In the African Court on Human and Peoples' Rights
Application No. 001/2015

Between

Armand Guehi ……Applicant

and

The United Republic of Tanzania…….Respondent

AMICI CURIAE BRIEF OF PROFESSOR CHRISTOF HEYNS AND PROFESSOR SANDRA BABCOCK

Mr. Donald Deya, Pan African Lawyers Union Counsel of Record

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I. INTRODUCTION

A. STATEMENT OF IDENTITY

(1) Professor Christof Heyns

1. Professor Christof Heyns is a ~~member of the United Nations Human Rights Committee (**"UNHRC"**)[1], as well as a~~ Professor of Human Rights Law and 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.

2. Professor Heyns has also been a long-standing advisor to the African Commission on Human and Peoples' Rights (**"ACHPR"**), working closely with the Working Group on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa. 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. In 2016, he was the head of the U.N. Investigation on Burundi.

3. From 2010 to 2016, Professor Heyns was the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, a mandate most recently described in U.N. Human Rights Council Resolution 26/12. In 2012, he presented a report to the U.N. General Assembly (A/67/275) on the restrictions of the death penalty under international law.

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[1] ~~This brief is submitted on a voluntary basis in the matter of *Armand Guehi v. United Republic of Tanzania* for the Honourable Court'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 Mr Heyns, in full accordance with his independence, has neither been sought nor given by the United Nations, the Human Rights Committee, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.~~

4. Professor 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'. He also contributed (with Thomas Probert) a chapter on 'The right to life and the progressive abolition of the death penalty' to the U.N.'s most recent publication on the death penalty, 'Moving Away from the Death Penalty: Arguments Trends and Perspectives' (2015).

5. Professor 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, Professor Heyns was a Visiting Fellow with the Human Rights Program at Harvard Law School in Cambridge, MA.

(2) Professor Sandra Babcock

6. Professor Sandra Babcock is a Clinical Professor of Law at Cornell University Law School. She is also the Faculty Director of the Cornell Center on the Death Penalty Worldwide, an academic centre engaged in research, advocacy and training on the application of the death penalty around the globe.

7. The Cornell Center on the Death Penalty Worldwide aims to bridge critical gaps in research and advocacy around the death penalty by providing comprehensive, transparent data regarding death penalty laws and practices in the 87 countries and territories that retain capital punishment and by publishing reports and manuals on issues of practical relevance to defence lawyers, governments, courts and organisations considering questions relating to the application of the death penalty.

8. Through her clinical teaching, Professor Babcock has spent several years working on access to justice for prisoners in Malawi, focusing in particular on securing fair hearings on retrial for prisoners resentenced following the *Kafentayeni* decision striking down the mandatory death penalty. She has also served as a facilitator in six training workshops on human rights and capital

punishment in Malawi. In July 2017, in her capacity as director of the Cornell Center on the Death Penalty Worldwide, Professor Babcock hosted the first Makwanyane Institute, an intensive training workshop for capital defence practitioners from common law jurisdictions in Africa.

9. In her 25 years as a practicing capital defence attorney, Professor Babcock has represented numerous defendants facing the death penalty in the U.S., the majority of whom were foreign nationals. Professor Babcock has also argued cases before the International Court of Justice (**"ICJ"**), the Inter-American Court on Human Rights (**"IACtHR"**), the Inter-American Commission on Human Rights (**"IACHR"**), the U.S. Court of Appeals for the Fifth Circuit, and the Supreme Courts of California, Texas, Minnesota, and New Mexico. She has served as an expert in capital cases in the United States and in the United Kingdom, including acting as an *Amicus Curiae*, on the application of international treaties to capital prosecutions.

10. From 2000 to 2006, Professor Babcock was the founding director of the Mexican Capital Legal Assistance Program, a project funded by the Government of Mexico to assist Mexican nationals facing capital prosecution in the United States. From 2003 to 2004, she was counsel to Mexico before the International Court of Justice in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 12 I.C.J. 128 (2004), and continues to represent the Government of Mexico in capital cases in U.S. courts. For her work, in 2003 she was awarded the Aguila Azteca, the highest honour bestowed by the government of Mexico upon citizens of foreign countries.

11. Professor Babcock has taught courses on international law and the death penalty at Northwestern and Tulane Law Schools. In addition to her clinical teaching at Cornell, she teaches doctrinal courses on International Human Rights and International Gender Rights. She spent the fall semester 2014 as the Fulbright-Toqueville Distinguished Chair at the Université de Caen, Basse-Normandie, where she also ran an international human rights clinic.

12. Professor Babcock has published extensively on the subject of the death penalty and international law, most recently, 'Capital Punishment, Mental

Illness, and Intellectual Disability: The Failure to Protect Individuals With Mental Disorders Facing Execution', in U.N. High Commissioner on Human Rights, Death Penalty and the Victims (2016), 'The Mandatory Death Penalty in Malawi: The Unrealized Promise of Kafantayeni', with Ellen Wight, in Peter Hodgkinson and Kerry Ann Akers, 'The Library of Essays on Capital Punishment' (Ashgate 2013) and 'The Limits of International Law: Efforts to Enforce Rulings of the International Court of Justice in U.S. Death Penalty Cases'[2].

B. INTERESTS OF *AMICI CURIAE*

13. *Amici Curiae* have both read the application to the African Court on Human and Peoples' Rights (the **"Honourable Court"**) filed by Mr Armand Guehi (the **"Applicant"**); the Order for Provisional Measures made by the Honourable Court on 18 March 2016 in respect of this case (the **"Order"**); and the Response of the United Republic of Tanzania (the "**Respondent"**) to the Application for Leave to Intervene by Côte d'Ivoire (the **"Response"**).

14. Having reviewed the above-mentioned documents, and as recognised experts on the intersection between international law and the death penalty, with particular expertise in the issues raised in this document (the **"Brief"**), *Amici Curiae* wish to assist the Honourable Court in promoting the protection of human and people's rights and the administration of justice in this case, and by jurisprudential extrapolation, similar cases across the continent.

15. The urgency and gravity of the issues under consideration by the Honourable Court and their possible impact on similar cases that have arisen, and may arise, across the African continent motivates *Amici Curiae* to offer their collective expertise for the benefit of the Honourable Court. *Amici Curiae* wish to share their knowledge of relevant international and regional case law, and offer a comparative analysis. *Amici Curiae* do so taking into account the obligations of the Respondent under international and regional law.

[2] 62 SYRACUSE L. REV. 183 (2012)

16. In addition to the arguments raised by the Applicant in the principal submissions, *Amici Curiae* consider that this case raises further fundamental questions regarding: (1) the right to consular assistance; and (2) reliance on death penalty moratoria by a retentionist jurisdiction. *Amici Curiae* submit that these are issues that they are uniquely well placed to comment on. As set out above, Professor Heyns and Professor Babcock are internationally recognised experts in the field of international law and the death penalty. Professor Heyns has written widely on the issue of death row phenomenon and the fragility of moratoria, as discussed below. Professor Babcock is an authority on the law of consular assistance and has comparative law expertise in assessing domestic legislation that affects countries' use or retention of the death penalty.

17. *Amici Curiae* note the opportunity for the Honourable Court to play a leading and proactive role in the development of death penalty jurisprudence in the Respondent State and across the African continent. Furthermore, the Honourable Court's determination of the issues in this case may contribute to and inform the emerging international jurisprudence on key issues relating to the death penalty, influencing other regional and international tribunals in their consideration of these issues.

II. EXECUTIVE SUMMARY

A. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

18. With a view to ensuring clarity of legal analysis, the facts as applicable to the issues raised in this Brief are summarised below and, unless otherwise stated, are taken from the Order. *Amici Curiae* do not seek to opine on the veracity or otherwise of the facts.

(1) Domestic Proceedings

19. The Applicant, a citizen of Cote d'Ivoire, is currently detained at Ukonga Prison in Dar es Salaam, Tanzania, having been convicted and sentenced to the mandatory death penalty on 30 March 2010. The Applicant's death sentence

was confirmed on 28 February 2014 by the Court of Appeal, the Highest Court of Tanzania.

(2) Proceedings before the Honourable Court

20. On 6 January 2015, the Applicant filed an application with the Honourable Court instituting proceedings against the Respondent for violation of his rights under various international human rights treaties (the **"Application"**).[3] In addition to various breaches of his right to a fair trial enshrined in the African Charter on Human and Peoples' Rights (the **"African Charter"**), the Applicant also alleges, *inter alia*, that "*save for the trial in 2010, the Respondent did not provide him with language assistance at critical stages of the case, such as when he was interviewed and recorded his statements at the Police Station, while at the time of his arrest he could only speak and understand the French language. In addition, he alleges that the Respondent never facilitated consular assistance for him*".[4]

21. On 2 March 2016, the Republic of Cote d'Ivoire (the **"Intervening State"**) deposited its application to intervene with the Honourable Court.

22. On 18 March 2016, and acting *proprio motu*, the Honourable Court handed down a Notification of Order for Provisional Measures under Article 27(2) of the Protocol to the African Charter on the Establishment of an African Court on Human and People's Rights (the **"Protocol"**[5]) and Rule 51(3) of the 2010 Rules of Procedure of the African Court on Human and Peoples' Rights (the **"Rules"**)[6], requiring the Respondent to refrain from executing the Applicant pending the determination of the application before the Honourable Court, and requiring the Respondent to demonstrate to the Honourable Court the measures it had undertaken to fulfil its obligations under the Order (the **"Provisional Measures"**). The Honourable Court noted in the Order that:

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3 Paragraph 7 of the Applicant's application to the African Court of Human and People's Rights.

4 Paragraph 3(b) of the Order.

5 **Tab 9:** Article 27 (2), the protocol to the African charter on human and people's rights on the establishment of an African court on human and people's rights.

6 **Tab 7:** Rule 51(3) of the 2010 Rules of the Procedure of the African court on human and people's rights. Available online at http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf [Accessed 19 December 2017].

"[u]nder Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures proprio motu in cases of extreme gravity and when necessary to avoid irreparable harm to persons and which it deems necessary to adopt in the interest of the parties or of justice;

It is for the Court to decide in each situation if, in the light of the particular circumstance, it should make use of the power provided for by the aforementioned provisions;

The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant;

Given the particular circumstances of the case, where there is risk of execution of the death penalty which will jeopardise the enjoyment of the rights guaranteed under Article 7 of the Charter and Article 14 of the ICCPR, the Court has decided to invoke its powers under Article 27(2) of the Protocol."[7]

(3) **Reliance on de-facto moratorium in Response to Provisional Measures**

23. On 4 January 2017, the Respondent submitted its Response to the Application for Leave to Intervene by the Intervening State (the **"Response"**). The Respondent refused to enforce the Provisional Measures of the Honourable Court, stating that: "*[t]he death penalty will be executed in accordance with prescribed procedure and the laws of the land*".[8]

24. The Response further states that, "*the situation is not of extreme gravity and urgency as the Respondent has a de facto moratorium, which is subject to the will of the incumbent President, on implementing the death sentence since 1985*".[9] The Respondent therefore reasons that "*the Honourable Court has not*

7 Paragraphs 16-20, inclusive, of the Order

8 Paragraph 51(ii) of the Response

9 Paragraph 40 of the Response

demonstrated sufficient reasons of extreme gravity, urgency and irreparable harm that could justify its issuance of the provisional order".[10]

25. The Respondent submits that "*there was no imminent need to issue the Order for Interim Measures not to execute the death penalty as the Applicants [sic] Review is still being addressed within the Respondent's justice system*".[11] Furthermore, the Respondent states "*that the Applicant is still exhausting legal remedies within the Respondent… Therefore, there is no extreme urgency or imminent harm*".[12]

26. As of the date of this *Amici Curiae* Brief, the Applicant has been detained under threat of execution for over 7 years.

