 of 23 July 1996 - Safeguards guaranteeing protection of the rights of those facing the death penalty, paragraph 5

<sup>23</sup> Hood and Hoyle, *The Death Penalty: A Worldwide Perspective*, 2015, Oxford University Press, 5<sup>th</sup> edition, p.312

<sup>24</sup> See page 1 of General Comment No. 3

<sup>25</sup> General Comment No.3 on the African Charter on Human and People's Rights: The Right to Life (Article 4), adopted during the 57<sup>th</sup> Ordinary Session on the African Commission on Human and People's Rights held from 4 to 18 November 2015 in Banjul, The Gambia available at: [http://www.achpr.org/files/instruments/general-comments-right-to-life/generalcommentno.3\\_eng.pdf](http://www.achpr.org/files/instruments/general-comments-right-to-life/generalcommentno.3_eng.pdf) at paragraph

<sup>26</sup> Ibid, para 25.

<sup>27</sup> General Comment No. 3 was adopted by the ACHPR at its 57<sup>th</sup> Ordinary Session in The Gambia between 4th and 18th November 2015.

30. The Commission has not yet had the opportunity to adjudicate upon the compatibility or otherwise of national clemency procedures with Article 4 of the Charter. In light of the adoption of General Comment No.3 and the envisaged scope of Article 4 where clemency is concerned, the Commission may take the view that, given the number of states which retain the death penalty, the right to seek clemency assumes particular importance for the development of regional jurisprudence.

(ii) **The clemency process should be meaningful and effective**

32. The Inter-American Commission has considered the requirements of clemency procedure against the requirements of the ACHR in a number of death penalty cases. In *McKenzie v. Jamaica*<sup>28</sup>, the Commission held that the right to seek clemency "*encompasses certain minimum procedural guarantees for condemned prisoners in order for the right to be effectively respected and enjoyed.*" The Commission's view was that the content of those guarantees included:

- a. the right to be informed of when the deliberations would take place;
- b. the ability to make representations personally or through a legal representative; and
- c. to receive a decision within a reasonable time prior to execution.

33. In finding that the Grenadian Constitution's provisions governing the Prerogative of Mercy violated Articles 4,5 and 8 of the ACHR, the Inter-American Commission found that they did not "*guarantee condemned prisoners an effective or adequate opportunity to participate in the mercy process.*"<sup>29</sup> In particular, the Inter-American Commission stated that it found no evidence of "*any right on the part of the offender to apply to the Advisory Committee, to be informed of the time when the Committee will meet to discuss the offender's case, to make oral or written submissions to the Privy Council or to present, receive or challenge evidence considered by the Privy Council.*"<sup>30</sup>

34. Since then, the Commission has reiterated and elaborated upon its previous decisions on clemency when it held in the case of *Medelin, Ramirez Cardenas and Leal Garcia*<sup>31</sup> that:

*"The right to apply for amnesty, pardon or commutation of sentence under inter-American human rights instruments, while not necessarily subject to full due process protections, is subject to certain minimal fairness guarantees for condemned prisoners in order for the right to be effectively respected and enjoyed."*<sup>32</sup>

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<sup>28</sup> *McKenzie v. Jamaica*, Inter-Am. Comm'n. H.R. Case 12.023, Report No. 41/00 (13 April 2000) at paragraph 228.

<sup>29</sup> *Rudolph Baptiste v. Grenada*, Case 11.743, Report No. 38/00 (April 13, 2000) at paragraph 120

<sup>30</sup> *Ibid* at paragraph 118-119

<sup>31</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication) , *Medellin, Ramirez Cardenas and Leal Garcia*, United States, 7 August 2009

<sup>32</sup> *Ibid* at paragraph 150 (citing: IACHR, Case No 12.023 (*McKenzie et al*), *Jamaica*, Annual Report of the IACHR 1999, para 228; Case No. 12.067 (*Edwards et al*), *The Bahamas*, Annual Report of the IACHR 2000, PARA 170).



