

The Centre for Human Rights Education, Advice and Assistance encourages the Parliament of Malawi to adopt legislation abolishing the death penalty for the following reasons:

Global trends show that countries are rejecting the death penalty.

The UN Secretary-General and the UN High Commissioner for Human Rights have emphasized that the death penalty has no place in the twenty-first century.¹ In December 2020, a record number of countries supported the General Assembly’s resolution in support of a worldwide moratorium on the use of the death penalty.² Amnesty International reports a significant and continuous decrease in the number of executions over the last several years.³ According to the High Commissioner, “the vast majority of States, with a variety of legal systems, traditions, cultures and religions, had either abolished the death penalty in law or did not carry it out in practice.”⁴

The death penalty does not deter the commission of crimes.

Proponents of the death penalty often assert without evidence that the existence of capital punishment will serve as a deterrent to crime.⁵

On 23 February 2021, the United Nations Human Rights Council held a high-level panel discussion on the question of the death penalty and deterrence.⁶ The UN High Commissioner for Human Rights reiterated that there is “no evidence that the death penalty deterred crime more effectively than any other punishment.”⁷ Carolyn Hoyle, Professor of Criminology at Oxford University, informed the Council that studies in many countries “all concluded that there was no evidence to suggest that the death penalty deterred individuals from committing murder to a greater extent than the threat of life imprisonment. Analysis of hundreds of deterrence studies had found that, while the deterrent effects could be found in relation to minor crimes, there were no such effects on murder of any punishment, including execution.”⁸

Moreover, empirical evidence shows that abolition of the death penalty or a reduction in the imposition of death sentences does not lead to an increase in crime rates. According to the UN High Commissioner, “studies suggested that in some States that had abolished the death penalty, murder rates had remained unaltered or had even declined.”⁹ After Mongolia abolished the death penalty in 2016, it experienced no increase in violent crime.¹⁰ According to Arif Bulkan, a member of the UN Human Rights Committee, many jurisdictions that abolished the death penalty or imposed a moratorium on its use have subsequently experienced “dramatic declines in homicide rates. Countries that retained the death penalty and continued to implement it showed no comparable success in reducing their homicide rates.”¹¹ “A study comparing murder rates in Singapore, which utilized the death penalty for murder, with those in Hong Kong, China, where the death penalty had been abolished, showed no difference, even though executions had ended in Hong Kong, China, 30 years before. Similarly, data on drug trafficking suggested that the death penalty did not deter drug offences.”¹²

Malawi’s abolition of the mandatory death penalty also demonstrates the lack of a deterrent effect for the death penalty. In 2007, in the landmark case of *Kafantayeni and Others v. Attorney General*, the Supreme Court of the Republic of Malawi ruled that that it was unconstitutional to make the death penalty a mandatory punishment for murder or treason.¹³ Despite this ruling, since 2007 incidents of homicide in the country have continually dropped. According to the United Nations Office on Drugs and Crime’s International Homicide Statistics database, the number of cases of intentional homicide in the country continually decreased from 8 per 100,000 people in the country in 2001 to 2 per 100,000 people in 2012.¹⁴

Rule of law is the best deterrent.¹⁵ According to studies cited by the UN High Commissioner, “the certainty of punishment, rather than its severity, . . . deterred people from committing a crime.”¹⁶ Therefore, to the extent that the Parliament of Malawi is concerned with deterring crime, it should better equip enforcement to conduct prompt and effective investigations of reported crimes to ensure that perpetrators are held accountable. The death penalty, on the other hand, is not an effective investment. Capital cases tend to be costly and experience long delays,¹⁷ and capital convictions can be “extremely hard to obtain and maintain on appeal.”¹⁸

The imposition of the death penalty is error-prone.

The UN High Commissioner has noted that “[t]here [i]s no such thing as a mistake-proof judiciary. Miscarriages of justice resulting in a person’s death [a]re unacceptable consequences entailing a State’s violation of the fundamental right to life.”¹⁹ In 1998, John Nthara, Jamu Banda, and Michael Banda, residents of the village of Chinkuyu, were wrongfully convicted and sentenced to death for killing a man in 1993. In 2014, Michael died in prison. In 2015, after having spent 20 years on death row in Zomba Prison, John and Jamu were released. “At a sentencing conference on April 11, 2014, the Director of Public Prosecutions acknowledged the wrongful convictions and concluded that the men should be released from prison as soon as possible.”²⁰

The death penalty is arbitrary and anti-poor.