B. SUMMARY OF ARGUMENT

(1) The Court's Issuance of Provisional Measures Is Appropriate and Necessary

27. As set out above, *Amici Curiae* note that the Respondent seeks to argue in its Response that it is unable to comply with the Honourable Court's Order of Provisional Measures to protect the Applicant from irreparable harm in the form of his execution. The Respondent submits, *inter alia*, that the situation of the Applicant was "*not of extreme gravity and urgency*"[13] so as to merit the issuing of Provisional Measures in accordance with the Protocol and the Rules, "*as the Respondent has a de facto moratorium, which is subject to the will of the incumbent President, on implementing the death sentence since 1985*".[14]

28. *Amici Curiae* submit this Brief to assist the Honourable Court in ensuring the effective protection of the Applicant's human rights as guaranteed by the African Charter and the International Covenant on Civil and Political Rights (the **"ICCPR"**) and other international legal instruments. This Brief seeks to examine the reliability of moratoria on executions at a regional and international

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10 Paragraph 43 of the Response

11 Paragraph 46 of the Response

12 Paragraph 47 of the Response

13 Paragraph 40 of the Response

14 Paragraph 40 of the Response

level, as well as in the particular case of the Applicant. *Amici Curiae* wish to draw the Honourable Court's attention to their concerns about any reliance on a moratorium, and particularly in the case of the Applicant, for the following reasons:

a) Although no execution has been carried out by the Respondent since 1994, no official moratorium exists in law. Historical experience dictates that such unofficial *de facto* moratoria are inherently fragile and are especially vulnerable to political and societal changes.

b) *Amici Curiae* understand that the continuance of the Respondent's moratorium on executions is dependent on nothing more than the political will of the executive. Recent attempts to enshrine the moratorium in law, and separately, to abolish capital punishment altogether, in the Respondent state have been unsuccessful. It is self-evident that any negative changes in the *status quo* in the Respondent state, including those which may be unforeseeable, could lead to the irreparable harm (by way of execution) of the Applicant.

c) Unless accompanied by an irrevocable commutation of sentence, a death sentence, even in a jurisdiction with a *de facto* moratorium in place, risks subjecting the Applicant to an extended stay on death row. This in itself has been held to constitute cruel, inhuman, or degrading treatment or punishment. Without a commitment from the Respondent to grant and respect a stay of execution while the Honourable Court considers the Applicant's case, the Respondent continues to expose the Applicant to a very real and ever increasing risk of inhuman and degrading treatment in the form of death row phenomenon, as he remains on death row and at risk of execution at any time should the moratorium on executions break.

(2) Respondent's Violation of its Obligations to Provide Consular Notification and Access

29. As set out above, Amici Curiae note that the Applicant alleges that the Respondent did not facilitate consular assistance for him as an Ivorian national

present in the territory of the Respondent, in breach of the international human rights obligations of the Respondent.

30. Amici Curiae wish to draw the Honourable Court's attention to existing international and regional jurisprudence in respect of:

    a) the importance of consular notification and access to effective due process and ensuring a fair trial for a foreign national;

    b) the requirement strictly to safeguard due process and fair trials standards in death penalty cases, given the irreversible nature of the harm that may be sustained; and

    c) the requirement to remedy consular rights violations in death penalty cases by providing review and reconsideration of an individual's conviction and death sentence.

31. This Brief examines relevant jurisprudence from various international and regional legal bodies including, amongst others, the ACHPR, the ICJ, the UNHRC and the IACtHR, as well as national jurisprudence in Africa and internationally. *Amici Curiae* hope that this jurisprudence will provide helpful guidance to the Honourable Court when it considers and interprets the provisions of the relevant international treaties, including the Vienna Convention on Consular Relations (the **"VCCR"**), African Charter and the ICCPR, all of which the Respondent is a state party to.

32. As set out below, *Amici Curiae* have focussed on the particular circumstances of the Applicant when examining international and regional human rights standards in order to assist the Honourable Court to consider the wider legal and human rights implications arising out of the Applicant's case.

33. *Amici Curiae* therefore respectfully request that the Honourable Court weigh the contents of this Brief when adjudicating the claims raised by the Applicant.

III. RELEVANT LAWS

A. NATIONAL LAWS

34. The Constitution of the Respondent, 1977, Cap. 2 of the Laws (the **"Constitution"**) came into operation on 26 April 1977[15].

35. Section 45 of the Constitution states (in part):

> *"45.-(1) Subject to the other provisions contained in this Article, the President may do any of the following:*
>
> *(a) grant a pardon to any person convicted by a court of law of any offence, and he may subject to law grant such pardon unconditionally or on conditions;*
>
> *(b) grant any person a respite, either indefinitely or for a specified period, of the execution of any punishment imposed on that person for any offence;*
>
> *(c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; and*
>
> *(d) remit the whole or part of any punishment imposed on any person for any offence, or remit the whole or part of any penalty of fine or forfeiture of property belonging to a convicted person which would otherwise be due to the Government of the United Republic on account of any offence."*

36. Section 196 of the Penal Code, Cap. 16 of the Laws[16] (the **"Penal Code"**) states that: "*Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder*."

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15 **Tab 1:** Available online at http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=56763 [Accessed 14 December 2017]

16 **Tab 2:** Available online at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TZA_penal_code.pdf [Accessed 14 December 2017]

37. Section 197 of the Penal Code states that "*Any person convicted of murder shall be sentenced to death…*"

38. Section 325 of the Criminal Procedure Act 1985[17], Cap. 20 of the Laws states (in part):

> *"(1) As soon as conveniently may be after sentence of death has been pronounced, if no appeal from a sentence of death passed by the High Court, is preferred, or if an appeal from any sentence of death is preferred and the sentence is upheld on appeal, then as soon as conveniently may be after the determination of the appeal the presiding judge or magistrate exercising powers conferred on him by section 173 shall forward to the President a copy of the notes of evidence taken on the trial with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.*
>
> *(2) After the said report has been considered the President shall communicate to the said judge or magistrate or his successor in office, the terms of any decision to which he may come thereon, and such judge or magistrate shall cause the tenor and substance thereof to be entered in the records of the court.*
>
> *(3) The President shall issue a death warrant, or an order of the sentence of death to be commuted, or a pardon, under his hand and the seal of the United Republic to give effect to the said decision. If the sentence of death is to be carried out, the warrant shall state the place where and the time when execution is to be had, and shall give directions as to the place of burial of the body of the person executed. If the sentence is commuted for any other punishment, the order shall that punishment. If the person sentenced is pardoned, the pardon shall state whether it is free, or to what conditions if any, it is subject."*

[17] **Tab 3:** Available online at https://www.wildlex.org/sites/default/files/legislations/LEG-160003.pdf [Accessed 14 December 2017]

39. Section 3 of the Presidential Affairs Act[18], Cap. 9 2002 states in part:

> *"3. Advisory Committee on the Prerogative of Mercy*
>
> *(1) There shall be an Advisory Committee on the Prerogative of Mercy…*
>
> *…*
>
> *(3) Where any person has been sentenced to death (otherwise than by a court-martial) for any offence, the President shall cause a written report of the case from the trial judge or magistrate, 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; and after obtaining the advice of the Committee, the President shall decide in his own deliberate judgement whether to exercise any of his powers under section 45 of the Constitution.*
>
> *(4) the President may consult with the Advisory Committee before exercising any of his powers under section 45 of the Constitution in any case not falling within subsection (3) of this section."*

B. INTERNATIONAL LAW

(1) Treaty Provisions Relevant to the Application of the Death Penalty

40. The Respondent is party to a number of instruments of international and regional law that explicitly guarantee the right to life and the right to be free of cruel, inhuman or degrading treatment or punishment. By ratifying and/or acceding to these instruments, the Respondent has agreed to be legally bound to the obligations specified therein under international law.

41. The Respondent ratified the African Charter[19] on 18 February 1984 and deposited the instrument of ratification on 9 March 1984.

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[18] **Tab 4:** Available online at http://tanzanialaws.com/statutes/principal-legislation/280-presidential-affairs-act [Accessed 14 December 2017]

[19] **Tab 8:** Available online at http://www.achpr.org/instruments/achpr/ [Accessed 14 December 2017]

42. Article 1 of the African Charter states:

> *"The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."*

43. Article 2 of the African Charter states:

> *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."*

44. Article 4 of the African Charter states:

> *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."*

45. Article 5 of the African Charter states:

> *"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."*

46. Article 6 of the African Charter states:

> *"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."*

47. Article 7 of the African Charter states in part:

> *"Every individual shall have the right to have his cause heard. This comprises:*
>
> *(a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
>
> *(b) The right to be presumed innocent until proved guilty by a competent court or tribunal;*
>
> *(c) The right to defence, including the right to be defended by counsel of his choice;*
>
> *(d) The right to be tried within a reasonable time by an impartial court or tribunal…"*

48. The Respondent acceded to the ICCPR[20] on 11 June 1976.

49. Article 2 of the ICCPR states (in part):

> *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

50. Article 6 of the ICCPR states (in part):

> *"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
>
> *2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention*

[20] **Tab 10:** Available online at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx [Accessed 14 December 2017]

on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

…

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence…

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

51. Article 7 of the ICCPR states that "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*."

52. Article 9 of the ICCPR states in part:

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

…

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

53. Article 14 of the ICCPR states in part:

"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public

hearing by a competent, independent and impartial tribunal established by law.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

…

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court".

54. The Respondent is a full member of the United Nations (the **"U.N."**) As such, the findings of bodies or experts under the special procedures within the U.N. system are of utmost relevance. Furthermore, the wording of the African Charter relating to the right to life and the right to not be subject to cruel, inhuman or degrading treatment or punishment, is similar to that used in international instruments including the ICCPR, the American Convention on Human Rights (the **"AmCHR"**),[21] and the European Convention on Human

[21] **Tab 11:** American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143, Article 4:

"*1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.*

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be re-established in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

Rights (the **"ECHR"**)[22]. These instruments form the basis of the decisions of the IACtHR and the European Court of Human Rights (the **"ECtHR"**) in relation to these rights. This Brief therefore refers to relevant jurisprudence from these sources.

(2) Treaty Provisions Relevant to the Denial of Consular Notification and Access

55. Both the Respondent and the Intervening State are signatories to the VCCR[23], opened for signature on 24 April 1963. The Respondent acceded to the VCCR on 18 April 1977. The Intervening State signed the VCCR on 24 April 1963.

56. Article 36 of the VCCR states in part:

> *"With a view to facilitating the exercise of consular functions relating to nationals of the sending State…*
>
> *…*
>
> *(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;*

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6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."

Article 5(2): "*2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person*."

[22] **Tab 25:** European Convention on Human Rights, Nov. 4, 1950, ETS no. 5, Article 2(1): "*1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*."

Article 3: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"

[23] **Tab 13:** Available online at http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf [Accessed 14 December 2017]

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

57. Both the Respondent and Intervening State refer to the Universal Declaration of Human Rights[24] (the **"UDHR"**) as adopted by the U.N. on 10 December 1948. In 1984 the Respondent agreed to ensure that it directs itself toward ensuring the guarantees enshrined in the UDHR. In 1960 the Intervening State agreed to adhere to the provisions of the UDHR.

58. Article 3 of the UDHR states: "*Everyone has the right to life, liberty and security of person*."[25]

59. Article 9(1) of the Constitution of the Respondent states in part:

"[T]he Authority of the State and all its instruments must direct all their activities and policies towards the task of ensuring ...

(f) that human dignity is preserved and maintained in accordance with the International [sic] Declaration on Human Rights."[26]

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[24] **Tab 12:** Available online at http://www.un.org/en/universal-declaration-human-rights/index.html [Accessed on 14 December 2017]

[25] **Tab 12**

[26] **Tab 1**

60. The Preamble to the Constitution of the Intervening State states in part:

> *"The people of the Ivory Coast declare their adherence to the principles of Democracy and the Rights of Man, as they have been defined by the Declaration of the Rights of Man and the Citizen of 1789, by the Universal Declaration of 1948, and as they have been guaranteed by this Constitution."*[27]

IV. ARGUMENT

A. THIS COURT'S ISSUANCE OF PROVISIONAL MEASURES WAS BOTH APPROPRIATE AND NECESSARY

(1) Respondent Has Refused to Adopt an Official Moratorium

61. *Amici Curiae* note that the Respondent has stated that Provisional Measures are neither necessary nor appropriate because "*the situation is not of extreme gravity and urgency as the Respondent has a de facto moratorium, which is subject to the will of the incumbent President, on implementing the death sentence since 1985*"[28]. With respect, it is *Amici Curiae's* understanding that executions were carried out by the Respondent as recently as 1994 and therefore this information is factually incorrect.[29]

62. *Amici Curiae* acknowledge that it is a positive development that no execution has been carried out by the Respondent since 1994. However, it should be remembered that there is no official moratorium on executions and so the de facto moratorium may at any time be rescinded. Statutorily and procedurally, there is nothing to prevent executions from resuming at any point and without warning, should the executive decide to sign the Applicant's execution warrant.

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27 **Tab 5**

28 Paragraph 40 of the Response

29 **Tab 82:** Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania Human Rights Report 2012* (2013), Paragraph 2.1.1.1 http://www.humanrights.or.tz/downloads/tanzania_human_rights_report_2012.pdf [Accessed 13 December 2017]; and **Tab 70.:** Radelet, Rutherford, Schabas (Ed.), Bedau (Ed.) and Hodgkinson (Ed.), *The International Sourcebook on Capital Punishment* (1997), p. 49

63. The retention of the death penalty on the statute books seems unlikely to be an accident or oversight, leaving open, as it does, the option of resuming executions at any time.