And:

*“The allegations of the parties indicate that the practice followed by the Texas Board of Pardons and Paroles when considering petitions filed on behalf of persons sentenced to death does not allow for opportunities to view the evidence submitted in opposition to clemency requests and that this body does not report on the reasons for its recommendation to reject a clemency petition. The State has not denied the assertion that there is no set of rules or criteria to be taken into account when making clemency determinations regarding death penalty cases in Texas. Therefore, the Commission finds that the procedure in place falls short of establishing minimal safeguards to prevent arbitrary decisions concerning evidence submitted either in favour or in opposition of a clemency request pending the execution of a death sentence.”<sup>33</sup>*

35. Roughly contemporaneous to *McKenzie v Jamaica*, the Judicial Committee of the Privy Council in *Neville Lewis and Others v. Attorney General of Jamaica*<sup>34</sup>, considered the appeals of four death row prisoners who contended that they were entitled, as part of their applications for mercy to the Jamaican Privy Council (JPC), to have access to the information that had been placed before the JPC and to make representations upon it. In accordance with section 91 of the Constitution of Jamaica, the JPC was obliged to consider a written report from the trial judge and such other information as the Governor General, acting on the recommendation of the Council, might require and cause to be forwarded to it before it advised him whether or not to exercise the prerogative of mercy.
36. In allowing the appeals of all four prisoners, the Privy Council held that whilst the merits of a decision to grant or not to grant a petition of mercy were not amenable to judicial review, *“the states' obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review”*<sup>35</sup>. The Privy Council held in particular that:
  - a) The decision to grant mercy or otherwise must be exercised by procedures which were fair and proper and amenable to judicial review.
  - b) That in considering what natural justice required it was relevant to have regard to international human rights norms laid down in treaties to which the state was a party, whether or not they were independently enforceable in domestic law.
  - c) That, therefore, the condemned man was entitled to sufficient notice of the date when the JPC would consider his case for him or his advisers to prepare representations which the JPC was bound to consider before taking a decision, when a report by an international human rights body was available the JPC should consider it and give an explanation if it did not accept the report's recommendations, and the condemned man should normally be given a copy of all the documents available to the JPC and not merely the gist of them.

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<sup>33</sup> Ibid at paragraph 152

<sup>34</sup> *Lewis and Others v. Attorney General of Jamaica* [2001] 2 AC 50

<sup>35</sup> Ibid at page 79



- d) That the defects in the procedures adopted in relation to the applicants' petitions for mercy had resulted in a breach of the rules of fairness and of natural justice.

37. Subsequently, *Lewis v. Jamaica* was considered by the Inter-American Commission in the case of *Lamey v. Jamaica*<sup>36</sup>, in which the Commission found as follows:

*"In the Commission's view, the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention, when read together with the State's obligations under Article 1(1) of the Convention, encompasses certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections include the right on the part of condemned prisoners to apply for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel, to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution. It also entails the right not to have capital punishment imposed while such a petition is pending decision by the competent authority. In order to provide condemned prisoners with an effective opportunity to exercise this right, a procedure should be prescribed and made available by the State through which prisoners may file an application for amnesty, pardon or commutation of sentence, and submit representations in support of his or her application. In the absence of minimal protections and procedures of this nature, Article 4(6) of the Convention is rendered meaningless, a right without a remedy. Such an interpretation cannot be sustained in light of the object and purpose of the Convention."*

38. The decision of *Knights v. Grenada*<sup>37</sup>, which was handed down by the Inter-American Commission on the same day as *Lamey*, extended the ruling in *Neville Lewis* throughout the Commonwealth Caribbean.

(iii) **The clemency process must be fair and transparent**

39. Insofar as international legal instruments are concerned, the particular requirement for transparency is one which has been interpreted as flowing directly from the African Charter, as discussed at paragraphs 9-11 above.

40. Where international jurisprudence is concerned, the lack of transparency surrounding the clemency procedure in Cyprus was considered by the European Court of Human Rights in the case of *Kafkaris* (supra). In a joint partly dissenting opinion, Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens highlighted the absence of a published procedure governing the criteria applied by the President in mercy applications in the country concerned, the absence of reasons for refusal of mercy and the overall "*lack of a fair, consistent and transparent procedure*" which in their view "*compound[ed] the anguish and distress which are intrinsic in a life sentence.*" It is worth noting that the death penalty *per se* is no longer considered compatible with the European Convention.

