Input for Secretary-General’s Report
on a moratorium on the use of the death penalty

*Submission on Malawi, Tanzania and Kenya
by Reprieve*

**May 2022**

**ABOUT REPRIEVE**

Reprieve is a charitable organisation registered in the United Kingdom (No. 1114900) in special consultative status with the United Nations Economic and Social Council (ECOSOC) that provides free legal and investigative support to those who have been subjected to state-sponsored human rights abuses. The key beneficiaries of Reprieve’s work belong to some of the most vulnerable populations in the world, as it is in their case that human rights are most swiftly jettisoned, and the rule of law is cast aside. In particular, we protect the rights of those facing the death penalty and deliver justice to victims of arbitrary detention, torture, and extrajudicial killing.

**EXECUTIVE SUMMARY**

This submission is made in contribution to the Secretary General’s Report on a moratorium on the use of the death penalty and updates on developments in Malawi, Tanzania and Kenya since December 2020.

**Malawi, Kenya, and Tanzania** have each been observing a de facto moratorium on executions for more than 25 years. Nevertheless, these countries continue to sentence people to death for offences ranging from homicide to robbery with violence. All three countries are signatories to the African Charter on Human and Peoples’ Rights, which guarantees the right to life. Despite being within the jurisdiction of the Charter, these states have yet to formalise moratoria in law and continue to take actions that undermine the rights of the most vulnerable individuals in their respective societies. In the past few years, there have been several significant domestic and regional cases arising from strategic litigation that has sought to abolish both the mandatory and discretionary death penalty.

* In April 2021, the Supreme Court of **Malawi** declared the death penalty unconstitutional and ordered resentencing for the last remaining individuals on death row. Four months later, in an unprecedented and unexplained move, the Court reversed this decision and reinstated the death penalty, causing anguish and panic amongst those on death row.
* In **Tanzania**, the African Court has found that the mandatory death penalty violates human rights law. In the past year, the Court has issued two further judgements calling for abolition, but neither decision has been implemented, limiting the options of hundreds on death row.
* In **Kenya**, in 2021, the Supreme Court issued clarification and guidance on the implementation of the *Muruatetu* decision but placed restrictions on those who were eligible for resentencing, excluding many who were previously eligible and had applied for resentencing.

**SUBMISSION**

1. **Right to seek pardon or commutation**

***MALAWI***

1. In Malawi, there are currently 25 people on death row, many of whom have been on death row for decades.[[1]](#footnote-1) Although granting commutations from the death penalty to a life sentence was previously regular practice, there have been no commutations since 2005.[[2]](#footnote-2) Further, the pardon process, provided for in the Constitution[[3]](#footnote-3), is not transparent in practice. It is unknown when a death-sentenced prisoner was last pardoned. As such, people on death row in Malawi have no pathway to receiving a pardon or commutation of their sentence and are stuck indefinitely on death row. All 25 people on death row applied for clemency in 2021, but there has been no response from the President.[[4]](#footnote-4)

***TANZANIA***

1. In Tanzania, the Constitution provides that the President has the power to grant a pardon or commutation, while the Tanzanian legislature oversees the clemency process.[[5]](#footnote-5) The Criminal Procedure Act provides that once a death sentence is upheld on appeal, the judge must forward to the President a report of the case along with recommendations.[[6]](#footnote-6) The President then decides whether to issue a death warrant, commute the sentence, or pardon the offender. It is unclear whether this procedure is followed in practice, as there is a lack of transparency in the clemency process.
2. There have been commutations in Tanzania in recent years. In December 2020, then President John Magufuli commuted the death sentences of 256 individuals to life sentences.[[7]](#footnote-7) In 2022, pardons were granted to 3,826 people, though neither the criteria for issuing pardons nor the list of recipients has been made public.[[8]](#footnote-8) Many people on death row, including women, elderly, and people with physical and mental disabilities have submitted applications for clemency or pardon to the President, but have received no response.[[9]](#footnote-9)

***KENYA***

1. In Kenya, the Constitution outlines the clemency process.[[10]](#footnote-10)  After all appeals are exhausted, the court sends notes of the case along with recommendations to the President. The President then determines whether to issue a death warrant, commute the sentence, or grant a pardon. In 2016 President Uhuru Kenyatta commuted the death sentences of 2,747 prisoners to life imprisonment.[[11]](#footnote-11) This followed a prior mass commutation signed by former President Mwai Kibaki in 2009.[[12]](#footnote-12)

**II. Data**

***MALAWI***

1. There are currently 25 people on death row in Malawi: 24 men and 1 woman.[[13]](#footnote-13) In 2007, the Supreme Court of Malawi overturned the mandatory death penalty, allowing resentencing in 169 cases and the subsequent release of more than 150 people from death row.[[14]](#footnote-14) The remaining 25 were sentenced after 2007, receiving a discretionary death sentence for murder, recently in cases involving the killing of persons with albinism.[[15]](#footnote-15) These trials are fraught with fair trial violations, including allegations of confessions induced through torture.[[16]](#footnote-16)

***TANZANIA***

1. The Legal and Human Rights Centre has documented that over 480 persons were on death row in Tanzania as of the end of 2019.[[17]](#footnote-17) The exact figure is unconfirmed as Tanzanian authorities do not publish information on the prison population. Tanzanian courts have sentenced at least 9 people to death in 2020.[[18]](#footnote-18) Tanzania retains the mandatory death penalty, which allows for people to be immediately sentenced to death without the opportunity to present crucial mitigating evidence.[[19]](#footnote-19)

***KENYA***

1. There are over 5,000 people who have been sentenced to death in Kenya prior to the 2017 Muruatetu decision who are eligible for resentencing. Following commutations, approximately 800 remain on death row, including at least 120 women.