64. Notably, the Respondent has to date made little progress towards abolition of the death penalty which would offer any reassurance to those on death row. Death sentences continue to be handed down by the courts: in 2014 alone, 91 death sentences were imposed.[30] As at the end of 2016, at least 491 people were known to be under sentence of death in the Respondent's jurisdiction.[31]

65. Calls for the abolition of capital punishment within the political establishment have all been unsuccessful to date. In 1991, the Nyalali Commission recommended the abolition of capital punishment; however, to the knowledge of *Amici Curiae*, the Respondent did not follow up on this recommendation.[32] In 2007, a Law Reform Commission chaired by Judge Bahati recommended abolition.[33] Again, nothing appears to have come of this recommendation. The Law Reform Commission recently commented: "*I don't think we, at the Law Reform Commission of Tanzania, have any reason to initiate the process of writing a law to abolish death penalty*."[34] The Respondent had previously rejected the U.N. Human Rights Council's recommendation of establishing an official moratorium on the death penalty, citing the need for a constitutional review process.[35] Furthermore, a new draft constitution, the product of a lengthy constitutional review process, was published containing explicit provisions enshrining the death penalty and the President's role in signing

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30 **Tab 87:** Amnesty International, *Death Sentences and Executions in 2014,* ACT 50/0001/2015 (2015), https://www.amnesty.org/en/documents/act50/0001/2015/en/ p.63 [Accessed 13 December 2017]

31 **Tab 91:** Amnesty International, *Death Sentences and Executions in 2016*, ACT 50/5740/2017 (2017), https://www.amnesty.org/en/documents/act50/5740/2017/en/, p.36 [Accessed 13 December 2017]

32 **Tab 80:** The International Federation for Human Rights, *Tanzania: The death penalty institutionalised?* (April 2005), https://www.fidh.org/en/region/Africa/tanzania/The-death-Sentence [Accessed 13 December 2017]

33 **Tab 77:** A. Gaitan and B.Kuschnik, *Tanzania's death penalty debate: An epilogue on Republic v Mbushuu*. African Human Rights Law Journal (2017), 9(2) p. 460 http://www.ahrlj.up.ac.za/images/ahrlj/2009/ahrlj_vol9_no2_2009_gaitan_kuschnik.pdf. [Accessed 13 December 2017]

34 **Tab 122:** R. Luhwago, *Death penalty 'here to stay*', Daily News (2017), https://dailynews.co.tz/index.php/home-news/53293-death-penalty-here-to-stay. [Accessed 13 December 2017]

35 **Tab 109:** U.N. GA Human Rights Council, *Report of the Working Group on the Universal Periodic Review: United Republic of Tanzania: Addendum*, U.N. Doc A/HRC/19/4/Add.1 (12 March 2012), pp.2-3, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/19/4/Add.1 [Accessed 13 December 2017]

death warrants and granting clemency.[36] As it currently stands, such provisions do not appear in the Constitution.

66. The Courts of the Respondent have engaged on the question of abolition and the constitutionality of the death penalty in a number of cases. In *R v Mbushuu alias Dominic Mnyaroge*, the High Court of Tanzania held that the death penalty constituted inhuman, cruel or degrading punishment and imposed life sentences on the convicted.[37] However, on appeal, the Court of Appeal of Tanzania (the highest judicial body in the Respondent) found that the death penalty was not be arbitrary and was therefore declared lawful.[38] Recent challenges to the mandatory death penalty have also failed. In 2017, in *R v Kafunja,* the High Court of Tanzania found that the Court was bound by the decision of the Court of Appeal in *Mbushuu* by doctrine of *stare decisis.*[39]

67. While *Amici Curiae* very much hope to see the Respondent take more active steps to move towards abolition, it nonetheless remains the case that the Respondent has to date failed to demonstrate a commitment to working towards abolition or a global moratorium in international for a. Notably, the Respondent has abstained from voting in every one of the U.N. General Assembly's resolutions to impose a global moratorium on the death penalty,[40] actions which the UNHRC considers significant. In the case of *Johnson v Ghana*, the UNHRC found that a violation of Article 6 of the ICCPR had been committed. In coming to that decision, the UNHRC took into consideration the fact that, although Ghana was a *de facto* abolitionist state at the time, it had not

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36 Article 92(1)(b) of the Proposed Constitution; see also: **Tab 84:** Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania Human Rights Report 2014* (2014), p.19 http://www.humanrights.or.tz/reports/tanzania-human-rights-report-2014 [Accessed 13 December 2017]

37 **Tab 29:** *R v Mbushuu alias Dominic Mnyaroge* [1994] 2 LRC 335, High Court of Tanzania (unreported) **[currently unavailable]**

38 **Tab 30:** *R v Mbushuu alias Dominic Mnyaroge,* Criminal Appeal No. 142 of 1994, Court of Appeal of Tanzania **[currently unavailable]**

39 **Tab 31:** *R v Kafunja,* Civil Cause No. 21 of 2016, High Court of Tanzania

40 Votes were undertaken in 2007 (**Tab 106:** United Nations General Assembly ("UNGA"), *62nd Session, 76th Plenary Meeting*, U.N. Doc. A/62/PV.76, 18 December 2007, pp. 16-17), 2008 (**Tab 107:** UNGA., *63rd Session, 70th Plenary Meeting*, U.N. Doc.A/63/PV.70, 18 December 2008, pp. 16-17), 2010 (**Tab 108:** UNGA, *65th Session, 71st Plenary Meeting*, U.N. Doc. A/65/PV.71, 21 December 2010, pp. 18-19)**,** 2012 (**Tab 111:** UNGA, *67th Session, 60th Plenary Meeting*, U.N. Doc. A/67/PV.60, 20 December 2012, pp. 16-17), 2014 (**Tab 114:** UNGA*, 69th Session, 73rd Plenary Meeting*, U.N. Doc. A/69/PV.73, 18 December 2014 pp. 17-18) and 2016 (**Tab 115:** U.N. Doc A/C.3/71/L.27 (http://www.un.org/en/ga/third/71/docs/voting_sheets/L.27.pdf) [Accessed 13 December 2017]

voted in favour of the U.N. General Assembly's resolution 62/149 on establishing a global moratorium on the death penalty.[41] In that case, the UNHRC found that "*the existence of a de facto moratorium on the death penalty [was] not sufficient to make a mandatory death sentence consistent with the Covenant*."[42]

68. Furthermore, the Respondent has not signed or ratified the Second Optional Protocol to the ICCPR 1989[43] which provides for the abolition of the death penalty. No official reason has been given for this.[44] Taken together, the above evidence suggests little active or effective movement towards abolition from a legal perspective.

69. In the most recent Universal Periodic Review of the U.N. Human Rights Council, the Respondent could not offer any comfort on the current or future status of the moratorium stating that this "*was a policy issue*".[45] This implies that the Respondent is reserving its opinion on the resumption of executions by preserving the current legal framework and by abstaining from definitive statements on the status of the moratorium.

(2) Unofficial Moratoria Are Inherently Fragile

70. The reversal of and/or failure to enforce moratoria in other jurisdictions demonstrates that they are vulnerable to political, societal and regional pressures. There are multiple recent and relevant illustrations of this occurring in practice. A pertinent example is the Republic of The Gambia, which carried

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41 **Tab 113:** *Johnson v Ghana* (2014), Human Rights Committee, CCPR/C/110/D/2177/2012, at paragraph 7.2 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/110/D/2177/2012&Lang=en [Accessed 14 December 2017]

42 **Tab 113:** *Johnson v Ghana* (2014), Human Rights Committee, CCPR/C/110/D/2177/2012, at paragraph 7.3 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/110/D/2177/2012&Lang=en [Accessed 14 December 2017]

43 **Tab 6:** Available online at http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx [Accessed 14 December 2017]

44 **Tab 84:** Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania Human Rights Report 2014* (2014), p348 http://www.humanrights.or.tz/reports/tanzania-human-rights-report-2014 [Accessed 13 December 2017]

45 **Tab 117:** Human Rights Council, 33rd Session, *Agenda Item 6: Report of the Working Group on the Universal Period Review: United Republic of Tanzania*, A/HRC/33/12 (14 July 2016), p.9 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/152/67/PDF/G1615267.pdf?OpenElement [Accessed 14 December 2017]

out 9 executions without notice in 2012, following 27 years without a single execution.[46] The executions were carried out within 3 days of the decision to resume executions being made public.[47] In 2001, Guinea executed 7 persons over 3 months following a 15-year moratorium.[48] Somaliland resumed executions in 2015, executing 6 people following a 9-year *de facto* moratorium.[49]

71. Even in instances where, unlike in the Applicant's case, countries have pledged to abolish the death penalty, the stability of a moratorium remains delicate. In 2014, Chad pledged to abolish the death penalty following recommendations by the Human Rights Council in their Working Report on Chad submitted as part of the Universal Periodic Review.[50] This pledge was followed up with abolition provisions in a draft Penal Code adopted in September 2014.[51] However, following a terrorist attack in June 2015, Chad introduced the death penalty for terrorism offences in July 2015 and promptly executed 10 people in August 2015.[52] The Penal Code was revised in December 2016 to reflect this legislative turnaround.[53]

72. Previous regional experience highlights that an appeal is no bar to execution. In 2013, Nigeria ended a 7 year "voluntary" moratorium with 4 executions. These

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46 **Tab 83:** Amnesty International, *Death Sentences and Executions in 2012,* ACT 50/001/2013 (2013), pp. 41-42 https://www.amnesty.org/download/Documents/8000/act500012013en.pdf [Accessed 13 December 2017]

47 **Tab 120:** VOA News, *Gambia Confirms 9 Death Row Executions* (27 August 2012), https://www.voanews.com/a/gambia-executions/1496805.html [Accessed 13 December 2017] and (F. Karimi, **Tab 119:** *Gambia vows to execute all death row inmates by September, sparking outcry,* CNN (23 August 2012), http://edition.cnn.com/2012/08/23/world/africa/gambia-inmates-execution/index.html) [Accessed 13 December 2017]

48 **Tab 79:** Amnesty International, *Guinea: Death penalty / fear of imminent execution*, AFR 29/004/2001 (15 October 2001), p.2 https://www.amnesty.org/en/documents/afr29/004/2001/en/ [Accessed 13 December 2017]

49 **Tab 89:** Human Rights Center Somaliland, *Annual Review of Human Rights Centre Somaliland 2016* (9 December 2016), p.4 http://hrcsomaliland.org/hrc-2016-annual-report/ [Accessed 13 December 2017]

50 **Tab 112:** UPR Info, *2RP: Responses to Recommendations and Voluntary Pledges – Chad* (10 July 2014), p.2 https://www.upr-info.org/sites/default/files/document/chad/session_17_-_october_2013/recommendations_and_pledges_chad_2014.pdf [Accessed 13 December 2017]

51 **Tab 85:** The International Federation for Human Rights, *Chad: The draft Penal Code abolishes capital punishment but severely condemns homosexuality* (23 September 2014), https://www.fidh.org/en/region/Africa/chad/16074-chad-the-draft-penal-code-abolishes-capital-punishment-but-severely [Accessed 13 December 2017]

52 **Tab 88:** Amnesty International, *Death Sentences and Executions in 2015*, ACT 50/3487/2016 (2015), p.56 https://www.amnesty.org/en/documents/act50/3487/2016/en/ [Accessed 13 December 2017]

53 **Tab 91:** Amnesty International, *Death Sentences and Executions in 2016,* ACT 50/5740/2017 (2017), p.9 https://www.amnesty.org/en/documents/act50/5740/2017/en/ [Accessed 13 December 2017]

went ahead without informing the relatives in advance and while appeals were allegedly still pending before the domestic courts.[54]

(3) Respondent Is Not Bound By Law To Continue the Unofficial Moratorium in the Applicant's Case

73. No official reason has been given to explain why the Respondent has not carried out any executions since 1994. *Amici Curiae* are not aware of any statements suggesting that there has been a permanent policy shift away from the practice of carrying out executions.

74. Since the moratorium is not enshrined in law, the resumption of executions requires only that the President exercises his prerogative power to issue a signed death warrant in respect of any prisoner with a death sentence.