41. In the Commission decision of *Spilg and Ditschwanelo (on behalf of Kobedi) v Botswana*<sup>38</sup>, the state was found to have violated Article 5<sup>39</sup> of the African Charter by reason of failing to

<sup>36</sup> *Lamey v. Jamaica*, Case Nos. 11/826, 11/843, 11/846, 11/847, Report No. 49/01 (I.A.C.H.R. April 4 2001).

<sup>37</sup> *Knights v. Grenada*, Report No. 47/01 (I.A.C.H.R. April 4 2001)

provide the deceased prisoner and his family with the result of his unsuccessful clemency petition and the time and date of his execution. Citing *Interights v. Botswana*, the ACHPR held 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 he can, to face his ultimate ordeal." The failure to allow the deceased prisoner and his family "to have closure with the dignity of their last farewells" amounted to inhuman treatment within the meaning of Article 5 of the African Charter.

(iv) **Minimum Safeguards for a Fair and Transparent Clemency Process**

42. There is, inevitably, scope for varying levels of formality within clemency procedure and practice at national level. It seems clear, however, from the jurisprudence identified above that the components of a fair and transparent clemency process which complies with international human rights law include:

- a. a published procedure as to the clemency process, including the criteria to be applied by the decision making body;
- b. the right to be informed of when the decision making body's deliberations will take place;
- c. the ability to make representations personally or through a legal representative;
- d. the right to view adverse information submitted to the clemency authority;
- e. reasons for an adverse decision; and
- f. the right to receive a decision within a reasonable time prior to execution.

43. At present, whilst the Complainant in this case has been afforded interim relief at domestic level to the extent that he has been permitted to make written representations prior to the decision making process and to have sight of the trial judge's report, the State of Botswana has confirmed the absence of any regulations, published or otherwise, which govern the clemency process. Moreover, the Court of Appeal of Botswana in its judgment of 21 April 2016, approved as constitutional the absence of any regulations governing the clemency process, and further ruled that the Advisory Committee on the Prerogative of Mercy is not bound to observe the "*trappings of judicial proceedings*"<sup>40</sup> including oral representations, legal representation, exchange of documents or the examination of witnesses. In particular, the Court of Appeal ruled that the Advisory Committee has "*full power to regulate its own procedure*" under article 54(5) of the Constitution. It is therefore the case that the discretion

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<sup>38</sup> IACHR Case No. 277/2003

<sup>39</sup> Article 5 of the African Charter protects "*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.*"

<sup>40</sup> *Patrick Gabaakanye v The President of Botswana and others* Court of Appeal Criminal Appeal Number CLCGB – 012 – 16 (21 April 2016)

enjoyed by the Advisory Committee to consider clemency petitions is unfettered by the components of a fair and transparent clemency process identified at paragraph 42(a)-(f) above.

44. Insofar as any substantive requirements of the clemency process are concerned, the ruling of the Court of Appeal has confirmed that they are confined to the following: a condemned prisoner has a constitutional right to apply for clemency; such a person should have *pro bono* legal assistance; and he should be permitted six weeks to prepare a clemency petition. Whilst those limited 'guidelines' have been pronounced by a national court, it remains the case that the executive of Botswana has not promulgated the criteria by which it, as the final decision maker, adjudicates upon clemency petitions and as a matter of national law, is not required to do so. The Commission is therefore urged to conclude that the Complainant in this case has not been afforded access to a transparent clemency process, by reason of not knowing what, if any, criteria will be applied to his petition, when it is submitted.
45. Additionally, the Complainant will not be informed of the date on which his clemency petition will be considered; simply that the Advisory Committee will not convene until he has filed his written representations. He has been given no opportunity to make oral submissions – a process through which the criteria to be adopted by the Advisory Committee might emerge - either personally or through a legal representative.
46. Finally, as the Complainant is plainly entitled to reasons for any adverse decision by virtue of the protection afforded by Article 4 of the Charter (if the scope of Article 4 is to be interpreted consistently with the requirements of Article 2 ECHR and Article 4 ACHR), the Commission may consider that such a guarantee requires the criteria for clemency to be published in advance. The Commission may determine that an entitlement to reasons at the conclusion of the process is not a meaningful guarantee where the criteria by which clemency may be refused are not disclosed or published in advance, and so the petitioner is not able to direct his or her submissions to the relevant criteria.