**III. Experiences of States that have adopted a moratorium/abolished death penalty**

***MALAWI***

1. Malawi has had a *de facto* moratorium on the death penalty since 1992, though the death penalty continues to be available at law. In practice, it is only imposed in murder cases.
2. In a significant positive step, many parliamentarians vocally support an abolition Bill.[[20]](#footnote-20) This Bill is particularly urgent following the unprecedented reversal of an abolition decision by the Malawi Supreme Court in *Khoviwa v The Republic.*[[21]](#footnote-21) The harshest implications of the Court of Appeal’s amendment are felt by the 25 people facing execution: they believed themselves to be free, and now have to reconcile themselves with the renewed threat of death.

***TANZANIA***

1. In 2011, the government acknowledged that a *de facto* moratorium was in place.[[22]](#footnote-22) The last execution in Tanzania was carried out in 1994.[[23]](#footnote-23) In 2017, then President Magufuli indicated that he has no wish to sign death warrants.[[24]](#footnote-24) In December 2020, in commemoration of Tanzania’s independence, President Magufuli commuted the death sentences of 256 persons to life imprisonment.[[25]](#footnote-25)
2. In November 2019, the African Court on Human and Peoples’ Rights held in *Rajabu and others v United Republic of Tanzania*[[26]](#footnote-26) that the mandatory death penalty was contrary to the African Charter's provisions on fairness[[27]](#footnote-27), due process[[28]](#footnote-28), right to life[[29]](#footnote-29), and inhuman and degrading treatment/torture[[30]](#footnote-30) and ordered Tanzania to revise the Penal Code to remove the mandatory death penalty within one year. To date, the decision has not been implemented.
3. Since 2019, the African Court has issued two further rulings against the mandatory death penalty: *Amini Juma v United Republic of Tanzania*[[31]](#footnote-31) and *Gozbert Henerico v United Republic of Tanzania*[[32]](#footnote-32)*,* in both of which the Court ordered Tanzania to remove the mandatory death penalty, which it has not done.[[33]](#footnote-33) Tanzania’s failure to implement the rulings of the African Court impacts hundreds of people on death row.[[34]](#footnote-34)
4. Samia Suluhu Hassan was inaugurated President of Tanzania in 2021. In her first year in office, she has shown a more progressive stance than her predecessor.[[35]](#footnote-35) Tanzania still has not indicated if it will implement the African Court’s rulings in death penalty cases under the new President’s leadership.

***KENYA***

1. There is no official moratorium on executions in Kenya, although Kenya has not carried out an execution since 1987.[[36]](#footnote-36)
2. In December 2017, the Kenyan Supreme Court declared in the landmark case of *Francis Karioko Muruatetu v. Republic*[[37]](#footnote-37) that the country’s mandatory death sentence was unconstitutional. This judgment entitles over 5,000 people to resentencing, during which they will be able to introduce mitigating evidence against a death sentence.
3. Implementation of the *Muruatetu* judgment has been hampered by a lack of dissemination and guidance. As a result, courts in Kenya have not approached resentencing consistently which has led to arbitrary, unfair judgements. In July 2021, considering these challenges, the Supreme Court clarified the 2017 decision and issued guidance for resentencing. Unfortunately, the Court also decided to limit eligibility for resentencing, ruling that *Muruatetu* would only be applicable to sentences for murder.[[38]](#footnote-38) This significantly cut the number of people eligible, as most people sentenced to death have been convicted of robbery with violence – a non-lethal offence.
1. Information on file with Reprieve. [↑](#footnote-ref-1)
2. Information on file with Reprieve. [↑](#footnote-ref-2)
3. Constitution of Malawi, amended through 2017, Art. 89 sec. 2, <https://www.constituteproject.org/constitution/Malawi_2017.pdf?lang=en>. [↑](#footnote-ref-3)
4. Information on file with Reprieve. [↑](#footnote-ref-4)
5. <https://deathpenaltyworldwide.org/database/#/results/country?id=77>. [↑](#footnote-ref-5)
6. Criminal Procedure Act of Tanzania, Art. 325(1). [↑](#footnote-ref-6)
7. See The Advocates for Human Rights et al., *United Republic of Tanzania’s Compliance with International Covenant on Civil and Political Rights* at paragraphs 4 and 22. <https://www.theadvocatesforhumanrights.org/uploads/tanzania_death_penalty_loipr_human_rights_committee_final.pdf>. [↑](#footnote-ref-7)
8. President Samia pardons 3,826 Inmates to mark 58 years of Union, The Citizen, 27 April 2022, <https://www.thecitizen.co.tz/tanzania/news/national/president-samia-pardons-3-826-inmates-to-mark-58-years-of-the-union-3796016>. [↑](#footnote-ref-8)
9. Information on file with Reprieve. [↑](#footnote-ref-9)
10. Constitution of Kenya, 2010, 133 – The Power of Mercy 1(a) <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>. [↑](#footnote-ref-10)
11. Pardon Prisoners on Death Row