75. In *Mbushuu*, Justice Mwalusanya stated that "*there are no checks or controls on the exercise of [the President's] power and the decision depends on the President's whim and his idiosyncrasies".*[55] Academic commentators have further noted "*the final question of whether a person must face the death penalty is dependent upon an arbitrary decision of the President and is not based on a fair and impartial process*"[56] and "*[T]he whole matter… hinges on the goodwill of the President.*"[57]

76. The President's decision as to whether or not to sign a death warrant is not subject to any judicial oversight. In Court of Appeal in *Mbushuu*, Justice Ramadhani stated that "*The Presidential pardon is outside the court process… the President is not bound by the recommendations of either the trial judge or*

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54 **Tab 86:** Amnesty International, *Death Sentences and Executions in 2013*, ACT 50/001/2014 (2014), pp.45-46 https://www.amnesty.org/en/documents/act50/001/2014/en/ [Accessed 13 December 2017]

55 **Tab 80:** The International Federation for Human Rights, *Tanzania: The death penalty institutionalised?* (April 2005), p.36 https://www.fidh.org/en/region/Africa/tanzania/The-death-Sentence [Accessed 13 December 2017]

56 **Tab 77:** A. Gaitan and B.Kuschnik, *Tanzania's death penalty debate: An epilogue on Republic v Mbushuu*. African Human Rights Law Journal (2017), 9(2) p. 479 http://www.ahrlj.up.ac.za/images/ahrlj/2009/ahrlj_vol9_no2_2009_gaitan_kuschnik.pdf. [Accessed 13 December 2017]

57 **Tab 78:** L. Shaidi, The British Institute of International and Comparative Law, *The Death Penalty in Tanzania: Law and Practice* (undated), http://www.biicl.org/files/2213_shaidi_death_penalty_tanzania.pdf [Accessed 13 December 2017]

the advisory committee."[58] Although this judgment was issued in 1994, *Amici Curiae* understand that the Respondent has yet to introduce any such checks or controls on the presidential prerogative.

77. There is no legal or political barrier to the signing of a death warrant by current president of the Respondent state, President John Magufuli. The Respondent acknowledges this in the Response: "*The de facto moratorium shall be exercised subject to the will of the sitting President and not otherwise*"[59] (emphasis added).

78. Uncertainty about the implementation of moratoria often goes hand in hand with political uncertainty. Accordingly, the resumption of executions could easily be the result of a change of regime, a reaction to public criticism, or a response to a particular event.

79. Numerous examples exist of reversals or failures to enforce moratoria in other jurisdictions following regime changes, or a shift in the balance between the strength of public pressure and the resolve of political leaders. In Indonesia, for example, there was a sharp increase in executions from 2015, following the election of President Joko Widodo, who, soon after coming into office, adopted a policy of refusing clemency for drug-related offences.[60] Similarly, an official 6-year moratorium in Pakistan was allowed to lapse after the election in December 2014 of the Pakistan Muslim League party, resulting in 7 immediate executions in December 2014 and around 326 executions in 2015.[61] In Taiwan, a *de facto* moratorium of 5 years between 2005 and 2010 came to an end after the resignation Minister of Justice Wang Ching-feng, who had been

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58 **Tab 30:** *R v Mbushuu alias Dominic Mnyaroge,* Criminal Appeal No. 142 of 1994, Court of Appeal of Tanzania **[currently unavailable]**

59 Paragraph 51(iii) of the Response

60 **Tab 121:** M. Aritonang and S. Susanto, *Jokowi to ban clemency for drug convicts*, The Jakarta Post (10 December 2014) http://www.thejakartapost.com/news/2014/12/10/jokowi-ban-clemency-drug-convicts.html [Accessed 13 December 2017]

61 **Tab 87:** Amnesty International, *Death Sentences and Executions in 2014,* ACT 50/0001/2015 (2015), p.11 https://www.amnesty.org/en/documents/act50/0001/2015/en/ [Accessed 13 December 2017]; and **Tab 88:** Amnesty International, *Death Sentences and Executions in 2015*, ACT 50/3487/2016 (2015), p.37 https://www.amnesty.org/en/documents/act50/3487/2016/en/ [Accessed 13 December 2017]

confronted in the legislature for not issuing execution orders. Her successor executed 4 people within two months of appointment.[62]

80. *Amici Curiae* respectfully invite the Honourable Court to consider this evidence when determining the weight to be given to the Respondent's unofficial moratorium in determining the issue of Provisional Measures. The above evidence clearly shows that unforeseeable and often uncontrollable events may, in the absence of a formal stay of execution, result in the Applicant being executed in circumstances which may breach the African Charter.

81. As experts in the regional application of the death penalty, *Amici Curiae* respectfully submit that placing any reliance on the existence of a *de facto* moratorium to mitigate against the need for Provisional Measures to protect an Applicant from execution would send a dangerous message. To do so would suggest that, in the absence of any firm undertaking or commitment regarding the Respondent's future actions, the Court should rely simply on the passage of time since an execution was carried out in determining whether provisional measures are necessary.

(4) The Court's Failure to Issue Provisional Measures Would Have Exacerbated the Effects of Death Row Phenomenon

82. Death row phenomenon is a term that has been adopted by courts to describe the unique anxiety, dread, fear and psychological anguish that accompanies long-term incarceration on death row. Significant mental torture as a result of sitting on death row has been widely documented: "*The observable result of mental suffering inflicted on the condemned prisoner is destruction of spirit, undermining of sanity, and mental trauma*." [63] The psychological torture associated with the anticipation of one's execution worsens with time and is often compounded by prison conditions that may include isolation, cramped environments, harassment and arbitrary or severe rules. This is considered further below.

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62 **Tab 81:** Taiwan Alliance to End the Death Penalty, *2010 Annual Report* (2011), pp. 6-7 http://www.taedp.org.tw/en/story/1915 [Accessed 13 December 2017]

63 **Tab 69:** *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA Law Review, (1972), p.814

83. As set out above, the Applicant has been held on death row for over 7 years. The existence of a de facto moratorium does not mitigate the risk of death row phenomenon, which itself has been found to constitute inhuman and degrading treatment, as set out below. In the absence of any formal commitment to stay the Applicant's execution, the Respondent state continues to expose the Applicant to the very real and ever increasing risk of death row phenomenon due to the constant fear that the moratorium may break and he could therefore be executed at any time.

84. Article 5 of the African Charter provides 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*". Other human rights treaties contain identical or analogous language.[64]

85. In addition, over the last two decades, a rich body of jurisprudence has developed in support of the notion that prolonged incarceration on death row (i.e. death row phenomenon) constitutes cruel, inhuman, or degrading punishment.[65] In light of this substantial body of jurisprudence, the prohibition against cruel, inhuman, or degrading treatment has, arguably, attained binding force as customary international law.[66]

86. *Amici Curiae* wish to draw the Honourable Court's attention to two ways in which the Applicant's circumstances render him particularly vulnerable to the ongoing and ever increasing risk of death row phenomenon in the absence of a stay of execution and notwithstanding the *de facto* moratorium, as follows:

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64 **Tab 10:** Article 7 of the ICCPR provides that "*[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.*" See also: **Tab 25:** European Convention on Human Rights, art. 3; **Tab 11**: American Convention on Human rights, art. 5; **Tab 8**: African Charter on Human and Peoples Rights, art. 5; **Tab 27**: Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 16 .

65 **Tab 37:** *Pratt and Morgan v. The Attorney General of Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993) (en banc); **Tab 36** Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (European Court of Human Rights1989) https://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"appno":["14038/88"],"documentcollectionid2":["CHAMBER"],"itemid":["001-57619"]}

66 **Tab 93:** Proclamation of Tehran, Final Act of the International Conference on Human Rights 3, at 4, paragraph 2, 23 GAOR, U.N. Doc. A/CONF. 32/41 (1968) http://hrlibrary.umn.edu/instree/l2ptichr.htm [Accessed 14 December 2017]

The Applicant Has Already Been Incarcerated on Death Row for Seven Years

87. Since 1993, Courts around the globe have made findings that lengthy incarceration on death row may constitute such treatment. [67]

88. In the case of *Pratt and Morgan, a* case concerning a Jamaican prisoner, the Privy Council was the first Court to hold that the lengthy delay between the time of conviction and the carrying out of a death sentence in was "*inhuman punishment*." [68] The Privy Council concluded that "*in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment.*"

89. Various regional Courts have further developed the jurisprudence on this issue. The Ugandan Supreme Court held in 2009 that a delay of more than three

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[67] See for instance **Tab 65:** *The Republic v Michael Khonje*, Sentence Rehearing Cause No. 28 of 2016, paragraph 167, in the High Court of Malawi (Malawi 2016);**Tab 56:** *Al-Saadoon and Mufdhi v The U.K.*, 2010 Eur. Ct. H.R. 282 https://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"appno":["61498/08"],"documentcollectionid2":["CHAMBER"],"itemid":["001-97575"]} [Accessed 14 December 2017]; **Tab 52:** *Attorney General v Kigula, Constitutional Appeal No. 03 of 2006*, 55 (Uganda 2006); **Tab 45:** *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002 (Merits, Reparations and Costs), Inter-American Court of Human Rights, paragraphs 168-169: "*the procedures leading up to the death by hanging of those convicted of murder terrorize and depress the prisoners; others cannot sleep due to nightmares, much less eat*" http://www.corteidh.or.cr/docs/casos/articulos/seriec_94_ing.pdf [Accessed 14 December 2017]; **Tab 39:** *Catholic Comm'n for Justice & Peace in Zimbabwe v Attorney General*, No. S.C. 73/93 (Zimb. June 24, 1993 (reported in 14 Hum. Rts. L. J. 323 (1993))) http://www.chr.up.ac.za/index.php/browse-by-country/zimbabwe/1173.html [Accessed 14 December 2017]; **Tab 36:** *Soering v The U.K.*, 11 Eur. Ct. H.R. 439 (1989), where the European Court of Human Rights referred to (at paragraph 100) "*the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him*" https://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"appno":["14038/88"],"documentcollectionid2":["CHAMBER"],"itemid":["001-57619"]} [Accessed 14 December 2017]; **Tab 34:** *Vatheeswaran v State of Tamil Nadu*, 2 S.C.R. 348, 353 (India 1983) (criticizing the "*dehumanizing character of the delay*" in carrying out the death penalty); **Tab 35:** *Sher Singh and Others v State of Punjab* [1983] SCR (2) 582 at 591D-E (India 1983), Chandrachud CJ: "*The prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman and degrading punishment*" https://indiankanoon.org/doc/1166797/ [Accessed 14 December 2017]; **Tab 33:** *Suffolk County District Attorney v Watson*, 411 N.E.2d 1274, 1289-95 & nn. (Mass. Supreme Judicial Court 1980) (Liacos, J., concurring) (vivid and detailed description of the type of psychological pain and torture that a condemned person experiences while awaiting execution). Justice Liacos' description in N.E.2d at 1290-92 of a condemned man in Massachusetts who won a commutation on the eve of a pending execution is worthy of extensive quotation: *"The raw terror and unabating stress that Henry Arsenault experienced was torture; torture in the guise of civilized business in an advanced and humane polity. This torture was not unique, but merely one degrading instance in a legacy of degradation. The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done the prisoner's mind must afflict the conscience of enlightened government and give the civilized heart no rest*." http://masscases.com/cases/sjc/381/381mass648.html [Accessed 14 December 2017]

[68] **Tab 37:** *Pratt and Morgan v. The Attorney General of Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 at paragraph 33

years between the confirmation of a prisoner's death sentence on appeal and execution constitutes cruel, inhuman or degrading treatment or punishment in violation of its national constitution.[69] The Zimbabwe Supreme Court has held that delays of 52 and 72 months between the imposition of a death sentence and execution constituted inhuman punishment.[70]

90. Similarly, in the case of *Soering v. United Kingdom*, the ECtHR in 1989 found that prisoners in Virginia spent an average of six to eight years on death row prior to execution. The Court determined that "*[h]owever well-intentioned and even potentially beneficial is the provision of the complex post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death*."[71] In 2010, the ECtHR expanded its decision in *Soering* in the case of *Al Saadoon and Mufdhi v. UK*.[72] There, the Court found that the United Kingdom had violated its obligations under article 3 of the European Convention merely by exposing the applicants to the threat of capital punishment.