(v) **Individuals with Mental or Intellectual Disabilities in the Clemency Process**

47. The Commission has recently denounced the execution of persons “*with psycho-social or intellectual disabilities*” as incompatible with Article 4 of the Charter. Such a denouncement is consistent with the special status of persons with mental health difficulties or illness in the death penalty context. The Commission will recall the prohibition in customary international law of the execution of insane persons<sup>41</sup>. The Commission is further reminded that the prohibition on executing the severely mentally ill, as constituting cruel, inhuman and degrading punishment, is an established norm of international human rights law<sup>42</sup>. The UN Commission on Human Rights has, in a series of annual resolutions urging full compliance with the Economic and Social Council Safeguards, urged retentionist countries “[n]ot to

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<sup>41</sup> U.N. ECOSOC, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, para. 3, E.S.C. Res. 1984/50, U.N. Doc. E/1984/92, 1984 ('the death penalty shall not be carried out on persons who have become insane').

<sup>42</sup> Francis v. Jamaica, Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994, Aug. 3, 1995; U.N. Human Rights Committee, Sahadath v. Trinidad and Tobago, Communication No. 684/1996, CCPR/C/74/D/684/1996, Apr. 15, 2002

*impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."*

48. The Commission may consider that the protection inherent in Article 4 of the Charter against the execution of those with mental or intellectual disabilities effectively requires the state to exercise its discretion to consider relevant medical evidence. The Complainant in the instant case requested that the state prepare a medical report regarding his mental health, intellectual and psycho-social functioning. The state unequivocally refused that request.
49. That refusal should be considered against the wide discretion enjoyed by the President to summons information about a clemency petitioner<sup>43</sup>. The discretion is consistent with constitutional and/or state practice globally; states typically do not limit the range of material that may be relied upon in support of a clemency petition. For example, section 91 of the Constitution of Jamaica is drafted in near identical terms to s.55(1) of the Constitution of Botswana, providing that the "*The Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require*", before seeking advice from the Privy Council. Similar provisions are contained in the respective constitutions of Belize<sup>44</sup>, Trinidad and Tobago<sup>45</sup>, The Bahamas<sup>46</sup>, Barbados<sup>47</sup> and Uganda<sup>48</sup>.
50. The Commission may therefore wish to consider – against the absence of any limitations imposed by the Constitution of Botswana on the material that may be considered by the President – the extent to which an ability to make representations to the decision maker can meaningfully be exercised where psychiatric and/or mental health related issues cannot be raised through state funded medical reports. Consequently, the Commission is encouraged to consider whether a state's refusal to prepare mental health reports upon a condemned petitioner is consistent with the protection afforded by Article 4 of the Charter in the clemency context when the Commission has denounced the execution of those "*with psycho-social or intellectual disabilities*".<sup>49</sup>

## **Conclusion**

51. The right to seek clemency is firmly established in international human rights law. Commensurate with the significance of clemency as a final remedy in death penalty cases and as already underscored by the Commission in General Comment No.3, it has been accepted at

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<sup>43</sup> Section 55(1) provides: "*Where any person has been sentenced to death for any offence, the President shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as he may require, to be considered at a meeting of the Advisory Committee on the Prerogative of Mercy; and after obtaining the advice of the Committee he shall decide whether to exercise any of his powers under section 53 of this Constitution.*"

<sup>44</sup> Section 53 of the Constitution

<sup>45</sup> Section 89(1) of the Constitution

<sup>46</sup> Section 92 of the Constitution

<sup>47</sup> Section 78(3) of the Constitution

<sup>48</sup> Section 121(5) of the Constitution

<sup>49</sup> It is worth noting that s.54 of the Botswana Constitution stipulates that one member of the Advisory Committee must be a medical practitioner.

the highest levels of international jurisprudence that the right to seek clemency is attended by minimum procedural safeguards.

52. The movement towards recognition of due process in clemency cases is a fundamentally important aspect of jurisprudential development concerning the right to life in international human rights law. Thus far, the clemency jurisprudence has emerged from cases where it was accepted that no procedures compliant with international norms were meaningfully adopted. There have been few opportunities to examine extant but inadequate clemency procedures. In light of the particular facts of the Claimant's case, wherein certain procedural safeguards have been granted but in a context where the signatory state proceeds in the absence of any published clemency procedure and refuses to permit a pre-execution mental health assessment, the Commission is presented with an important opportunity to consider the proper scope and parameters of Article 4 of the Charter.