Because people living in poverty lack access to effective legal services and are unable to mount an effective defense, they are susceptible to being sentenced to death. The UN High Commissioner recently remarked that “[a]rbitrary and discriminatory application of the death penalty often disproportionately affect[s] the poor and economically vulnerable, those belonging to religious or ethnic minorities, lesbian, gay, bisexual, transgender and intersex communities, persons with disabilities, foreign nationals, indigenous peoples and marginalized members of society.”²¹ According to Professor Hoyle of Oxford, research “strongly indicate[s] that arbitrariness was inherent in all criminal justice systems through which the death penalty continued to be imposed; it was highly unlikely that any system could guarantee the absence of arbitrariness.”²²

In Malawi, the families of John Nthara, Jamu Banda, and Michael Banda “sold all of their cattle to pay for a private lawyer, who absconded before trial. When the lawyer failed to show up at court, the court refused to appoint legal aid lawyers to represent the brothers at trial. The three defendants, who were illiterate and had no means of contacting witnesses in their remote village, were prosecuted without any legal representation.”²³

The imposition of death penalty runs counter to the African Charter on Human and Peoples’ Rights

Malawi is a State Party to the African Charter on Human and Peoples’ Rights (the African Charter or the Charter), having ratified the same on 17 November 1989.²⁴ Article 3 of the African Charter demands that “[e]very individual shall be equal before the law” and “shall be entitled to equal protection of the law.” All humans are “inviolable” and every person, without qualification, is “entitled to respect for his life and the integrity of his person,” which includes not being “arbitrarily deprived of this right.”²⁵ The death penalty violates this right to life.²⁶ The African Commission, in its Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples’ Rights, expressed concern over the country’s retention of the death penalty. It likewise

recommended that Malawi ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty and to adopt an official moratorium on the death penalty as a step towards the definitive abolition of the death penalty.

In remarks before the Human Rights Council, Chad's Minister of Justice, Djimet Arabi, told the body that the Government of his country had "recognized that the death penalty was a violation of the right to life and constituted cruel, inhuman and degrading treatment," and therefore abolished the death penalty in May 2020.²⁷

The death penalty causes unnecessary suffering.

The UN High Commissioner has observed that imposition of the death penalty inflicts "severe mental and physical suffering . . . on the persons [sentenced to death] and their family members."²⁸

¹ *High-level panel discussion on the question of the death penalty*, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, UN Doc. A/HRC/48/38, 3 Aug. 2021, ¶ 7 [hereinafter *2021 High-level panel discussion*].

² *Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General*, Report of the Secretary General: Question of the death penalty, UN Doc. A/HRC/48/29, 15 Sept. 2021, ¶ 4, 8.

³ *Ibid.*

⁴ *2021 High-level panel discussion*, *supra* note 1, ¶ 8.

⁵ *Id.* ¶ 32.

⁶ *2021 High-level panel discussion*, *supra* note 1.

⁷ *Id.* ¶ 4.

⁸ *Id.* ¶ 19.

⁹ *Id.* ¶ 4.

¹⁰ *Id.* ¶ 13.

¹¹ *Id.* ¶ 15.

¹² *Id.* ¶ 20.

¹³ Cornell Chronicle, "Law clinic helped pave way for Malawi's death penalty ban," accessed May 17, 2022, <https://news.cornell.edu/stories/2021/05/law-clinic-helped-pave-way-malawis-death-penalty-ban>

¹⁴ The World Bank, "Intentional homicides (per 100,000 people) - Malawi," accessed May 17, 2022, <https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?end=2012&locations=MW&start=2000&view=chart>

¹⁵ *2021 High-level panel discussion*, *supra* note 1, ¶ 41.

¹⁶ *Id.* ¶ 4.

¹⁷ *Id.* ¶ 45.

¹⁸ *Id.* ¶ 17.

¹⁹ *Id.* ¶ 5.

²⁰ Cornell Law School, *Justice Denied: A Global Study of Wrongful Death Row Convictions*, The Cornell Center on Death Penalty Worldwide, 34-37 [hereinafter Cornell Law School, *Justice Denied*].

²¹ *2021 High-level panel discussion*, *supra* note 1, ¶ 5.

²² *Id.* ¶ 22.

²³ Cornell Law School, *Justice Denied*, *supra* note 20, at 34-37.

²⁴ African Commission on Human & Peoples' Rights, Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights, 57th Ordinary Session.

²⁵ African Charter on Human and Peoples' Rights, art. 4, October 1986, as cited in "Report on the Death Penalty and Detention Conditions in the Republic of Cameroon Under the African Charter on Human and Peoples' Rights," Advocates for Human Rights, April 2013.

²⁶ See e.g. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances ("Convinced that everyone's life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings . . .").

²⁷ *2021 High-level panel discussion*, *supra* note 1, ¶ 10.

²⁸ *Id.* ¶ 4.