91. The Zimbabwe Supreme Court referred to the period of lengthy incarceration on death row as "*exquisite psychological torture, wherein many inmates suffer obvious deterioration and severe personality distortions… Throughout all that time the prisoner constantly broods over his fate. The horrifying spectre of being hanged and the apprehensions of being made to suffer a painful and lingering death is, if at all, never far from his mind*".[73]

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69 **Tab 54:** *Kigula and Others v. Attorney Gen.,* 2006 S. Ct. Const. App. No. 03, at paragraphs 56-57 (Uganda 2009)

70 **Tab 39:** *Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General*, No. S.C. 73/93 (Zimb. June 24, 1993 (reported in 14 Hum. Rts. L. J. 323 (1993)) http://www.chr.up.ac.za/index.php/browse-by-country/zimbabwe/1173.html [Accessed 14 December 2017]

71 **Tab 36:** *Soering v. United Kingdom* 161 Eur. Ct. H.R. (ser. A) at paragraph 42 (1989). See also **Tab 44:** Minister of Justice v. Burns and Rafay, 2001 SCC 7 (S.C. Canada, 22 March 2001) at paragraph 122 https://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"appno":["14038/88"],"documentcollectionid2":["CHAMBER"],"itemid":["001-57619"]}) [Accessed 14 December 2017]

72 **Tab 56:** *Al Saadoon and Mufdhi v. UK* 2010 Eur. Ct. H.R. 282 https://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"appno":["61498/08"],"documentcollectionid2":["CHAMBER"],"itemid":["001-97575"]} [Accessed 14 December 2017]

73 **Tab 39:** *Catholic Comm'n for Justice & Peace in Zimbabwe v Attorney General*, No. S.C. 73/93 (Zimb. June 24, 1993 (reported in 14 Hum. Rts. L. J. 323 (1993)), paragraphs 40 and 112 http://www.chr.up.ac.za/index.php/browse-by-country/zimbabwe/1173.html [Accessed 14 December 2017]

92. In *Al-Saadoon and Mufdhi v The United Kingdom*[74], the European Court of Human Rights held that the petitioners' well-founded fear of being executed during the 3 years in which they awaited their capital murder prosecutions gave rise to degree of mental suffering significant enough to constitute a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In the case of *Attorney General v Kigula*[75], the Ugandan Supreme Court agreed with the Constitutional Court who found that a delay of over 3 years " *is cruel and inhuman and therefore a violation of article 24 of the [Ugandan] Constitution*".[76] In the case of *Henfield v Attorney General of Bahamas*[77], the Privy Council found that a delay of 3.5 years amounted to inhuman punishment.

93. In recent capital sentencing hearings, the High Courts of Malawi have powerfully reiterated that prolonged confinement under sentence of death amounts to cruel and degrading punishment. In *Republic v Yale Maonga*[78] Kamwambe J affirmed that protracted confinement after the death sentence is imposed is a violation of the constitutional prohibition against inhuman and degrading punishment. Citing *Pratt & Morgan v Attorney Gen. for Jamaica*[79], the Court observed that "*in cases of protracted confinement after a lawful death sentence it would be a violation of the constitutional prohibition against inhuman and degrading punishment*"[80] to sentence someone to death.

94. In *Rahendra Prasad v State of Uttar Pradesh*, the judge noted that a prisoner who had been on death row for 6 years, 1 year less than the Applicant: "*must, by now, be more a vegetable than a person and hanging a vegetable is not [the] death penalty*."[81] Similarly, in the Malawi case of *Republic v Edson*

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74 **Tab 56:** *Al-Saadoon and Mufdhi v The United Kingdom,* 2010 Eur. Ct. H.R. 282, at paragraph 137 https://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"appno":["61498/08"],"documentcollectionid2":["CHAMBER"],"itemid":["001-97575"]} [Accessed 14 December 2017]

75 **Tab 52:** *Attorney General v Kigula*, Constitutional Appeal No. 3 of 2006, 55 (Uganda 2009)

76 **Tab 52:** *Attorney General v Kigula*, Constitutional Appeal No. 3 of 2006, 55 (Uganda 2009), pp.47-49

77 **Tab 65:** *Henfield v Attorney General of Bahamas* [1997] AC 413

78 **Tab 63:** *Republic v Yale Maonga,* Sentence Rehearing Cause No. 29 of 2015 (unreported)

79 **Tab 37:** *Pratt & Morgan v Attorney Gen. for Jamaica,* [1994] 2 A.C. 1, 4 All E.R. 769 (P.C. 1993)

80 **Tab 63:** *Republic v Yale Maonga,* Sentence Rehearing Cause No. 29 of 2015 (unreported) at p.3

81 **Tab 32:** *Rahendra Prasad v State of Uttar Pradesh*, [1979] 3 SCR 78 at paragraph 130(1979) https://indiankanoon.org/doc/1309719/ [Accessed 14 December 2017]

Khwalala, Mr Khwalala had, at the time of sentence rehearing, been under sentence of death for 10 years in relation to the second of 2 separate murder offences. The High Court held as follows: "*One should not stay a long time under the weight of death sentence before it is carried out since one is always haunted by it. One becomes a living corpse. This is a ghastly experience*. […]"[82]

95. The Malawi High Court's jurisprudence in the *Khwalala* case built upon the principles established in the earlier sentence rehearing case of *Republic v Aaron John and Tonny Thobowa supra*. In that case, the convicts had been held on death row for 12 years. Kamwambe J found that "*the pain and anguish, physically and emotionally suffered during all this long period*"[83] acted to *"militate against the imposition at this stage of death or life penalty*"[84].

96. The Applicant has been held on death row for over 7 years, a period well in excess of the amount of time held by any of the Courts listed above to be cruel, inhuman or degrading. The fact of this prolonged incarceration is an important factor for the Honourable Court to consider in the Applicant's case, as there can be little doubt that, applying international jurisprudence and standards set by other African courts, he has suffered and continues to suffer to cruel, inhuman or degrading treatment or punishment as a result.

Death Row Conditions in the Respondent State's Prisons Are Inhumane

97. Reports on Tanzanian prisons describe extreme overcrowding. The State Department of the United States in 2016 described conditions in the prison system in the Respondent State as "*harsh and life threatening. Inadequate food, overcrowding, poor sanitation, and insufficient medical care [are] pervasive*."[85] Death row prison cells are said to hold three people instead of the

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82 **Tab 64:** *Republic v Edson Khwalala* (Sentence Rehearing Cause No. 70 of 2015) (unreported) at p.4

83 **Tab 67:** *Republic v Aaron John and Tonny Thobowa supra* (Sentence Re-Hearing Cause No. 13 of 2015) at p.8

84 **Tab 67:** *Republic v Aaron John and Tonny Thobowa supra* (Sentence Re-Hearing Cause No. 13 of 2015) at p.8

85 **Tab 90:** United States Department of State, *Country Reports on Human Rights Practices (2016): Tanzania,* (2016), p.3. http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265310 [Accessed 13 December 2017]

one person required by law.[86] The gallows is situated in the first room of the corridor on which death row prisoners are continually confined.[87]

98. *Amici Curiae* have been briefed by caseworkers from the legal action charity Reprieve who have visited prisoners on death row in Tanzania. The prisoners described that at night around twenty prisoners are held in each cell. During the day all death row inmates are moved to one small room. They are not permitted to interact with any prisoners other than prisoners on death row and they cannot participate in any sports. Prisoners receive one meal a day which rarely contains meat. When it rains, water runs into the room they are held in. They are not allowed any vocational training and do not have any meaningful work. Almost all of the prisoners the caseworkers spoke to did not receive family visits, both because their families are too far away and also because it is necessary to get permission from the district warden for a family visit.

99. The conditions faced by a prisoner on death row in the Respondent State were graphically described by Justice Mwalusanya in *Mbushuu*:

> *"Every night all his clothes are taken away and he is kept naked in his cell until the next morning. The light in his cell is never turned off and he is kept under surveillance by the guards. Some guards take delight in taunting the prisoners, constantly reminding them of their impending fate and telling them gruesome stories of executions which have gone wrong… in short, the prisoners on death row are treated as non-persons whose rights are subject to the whim of the supervising administration at the prison concerned."*[88]

100. As a death row prisoner, the Applicant faces demeaning conditions like those described above on a daily basis. The nature of the incarceration on death row

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86 **Tab 84:** Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania Human Rights Report 2014* (2014), p17 http://www.humanrights.or.tz/reports/tanzania-human-rights-report-2014 [Accessed 13 December 2017]

87 **Tab 80:** The International Federation for Human Rights, *Tanzania: The death penalty institutionalised?* (April 2005), p.37 https://www.fidh.org/en/region/Africa/tanzania/The-death-Sentence [Accessed 13 December 2017]

88 **Tab 80:** The International Federation for Human Rights, *Tanzania: The death penalty institutionalised?* (April 2005), p.37 https://www.fidh.org/en/region/Africa/tanzania/The-death-Sentence [Accessed 13 December 2017]

has been given weight by Courts in determining that death row phenomenon constitutes cruel, inhuman or degrading treatment.[89]

B. RESPONDENT DOES NOT DISPUTE THAT IT VIOLATED ITS OBLIGATIONS TO PROVIDE CONSULAR NOTIFICATION AND ACCESS

(1) Respondent has an obligation to provide consular notification and access

101. The Respondent acceded to the VCCR[90] in 1977. At no time has the Respondent contended that it complied with its obligations under Article 36 of the VCCR to notify the Applicant of his rights to consular notification and access. *Amici Curiae* respectfully suggest that there is no dispute as to the existence of the violation, and the only remaining issue before the Court is the remedy that should be provided. International tribunals and national courts have ordered sweeping remedies in such cases, including new trials. Such remedies are particularly apt in death penalty cases, where consular access can make the difference between life and death.

102. The right to consular notification and access is enshrined in multiple human rights conventions and UN Resolutions, indicating that it has attained the status of customary international law. For example, Article 6.3 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) provides that:

> *"[a]ny person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides."*[91]

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89 **Tab 39:** *Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General*, No. S.C. 73/93 (Zimb. June 24, 1993 (reported in 14 Hum. Rts. L. J. 323 (1993)) at paragraph 120 http://www.chr.up.ac.za/index.php/browse-by-country/zimbabwe/1173.html [Accessed 14 December 2017]

90 **Tab 13:** Available online at http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf [Accessed 14 December 2017]

91 Likewise, most of the international conventions dealing with terrorism contain a provision reflecting the obligations under Article 36(2) of the Vienna Convention. Some contain practically identical language. *See, e.g.,* **Tab 14:** 1999 OAU Convention on the Prevention and Combatting of Terrorism, art. 7(3); **Tab 15:** the 1999 International Convention for the Suppression of the Financing of Terrorism, art. 9(3); **Tab 16:** the 1997 International Convention for the Suppression of Terrorist Bombings, art. 7(3); **Tab 17:** the 1994

103. Another example can be found in Article 16.7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the United Nations General Assembly in December 1990:

> *"[w]hen a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:*
>
> *(a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefore;*
>
> (b) *The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;*
>
> (c) *The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation."*[92]

Convention on the Safety of United Nations and Associated Personnel, adopted on 9 December 1994, art. 17(2) (entitling any alleged offender to communicate without delay to the nearest appropriate representative of the State or States of which such person is a national); **Tab 18:** the 1979 International Convention against the taking of hostages, art. 6(3); **Tab 19:** the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, art. 6(2); **Tab 20:** the 1971 Convention for the suppression of unlawful acts against the safety of civil aviation, art. 6(3); **Tab 21:** the 1963 Convention on offences and certain other acts committed on board aircraft, art. 13(2). **Tab 26:** The draft International Convention for the suppression of acts of nuclear terrorism, art 10(3); and **Tab 22:** the draft Comprehensive Convention on International Terrorism, art. 10(3), currently under consideration of the UN General Assembly, contain similar provisions.

92 **Tab 23:** Article 16.5 of Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, provides that "*each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that informing the person concerned without delay about the provisions concerning notification to and communication with consular officers*." G.A. res. 55/25. 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001), Article 16.5. https://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/convention_smug_eng.pdf [Accessed 14 December 2017]

104. The right to immediate consular access has further been embodied in a number of U.N. resolutions providing for basic human and due process rights.[93] For instance, the United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live, adopted by U.N. General Assembly on 13 December 1985, provides that:

> *"[a]ny alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides."*[94]

105. In addition, in its resolutions calling for a universal moratorium on capital punishment, the UN General Assembly has repeatedly called on states to "*comply with their obligations under article 36 of the 1963 Vienna Convention on Consular Relations, particularly the right to receive information on consular assistance*"[95] in death penalty cases.

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93 General Assembly resolutions, though not legally binding *stricto sensu*, may have normative value to the extent that they reflect the existence of a rule of law or the emergence of an *opinio juris* (**Tab 123:** *Legality of the Threat of the Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports, 1996,* para. 70). Although it would only be natural for international tribunals to confirm the existence of a rule of law, as Jorge Castañeda writes: "*il n'existe aucune raison essentielle qui interdise à d'autres organes internationaux, largement représentatifs, d'exprimer valablement, au nom de la communauté internationale, ce qui, dans l'opinion de celle-ci, est le droit international a ùn moment donné*." *See* **Tab 68:** J. Castañeda, *Recueil des cours*, (Collected Courses of the Hague Academy of International Law), 1970 I, Vol. 129, p.315 (les resolutions "ne créent pas le droit, mais elles peuvent prouver, avec autorité, son existence"). **Tab 71:** M. Pinto, *De la protection diplomatique a la protection des droits de l'homme*, Revue Générale de Droit International Public, 2002-3, p.545 ("*Cet ensemble de règles de soft law prévoient l'assistance consulaire parmi les garanties judiciaires applicables a des étrangers*.")

94 **Tab 96:** U.N. General Assembly Resolution 40/144 of 13 December 1985, adopted without a vote http://www.un.org/documents/ga/res/40/a40r144.htm [Accessed 14 December 2017]. The drafting history of the declaration shows that various Governments referred to the close relationship between Art. 10 of the Declaration and Art. 36 of the Vienna Convention on Consular Relations (see U.N. Doc. E/CN.4/1354 p. 19). *See also* **Tab 97:** U.N. General Assembly Resolution A/RES/43/173 of December 9, 1988 ("Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment"), pr. 16(2) http://www.un.org/documents/ga/res/43/a43r173.htm [Accessed 14 December 2017]; **Tab 99:** G.A. Res. 45/113 U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/45/113 (1990) ("Rules for the Protection of Juveniles Deprived of their Liberty"), Rule I.56 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/45/113 [Accessed 14 December 2017] and **Tab 105:** resolution of 23 April 2003 of the UN Commission on Human Rights regarding Migrant Rights, U.N. Document E/CN.4/2003/46, para 7

95 **Tab 118:** U.N. General Assembly, Resolution 71/187 on Moratorium in the use of the Death Penalty (adopted 19 December 2016) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/187 [Accessed 14 December 2017]

(2) Consular notification and access are essential guarantees of due process in capital cases involving foreign nationals

106. International human rights conventions universally recognise that "*criminal sanctions can be imposed only against an individual who has been subject to due process of law that guarantees a presumption of innocence, a fair opportunity to answer the charges brought against him or her before a duly constituted court, and the assistance of a well-qualified defence counsel*".[96]

107. Ensuring effective due process is particularly challenging where an individual is unfamiliar with the legal and judicial systems of the country in which they are incarcerated and are therefore unsure to what extent their rights are and how they can be protected. Such is the situation of many individuals facing criminal charges in a jurisdiction other than their country of origin, including the Applicant. These difficulties are inherently compounded when there are linguistic or cultural barriers to communication. Consular notification and access are crucial to safeguard the rights of detainees in a foreign criminal justice system.

(3) Foreign nationals are uniquely disadvantaged in the criminal justice system

108. Numerous Courts have observed that foreign nationals are uniquely disadvantaged when faced with prosecution by a foreign criminal justice system to which they are unaccustomed.[97] In his concurring opinion in the seminal decision of the Inter-American Court on Human Rights interpreting the scope of Article 36 of the VCCR, Judge Sergio Ramírez observed:

> *"Aliens facing criminal prosecution –especially, although not exclusively, those who are incarcerated- must have the facilities that afford them true and full access to the courts. It is not sufficient to say that aliens are*

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[96] **Tab 76:** R. Hood and C. Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic', Crime* and Justice, (2009) 38 (1), pp. 1-63, p. 37 http://www.journals.uchicago.edu/doi/full/10.1086/599200 [Accessed 14 December 2017 – only available to members] . See also (amongst others) **Tab 10:** Article 7 of the African Charter; Articles 10 and 11 of the UDHR, Article 14 of the ICCPR; **Tab 28:** Article 8 of the Inter-American Convention on Human Rights; and **Tab 25:** Article 8 of the ECHR

[97] **Tab 59:** *Amparo Directo en Revisión 517/2011 Florence Marie Cassez Crepin, Pleno de la Suprema Corte de Justicia* (Mexican Supreme Court), p. 20-21, 81

afforded the same rights that nationals of the State in which the trial is being conducted enjoy. Those rights must be combined with others that enable foreign nationals to stand before the bar on an equal footing with nationals, without the severe limitations posed by their lack of familiarity with the culture, language and environment and the other very real restrictions on their chances of defending themselves. If these limitations persist, without countervailing measures that establish realistic avenues to justice, then procedural guarantees become rights 'in name only', mere normative formulas devoid of any real content. When that happens, access to justice becomes illusory."[98]

109. The Mexican Supreme Court in the case of Florence Cassez specifically noted that such disadvantages include "*the multitude of linguistic, cultural and conceptual barriers that render it difficult [for a detained foreign national] to understand, in a comprehensive manner, [their legal rights]*".[99]

110. The Applicant, an Ivorian national who had no knowledge of Kiswahili and could neither speak nor understand English perfectly, faced such disadvantages by being prosecuted in the Respondent state. The Applicant speaks and understands French[100] but alleges that he was not provided with linguistic assistance at several key stages of the case. Such language barriers impede an individual's ability to communicate effectively with the police and their lawyers and to participate fully in their defence. Furthermore, the Applicant alleges that he was not given access to consular services that could have facilitated such linguistic assistance, and thereby assisted in ensuring effective due process in his case.

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98 **Tab 101:** Advisory Opinion OC – 16/99 (1 October 1999) '*The right to information on consular assistance in the framework of the guarantees of the due process of law*' at paragraph 7 http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf [accessed 14 December 2017]

99 **Tab 59:** *Amparo Directo en Revisión 517/2011 Florence Marie Cassez Crepin, Pleno de la Suprema Corte de Justicia* (Mexican Supreme Court) p. 83

100 Applicant's Petition to African Court on Human and Peoples' Rights *004/01/2015/Reg.* (received 6 January 2015) at paragraph 7(i)

(4) International tribunals and National Courts Have Recognized the Crucial Importance of Consular Access in Ensuring Fair Trials for Foreign Nationals

111. Article 36 (1)(b) of the VCCR requires that detaining authorities must advise a foreign national without delay of their right to consular notification and access, and to facilitate such contact if so requested.[101]

112. Assistance from an individual's home country helps to bridge the cultural, linguistic and legal gap faced by foreign nationals in prison abroad, and plays a vital role in safeguarding the rights of foreign nationals, especially those individuals facing the death penalty. In cases where a national is detained in a foreign prison, a consular official may visit the detainee, facilitate communication with family members, arrange legal representation, and assist with investigation and record collection in the country of origin.

113. It is well-recognised that the aid of consular officials can have a meaningful impact at several stages of the criminal process, including during interrogation, at trial, and on appeal. The IACtHR has stated that this is particularly important in criminal proceedings where foreign nationals' "*most precious juridical rights, perhaps even their lives, hang in the balance […] it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.*"[102]

114. In *Osagiede v. United States*, the US Court of Appeals for the 7th Circuit concluded that prompt consular assistance "*can be invaluable because cultural misunderstandings can lead a detainee to make serious legal mistakes,*

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101 **Tab 13**

102 **Tab 101:** Advisory Opinion OC – 16/99 (1 October 1999) '*The right to information on consular assistance in the framework of the guarantees of the due process of law*' at paragraph 121 http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf [accessed 14 December 2017]

particularly where a detainee's cultural background informs the way he interacts with law enforcement officials and judges".[103]

115. In recognition of the vital importance of consular rights, international human rights courts and the domestic courts of signatory states have held that Article 36 of the VCCR is an indispensable component of a fair trial. The IACtHR has held that providing detained foreign nationals with the rights conferred under Article 36 of the VCCR makes it "possible for the right to due process of the law upheld in Article 14 [of the ICCPR] to have practical effects in tangible cases."[104] Indeed, the IACtHR advised that the right to consular assistance should be "recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defence and receive a fair trial"[105] (emphasis added), having as it may do, "sometimes decisive repercussions - on the enforcement of the accused's other procedural rights"[106] (emphasis added).

116. Just this year, the Malawi High Court adopted a similar view, reasoning that: "*prompt consular assistance can be invaluable due to potential for cultural misunderstandings that might affect the offender's interactions with the courts and law enforcement agents (leading to serious prejudice where no such assistance is accessed promptly). Such prejudice in turn, affects the fairness of the entire trial process*".[107]

117. Brazil's highest court, the Supreme Federal Court of Brazil, has also interpreted Article 36 of the VCCR as conferring an individual right to consular information and notification.[108] In 2009, the Court held that compliance with Article 36 was

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103 **Tab 53:** *Osagiede v. United States*, 543 F.3d 399, 403 (7th Cir. 2008) at paragraph 4 http://caselaw.findlaw.com/us-7th-circuit/1274821.html [Accessed 14 December 2017]

104 **Tab 102:** Advisory Opinion OC/99, Inter-Am. Ct. H.R. (Oct. 1, 1999), 124, 141(6), http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf. This Advisory Opinion has been endorsed by United Nations General Assembly Resolution A/RES/54/166 (20 February 2000) p.2 (**Tab 102**) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/54/166 [Accessed 14 December 2014]

105 **Tab 101:** Advisory Opinion OC/99, Inter-Am. Ct. H.R. (Oct. 1, 1999), 124, 141(6), at paragraph 123 http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf, [Accessed 14 December 2017]

106 **Tab 101:** Advisory Opinion OC/99, Inter-Am. Ct. H.R. (Oct. 1, 1999), 124, 141(6), at paragraph 123 http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf, [Accessed 14 December 2017]

107 **Tab 66:** High Court of Malawi, Sentence Rehearing Case No. 25 of 2017 (23 June 2017): The Republic v Lameck Bandawe Phiri, at p.3

108 **Tab 51:** S.T.F., Ext. No. 954, Relator: Joaquim Barbosa, 17.05.2005, 98, DIÁRIO DA JUSTIÇA [D.J.], 24.05.2005, at paragraph 75 **[currently unavailable]**

essential to guarantee respect for due process.[109] Citing the 1999 advisory opinion of the IACtHR,[110] the Court characterised the right to consular notification and access as having a "*fundamental character*."[111] The Court further emphasised that an individual's right to consular access "*ensure[s] [that] any foreigner under arrest [has] the possibility of receiving consular assistance from their own country, enabling him thereby the full exercise of all rights and prerogatives comprised by the constitutional clause of due process of law*".[112]

118. The Mexican Supreme Court has stated that consular assistance serves multiple functions. It serves a humanitarian function, in that "*consular officials provide detainees with contact with the outside world, by communicating the news [of their detention] to family members or people the detainee trusts*".[113] Additionally, it serves a protective function, as "*[t]he presence of a consular official, in and of itself, contributes to dissuading local authorities from committing acts against foreign nationals that can be contrary to their human dignity or that would put at risk the penal process to which the foreign national will be subjected.*"[114] Finally, consular assistance serves to provide detained foreign nationals with technical-legal assistance, designed to ensure the full protection of their rights.[115]

119. Accordingly, the Mexican Supreme Court found in *Cassez*:

> *"The fundamental right to consular assistance for foreign nationals cannot be conceived as merely a procedural requirement. When an authority... prevents a foreign national from supplementing their [legal] deficiencies*

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109 **Tab 55:** S.T.F., Ext. No. 1126, Relator: Joaquim Barbosa, 22.10.2009, 232, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e], 11.12.2009, at paragraph 18 **[currently unavailable]**

110 **Tab 101:** Advisory Opinion OC/99, Inter-Am. Ct. H.R. (Oct. 1, 1999), 124, 141(6), at paragraph 123 http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf, [Accessed 14 December 2017]

111 **Tab 51:** S.T.F., Ext. No. 954, Relator: Joaquim Barbosa, 17.05.2005, 98, DIÁRIO DA JUSTIÇA [D.J.], 24.05.2005 **[currently unavailable]**

112 **Tab 51:** S.T.F., Ext. No. 954, Relator: Joaquim Barbosa, 17.05.2005, 98, DIÁRIO DA JUSTIÇA [D.J.], 24.05.2005 **[currently unavailable]**. In addition, in 2014 the Federal Court of Appeals for the 3rd Region affirmed a lower court decision ordering the state police of Sao Paulo to comply with their legal obligations under Article 36 in the cases of arrested foreigners under the penalty of a daily fine. **Tab 62:** TRF-3, Ap. Civ. No. 0006394-33.2007.4.03.6119 São Paulo, Relator: Roberto Jeuken, 20.02.2014, 42, DIÁRIO ELETRÔNICO DA JUSTIÇA FEDERAL DA 3ª REGIÃO [D.J.e], 28.02.2014, 1230, 1231 **[currently unavailable]**

113 **Tab 61A:** *Amparo Directo en Revisión 886/2013,* at paragraph 25 **[currently unavailable]**

114 **Tab 61A:** *Amparo Directo en Revisión 886/2013,* at paragraph 25 **[currently unavailable]**

115 **Tab 61A:** *Amparo Directo en Revisión 886/2013,* at paragraph 25 **[currently unavailable]**

through the means Article 36… places at their disposal, that authority not only limits, but makes it impossible to fully satisfy the rights to a proper defence."[116]

120. In no circumstances is consular assistance more vital than in the case of a foreign national facing a capital murder prosecution, where any such legal mistake could lead to irreparable harm.

(5) Failure to Respect a Capital Defendant's Consular Rights Renders Any Subsequent Execution an Arbitrary Deprivation of Life

121. International and regional human rights instruments make clear the importance of upholding fair trials standards in capital punishment cases. In the absence of such procedural safeguards, or where due process is ineffective or flawed, any resulting loss of life is deemed to be 'arbitrary' and therefore a breach of the provisions enshrining right to, or respect for, life.

Due Process Safeguards Must Be Rigorously Applied in Capital Cases

122. Article 7 of the African Charter enshrines fair trial standards and due process.[117] Furthermore, Article 60 of the African Charter states that it "*draws inspiration from international law on human and peoples' rights, particularly from the provisions of… the Universal Declaration of Human Rights, [and] other instruments adopted by the United Nations*…"[118]. Articles 10 and 11 of the UDHR establish fair trials standards[119], as do (amongst others) Article 14 of the ICCPR[120]; Article 8 of the Inter-American Convention on Human Rights[121]; and Article 8 of the ECHR[122].

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116 **Tab 59:** *Amparo Directo en Revisión 517/2011 Florence Marie Cassez Crepin, Pleno de la Suprema Corte de Justicia*

117 **Tab 8**

118 **Tab 8**

119 **Tab 8**

120 **Tab 10**

121 **Tab 28**

122 **Tab 25**

123. The imperative of ensuring fair trial standards takes on a unique importance in capital cases, given the irrevocable nature of the punishment.[123] This has been recognised by the U.N. in General Assembly Resolutions 2393 and 35/172, in which the U.N. General Assembly invited governments of Member States to guarantee "*the most careful legal procedures and the greatest possible safeguards for the accused in capital cases*".[124]

124. The UNHRC has adopted the view that "*the strictest respect for procedural due process guarantees must be ensured if the death penalty is to be imposed*"[125], noting in *Reid v Jamaica*, that "*in capital punishment cases, the duty of [s]tate parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant is even more imperative*".[126]

Failure to Uphold Due Process in Capital Cases Constitutes an 'Arbitrary Deprivation of Life'

125. Article 4 of the African Charter prohibits the "*arbitrary deprivation of life*". The African Charter does not define the word 'arbitrary', but in *Article 19 v The State of Eritrea*, the African Commission endorsed the Committee's decision in *Albert Mukong v Cameroon* that *"[A]rbitrariness is not to be equated with against the*

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123 **Tab 76:** R. Hood and C. Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic'* , Crime and Justice, (2009) 38 (1), p. 37 http://www.journals.uchicago.edu/doi/abs/10.1086/599200 [Accessed 14 December 2017 – only available to members]

124 **Tab 92:** U.N. General Assembly (UNGA) Resolution 2393 (XXIII), UNGAOR, 23rd Sess, Supp No 18, UN Doc A/RES/2393(XXIII) (26 November 1968) p. 42 https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/243/53/IMG/NR024353.pdf?OpenElement [Accessed 14 December 2017]; **Tab 94:** U.N. General Assembly Resolution 35/172, UNGAOR, 35th Sess, Supp No 48, UN Doc A/RES/35/172 (15 December 1980) 195 http://www.un.org/documents/ga/res/35/a35r172e.pdf [Accessed 14 December 2017]. This was also recognised by the U.N. Economic and Social Council in Resolution 1989/64 (24 May 1989l, **Tab 98**), where the Council recommended that Member States: *"[Afford] special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases…*" http://www.internationalhumanrightslexicon.org/hrdoc/docs/ecosocresolutiondeathpen1989.html [Accessed 14 December 2017]. See also **Tab 95:** Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the U.N. Economic and Social Council in 1984 http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx [Accessed 14 December 2017]

125 **Tab 72:** Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, William & Mary Bill of Rights Journal (2004), 13 (2), p.429 http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1237&context=wmborj [Accessed 14 December 2017]

126 **Tab 100:** Communication 250/1987, UN Doc. CCPR/C/39/D/250/1978, 21 August 1990, paragraph 12.2 http://www.ohchr.org/Documents/Publications/SDecisionsVol3en.pdf [Accessed 14 December 2017]

law but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law…"[127]

126. The African Commission itself has emphasised that "If, for any reason, the criminal justice system of a State does not, at the time of trial or conviction, meet the criteria of Article 7 of the African Charter or if the particular proceedings in which the penalty is imposed have not stringently met the highest standards of fairness, then the subsequent application of the death penalty will be considered a violation of the right to life"[128]and that "the right to life is the fulcrum of all other rights. It is the fountain through which other rights flow"[129]. This takes into account the fact that "[a]ll human rights are of no significance without the right to life as 'life' is a prerequisite for the enjoyment of any other human rights."[130]

127. In *Mansaraj and Others v Sierra Leone*, the UNHRC found a breach of Article 14 of the ICCPR based on the Sierra Leone's failure to provide for a right of appeal for the applicants.[131] In *Yasseen & Thomas v. Guyana* (No. 676/1996),

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127 **Tab 46:** *Article 19 v The State of Eritrea*, Communication 275 (2003), paragraph 93 http://www.achpr.org/files/sessions/41st/comunications/275.03/achpr41_275_03_eng.pdf [Accessed 14 December 2017]

128 **Tab 126:** African Commission on Human and Peoples' Rights, *General Comment No. 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4), Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights, 4-18 November 2015, Banjul, The Gambia,* at paragraph 24 http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf [Accessed 19 December 2017]

129 **Tab 42:** *Forum of Conscience v Sierra Leone*, Communication 223/98, 14th Annual Activity Report: 2000-2001; (2000) AHRLR 293 (ACHPR 2000), paragraph 20 http://www.achpr.org/files/sessions/28th/comunications/223.98/achpr28_223_98_eng.pdf [Accessed 14 December 2017]. The African Commission in this case found the execution of 24 soldiers following trials with no right of appeal, to be in breach of Article 7(1)(a) of the African Charter and therefore an arbitrary deprivation of life. The Commission therefore ruled there was also a breach of Article 4 (respect for life) of the African Charter. Similarly, see **Tab 125:** Communications 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan* (2009), paragraph 146, where the African Commission described the right to life as "*the supreme right of the human being. It is basic to all human beings and without it all other rights are without meaning*" http://www.achpr.org/files/sessions/45th/comunications/279.03-_296.05/achpr45_279.03_296.05_eng.pdf [Accessed 14 December 2017]

130 **Tab 74:** L. Chenwi, *Towards the Abolition of the Death Penalty in Africa: A human rights perspective* (2007), p. 57 http://www.pulp.up.ac.za/monographs/towards-the-abolition-of-the-death-penalty-in-africa-a-human-rights-perspective [Accessed 14 December 2017]. See also the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (then Christof Heyns), **Tab 110.** UN document A/67/275, 9 August 2012, paragraphs 11-12: "Life is the supreme right and the ultimate metaright, since no other right can be enjoyed without it."

131 **Tab 104:** *Mansaraj and Others v Sierra Leone*, Communications 839/1998, 840/1998 and 841/1998, UN Doc. CCPR/C/72/D/839/1998, 30 July 2001, paragraphs 6.1 and 6.2 http://www.worldcourts.com/hrc/eng/decisions/2001.07.16_Mansaraj_v_Sierra_Leone.htm [Accessed 14 December 2017]

the UNHRC found violations of various provisions of Article 14 of the ICCPR due to an absence of legal representation for part of the defendants' trial; failure to produce certain documents; and delays between arrest, trial and appeal.[132] In both cases, the Committee held that the imposition of a death sentence following an Article 14 violation necessarily resulted in the violation of Article 6 (the right not to be arbitrarily deprived of life).[133] This reasoning draws strength from Article 6(2) of the ICCPR, which states that any sentence of death should not be "*contrary to the provisions of the present Covenant*", which includes Article 14.

128. This logic has been followed by international and regional human rights tribunals, including the African Commission.[134] In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,[135] the ACHPR held that the due process provisions of Article 7 of the African Charter had been violated, and that therefore the sentence of death was arbitrary. The ACHPR stated that "*[G]iven 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.*"[136] The ACHPR reached a similar verdict in *Amnesty International and Others v Sudan*.[137] Academic commentators have stated that the ACHPR's judgments on fair trial safeguards

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132 **Tab 40:** *Abdool Salem Yasseen and Noel Thomas v Republic of Guyana,* Communication 676/1996, U.N. Doc. CCPR/C/62/D/676/1996, paragraphs 7.8, 7.10 and 7.11 http://hrlibrary.umn.edu/undocs/session62/view676.htm [Accessed 14 December 2017]. See also **Tab 38:** *LaVende v. Trinidad and Tobago* (No. 554/1993) U.N. Doc. CCPR/C/61/D/554/1993, paragraphs 5 and 6, where the Committee found violations of Article 14 of the ICCPR based on the denial of legal aid to the applicant and the right to have his conviction and sentence reviewed by a higher tribunal http://hrlibrary.umn.edu/undocs/session61/vws554.htm [Accessed 14 December 2017]

133 **Tab 104:** *Mansaraj and Others v Sierra Leone*, paragraph 5.6 http://www.worldcourts.com/hrc/eng/decisions/2001.07.16_Mansaraj_v_Sierra_Leone.htm [Accessed 14 December 2017]; **Tab 40:** *Abdool Yasseen & Thomas v. Guyana* (No. 676/1996), at paragraph 7.12

134 **Tab 73:** L. Chenwi, *Initiating constructive debate: a critical reflection on the death penalty in Africa'*, The Comparative and International Law Journal of Southern Africa (2005), 38(3), pp. 474-491, p.477

135 **Tab 48:** *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria,* Communication 137/94, 139/94, 154/96 and 161/97, 12th Annual Activity Report: 1998-1999; (2002) AHRLR 212 (ACHPR 1998), paras 90 & 95 http://www.achpr.org/files/sessions/24th/comunications/137.94-139.94-154.96-161.97/achpr24_137.94_139.94_154.96_161.97_eng.pdf [Accessed 14 December 2017]

136 **Tab 48:** *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, at paragraph 103 http://www.achpr.org/files/sessions/24th/comunications/137.94-139.94-154.96-161.97/achpr24_137.94_139.94_154.96_161.97_eng.pdf [Accessed 14 December 2017]

137 **Tab 103:** *Amnesty International and Others v Sudan*, Communications 48/90, 50/91, 52/91, 89/93, 13th Annual Activity Report: 1999-2000; (2000) AHRLR 297 (ACHPR 1999), at paragraphs 47-52

in capital cases "*have been progressive, and can be seen as procedural benchmarks in capital cases*."[138]

129. Similarly, the IACHR in *Graham v United States* found that "*serious violations of due process…deprived [the accused's] criminal proceedings of their efficacy from the outset and thereby invalidate[d] his conviction and sentence*".[139] Consequently, the IACHR found that the United States had "*arbitrarily deprived [the accused] of his life*" and was therefore responsible for a "*serious violation of his right to life*".[140]

130. Academics have concluded from this line of jurisprudence that Article 14 of the ICCPR is non-derogable in death penalty cases.[141] The ACHPR reached a similar conclusion in its Resolution on the Right to a Fair Trial and Legal Aid in Africa.[142] This Resolution adopts the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa, which states that, "*[t]he right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right to a fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines.*"[143]

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138 **Tab 74:** L. Chenwi, *Towards the Abolition of the Death Penalty in Africa: A human rights perspective* (2007), p. 165 http://www.achpr.org/files/sessions/26th/comunications/48.90-50.91-52.91-89.93/achpr26_48.90_50.91_52.91_89.93_eng.pdf [Accessed 14 December 2017]

139 **Tab 47:** *Graham v United States*, Case 11.193, Report No 97/03, (29 December 2003), at paragraph 49 http://www.worldcourts.com/iacmhr/eng/decisions/2000.06.15_Graham_v_United_States.pdf [Accessed 14 December 2017]

140 **Tab 47:** *Graham v United States,* Case 11.193, Report No 97/03, (29 December 2003), at paragraph 49 http://www.worldcourts.com/iacmhr/eng/decisions/2000.06.15_Graham_v_United_States.pdf [Accessed 14 December 2017]

141 **Tab 74:** L. Chenwi, *Towards the Abolition of the Death Penalty in Africa: A human rights perspective* (2007), p. 158

142 **Tab 124:** Resolution on the Right to a Fair Trial and Legal Aid in Africa, 26th session in Kigali, Rwanda, 1-15 November 1999 http://www.achpr.org/sessions/26th/resolutions/41/ [Accessed 14 December 2017], see: L. Chenwi, *Towards the Abolition of the Death Penalty in Africa: A human rights perspective* (2007), p. 160

143 **Tab 24:** Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwic0NXji4rYAhXIuRQKHe8SChgQFggnMAA&url=http%3A%2F%2Fwww.chr.up.ac.za%2Fchr_old%2Fhr_docs%2Fafrican%2Fdocs%2Fachpr%2Fachpr2.doc&usg=AOvVaw0AbriWZ_PzCT38WHBUjdBC [Accessed 14 December 2017]; see **Tab 74:** L. Chenwi, '*Towards the Abolition of the Death Penalty in Africa: A human rights perspective* (2007), p. 160

(6) Violations of Consular Rights in Capital Cases Require Substantial Remedies

131. Violations of Article 36 of the VCCR require substantial remedies in capital cases. Where the violation has tainted the fairness of the entire trial, courts have found that remedies ranging from immediate release to a new trial are warranted. Violations that affect only the sentencing proceedings call for, at a minimum, a reduction in the detainee's sentence.

132. The ICJ has held that where state authorities violate the VCCR Article 36 rights of a detained foreign national, those prisoners are entitled to have their sentences "*review[ed] and reconsider[ed]*" to remedy the violation[144]. The IACtHR has concluded that the execution of a foreign national whose rights under Article 36 of the VCCR were violated (thereby violating fair trials standards and the right to effective due process) would constitute an arbitrary deprivation of life in violation of international law. The IACtHR stated that: '*[Non-observance] of a detained foreign national's right to information, recognized in article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be "arbitrarily" deprived of one's life, in terms of the relevant provisions of the human rights treaties*…".[145]

133. National courts have similarly held that in death penalty cases, consular rights violations require substantial remedies. In two recent cases involving violations of Article 36, the Malawi High Court vacated the death sentences of the two Mozambican nationals, finding that a violation of an individual's Article 36 VCCR rights was a "*substantial matter warranting equally substantial remedies*".[146]

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144 **Tab 49:** *Avena and Other Mexican Nationals (Mexico v US)* (Judgment) (2004) I.C.J. 12, 121 (31 March 2004) http://www.icj-cij.org/files/case-related/128/128-20040331-JUD-01-00-EN.pdf [Accessed 14 December 2017]

145 **Tab 101:** Inter-American Court of Human Rights, Advisory Opinion OC 16/99 (1 October 1999) *'The right to information on consular assistance in the framework of the guarantees of the due process of law'* 124, 141(6), at paragraph 137 http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf

146 **Tab 66:** *High Court of Malawi, Sentence Rehearing Case No. 25 of 2017 (23 June 2017): The Republic v Lameck Bandawe Phiri*, p 3

134. These decisions are consistent with remedies provided by national courts in non-capital cases. In 2006, the German Constitutional Court reversed a decision from the *Bundesgerichtshof* (the German Federal Court of Justice) which had held that Article 36 did not affect the rights of individuals.[147] The Constitutional Court found that the lower court had erred by failing to justify its decision to deviate from previous ICJ decisions.[148] The Constitutional Court reasoned that the lower courts were obligated to interpret Article 36 consistently with the ICJ's judgments. even where Germany was not a party to the relevant ICJ decision (as in the case of *Avena* referred to in paragraph 132 above) "*since the ICJ has the authority to interpret the Convention*." [149] The Constitutional Court found that the lower Courts has to comply with ICJ judgments because "*one of the rationales of rendering jurisdiction to international courts is to ensure uniformity in the interpretation of the law, which can only be fully accomplished when such decisions result in compliance.*"[150]

135. In the wake of that decision, the German Federal Court of Justice ordered judicial remedies for Article 36 violations in two asylum cases decided in 2010. Each case involved an undocumented foreign national residing in Germany who had been listed for deportation as a result of a decision of a lower Court.[151] Both asserted that the police had failed to notify them of their consular rights at the time of arrest despite knowing of their foreign nationality.[152] In each instance the Federal Court of Justice overturned the lower court decision, stating that the right to consular notification was an *"essential component*" of

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147 **Tab 75:** Jana Gogolin, *Avena and Sanchez-Llamas Come to Germany – The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations*, 8 German L.J. 261, 264 (2007) https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b8633422482eb67e22a3d6/1454924597139/GLJ_Vol_08_No_03_Gogolin.pdf [Accessed 14 December 2017] (discussing **Tab 43** *Bundesgerichtshof* [BGH] [Federal Court of Justice], Nov. 7, 2001, 5 StR 116/01 (F.R.G) and **Tab 50:** *Bundesverfassungsgericht* [BVerfG] [Federal Constitutional Court], Sept. 19, 2006, 2 BvR 2115/01, paragraph 69 (F.R.G.))

148 **Tab 75:** Gogolin, *Avena and Sanchez-Llamas Come to Germany* at 265 (citing **Tab 50:** 2 BvR 2115/01 at paragraph 34).

149 **Tab 75:** Gogolin, *Avena and Sanchez-Llamas Come to Germany* at 269 (citing **Tab 2:** 2 BvR 2115/01 at paragraph 61).

150 **Tab 75:** Gogolin, *Avena and Sanchez-Llamas Come to Germany* at 270 (citing **Tab 2:** 2 BvR 2115/01 at paragraph 62).

151 **Tab 57:** *Bundesgerichtshof* [BGH] [Federal Court of Justice] May 6, 2010, V ZB 223/09, paragraphs 1-5 (F.R.G.); **Tab 58:***Bundesgerichtshof* [BGH] [Federal Court of Justice] Nov. 18, 2010, V ZB 165/10, paragraphs 1-3 (F.R.G.)

152 **Tab 57:** BGH, May 6, 2010, V ZB 223/09 at paragraphs 6, 16; **Tab 58:** BGH, Nov. 18, 2010, V ZB 165/10 at paragraphs 3-4

the constitutional fair trial doctrine and that the failure to advise a foreign national of his consular rights constitutes a "*fundamental procedural defect*" that renders his arrest "unlawful."[153]

(7) Failure to Raise the Article 36 Violation at Trial

136. The Applicant is entitled to a remedy for the violation of his consular rights notwithstanding any failure to raise the issue at trial. Article 36(2) of the VCCR prohibits the State from invoking procedural default rules to prevent the Applicant's access to a sentencing rehearing.[154] While Article 36(2) does permit domestic procedural law to be followed in proceedings involving the consular notification and access rights secured by Article 36(1), it is nevertheless "*subject to the proviso*" that any such domestic laws must give "*full effect*" to the purposes for which Article 36(1) rights are intended.[155]

137. As the ICJ has explained, a State may not benefit from its failure to properly advise a defendant of his consular rights. Thus, when it is the State itself that has failed in its obligations to advise a foreign national of his rights to consular notification and access, it may not later argue that the prisoner has forfeited his right to a remedy by not raising the violation earlier in the proceedings.[156]

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153 **Tab 57:** BGH, May 6, 2010, V ZB 223/09 at paragraph 18; **Tab 58:** BGH, Nov. 18, 2010, V ZB 165/10, paragraph 4. German courts have likewise ordered judicial remedies in civil cases involving violations of Article 36. See **Tab 60:** *Bundesverwaltungsgericht* [BVerwG] [Federal Administrative Court] Oct. 16, 2012, 10 C 6/12, paragraphs 1-4 (F.R.G.) (limiting costs that could be recovered from employer in connection with employee's deportation to those unconnected to violation of employee's Article 36 rights); **Tab 61:** *Landgericht* [LG] [Regional Court of Nuremberg-Fürth], Nov. 21, 2013, 13 T 8854/13 (F.R.G.) (quashing civil commitment of mentally ill foreign national due to a "substantial and incurable procedural defect" caused by the failure to advise the national of his rights pursuant to Article 36 of the VCCR).

154 See **Tab 49:** *Avena and Other Mexican Nationals (Mexico v US)* (Judgment) (2004) I.C.J. 12, 121 (Mar. 31), at paragraphs 111–13 http://www.icj-cij.org/files/case-related/128/128-20040331-JUD-01-00-EN.pdf [Accessed 14 December 2017]

155 See **Tab 49:** *Avena and Other Mexican Nationals (Mexico v US)* (Judgment) (2004) I.C.J. 12, 121 (31 March 2004), at paragraph 113 http://www.icj-cij.org/files/case-related/128/128-20040331-JUD-01-00-EN.pdf [Accessed 14 December 2017]

156 **Tab 49:** *Avena and Other Mexican Nationals (Mexico v US)* (Judgment) (2004) I.C.J. 12, 121 (Mar. 31), at paragraph 112 (31 March 2004), at paragraph 113 http://www.icj-cij.org/files/case-related/128/128-20040331-JUD-01-00-EN.pdf [Accessed 14 December 2017]

V. CONCLUSION

A. RELIANCE ON DE FACTO MORATORIA

138. In this brief, *Amici Curiae* have sought to highlight that an unofficial moratorium based on the forbearance of an executive branch has not historically provided a reliable means of protecting the right to life enshrined under regional and international human rights instruments, including the African Charter. The above submissions provide strong evidence that a moratorium, especially a *de facto* moratorium, is not akin to abolition or a formal stay of execution and should therefore be treated with the utmost caution by the Honourable Court.

139. The Honourable Court should consider the potential regional implications of its decision before issuing a ruling which places any reliance upon a de facto death penalty moratorium. Such a ruling could provide a disincentive to other African states from actively moving toward abolition of the death penalty. National and international jurisprudence speak clearly and consistently on the tortuous effects of prolonged incarceration under sentence of death. *Amici Curiae* note that the Honourable Court has frequently embraced international norms and standards. In this case, the reliance of the Respondent on an unofficial moratorium has led to the Applicant spending over 7 years on death row, far in excess of the time other courts have ruled constitutes cruel, inhuman, or degrading treatment or punishment.

140. *Amici Curiae* respectfully invite the Honourable Court to assess the best way of ensuring the effective protection and realisation of the Applicant's rights as enshrined under Articles 4, 5, 6 and 7 of the African Charter and under Articles 6, 7, 9 and 14 of the ICCPR. Given the critical role of the Honourable Court in developing jurisprudence across the African continent, the opportunity for the Honourable Court to enunciate the importance of these rights in this case will likely have an effect reaching far beyond the boundaries of the Respondent's jurisdiction. *Amici Curiae* respectfully request that the Honourable Court take these submissions into account as useful supplementary material in the Applicant's case.

B. DENIAL OF CONSULAR ASSISTANCE

141. This present case directly engages Articles 4 and 7 of the African Charter, and other similar provisions of international human rights conventions and standards. *Amici Curiae* respectfully submit this Brief for the consideration and information of the Honourable Court, in order to assist it in determining the extent of the rights and obligations engaged under these legal instruments.

142. This Brief highlights in particular the imperative nature of prompt consular assistance to nationals who find themselves facing prosecution under a foreign justice system, especially where such prosecution could result in capital punishment. *Amici Curiae* have underscored how consular assistance is integral to effective due process. As such, any denial of consular assistance will render a verdict unsafe and in breach of fair trial standards, meaning that any corresponding death sentence will be arbitrary and itself in breach of right to, or respect for, life provisions in the relevant human rights conventions.

143. *Amici Curiae* respectfully note that the Honourable Court has frequently embraced international norms and looked to international and regional jurisprudence for guidance. In doing so, the Honourable Court has itself influenced regional judicial standards. *Amici Curiae* see this case as an opportunity for the Honourable Court to do so in relation to consular assistance, enshrining the right as an indispensable part of fair trials standards. To do so would provide valuable guidance for future cases across the African continent and throughout the globe.

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Applicants (*Amici Curiae*)

Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
African Charter	The African Charter on Human and Peoples' Rights
AmCHR	American Convention on Human Rights
Constitution	The Constitution of Tanzania
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
Penal Code	The Penal Code of Tanzania
Protocol	The Protocol to the African Charter on the Establishment of an African Court on Human and People's Rights
Rules	The Rules of Procedure of the African Court on Human and Peoples' Rights (2010)
UDHR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Committee
VCCR	Vienna Convention on Consular Relations