<https://worldcoalition.org/2016/11/08/pardon-prisoners-on-death-row/>. [↑](#footnote-ref-11)
12. Kenya Commutes the Death Sentences of More Than 4,000 prisoners

<https://deathpenaltyproject.org/kenya-commutes-the-death-sentences-of-more-than-4000-prisoners/>. [↑](#footnote-ref-12)
13. Information on file with Reprieve. [↑](#footnote-ref-13)
14. *Francis Kafantayeni & Others v Attorney General* Constitutional Case No 12 of 2005 (2007) MWHC 1. [↑](#footnote-ref-14)
15. Malawi Court Uses Death Sentence to Help Stop Attacks on Albinos, 15 August 2019, <https://www.voanews.com/a/africa_malawi-court-uses-death-sentence-help-stop-attacks-albinos/6173912.html> [↑](#footnote-ref-15)
16. Malawi Human Rights Commission, A REPORT OF AN INVESTIGATION INTO THE DEATH OF MR. BULEYA LULE IN POLICE CUSTODY, HRC/05/03/234, May 2019, available at: <https://malawilii.org/system/files/MHRC%20Buleya%20Report.pdf>. [↑](#footnote-ref-16)
17. Summary of the Tanzania Human Rights Report 2019, Legal and Human Rights Centre, at 5 (April 2020), <https://www.humanrights.or.tz/assets/attachments/1588571531.pdf>. [↑](#footnote-ref-17)
18. This figure based on information that is publicly available online – it is likely to be significantly higher. [↑](#footnote-ref-18)
19. Penal Code of Tanzania, arts. 196–197, Sep. 28, 1945, as updated through to Jul. 7, 2016. [↑](#footnote-ref-19)
20. <https://malawi24.com/2022/04/14/malawi-legislators-in-support-of-death-penalty-abolition/>. [↑](#footnote-ref-20)
21. *Charles Khoviwa v The Republic* MSCA Miscellaneous Criminal Appeal No12 of 2017 (2021) MWSC 3. Malawi Supreme Court Retreats from Opinion that Declared Death Penalty Unconstitutional, 24 August 2021. <https://deathpenaltyinfo.org/news/malawi-supreme-court-retreats-from-opinion-that-declared-the-death-penalty-unconstitutional>. [↑](#footnote-ref-21)
22. Cornell Centre on Death Penalty Worldwide, United Republic of Tanzania. <https://deathpenaltyworldwide.org/database/#/results/country?id=77>. [↑](#footnote-ref-22)
23. Cornell Centre on Death Penalty Worldwide, United Republic of Tanzania. <https://deathpenaltyworldwide.org/database/#/results/country?id=77>. [↑](#footnote-ref-23)
24. Tanzania: President Magufuli declares his position against the death penalty

https://worldcoalition.org/2017/09/20/tanzania-president-magufuli-declares-his-position-against-the-death-penalty/. [↑](#footnote-ref-24)
25. Kizito Makoye, *Tanzania commutes death sentences of 256 convicts*, Anadolu Agency, 9 Dec. 2020, <https://www.aa.com.tr/en/africa/tanzania-commutes-death-sentences-of-256-convicts/2071191>. [↑](#footnote-ref-25)
26. *Ally Rajabu and others v United Republic of Tanzania*, ACHPR no. 007/2015, 29 November 2019, <https://africanlii.org/afu/judgment/african-court/2019/7>. [↑](#footnote-ref-26)
27. African Charter, Article 7(1); *Ally Rajabu and others v United Republic of Tanzania* at paragraph 111. [↑](#footnote-ref-27)
28. African Charter, Article 7(1); *Ally Rajabu and others v United Republic of Tanzania* at paragraph 111. [↑](#footnote-ref-28)
29. African Charter, Article 4; *Ally Rajabu and others v United Republic of Tanzania* at paragraph 114. [↑](#footnote-ref-29)
30. African Charter, Article 5; *Ally Rajabu and others v United Republic of Tanzania* at paragraph 119*.* [↑](#footnote-ref-30)
31. *Amini Juma v United Republic of Tanzania*, ACHPR no. 024/2016, 30 September 2021, <https://www.african-court.org/cpmt/storage/app/uploads/public/615/bf4/f09/615bf4f09e55a745995400.pdf>. [↑](#footnote-ref-31)
32. *Gozbert Henrico v United Republic of Tanzania*, ACHPR no. 056/2016, 10 January 2022, <https://www.african-court.org/cpmt/storage/app/uploads/public/61e/163/77e/61e16377e31f0332569496.pdf>. [↑](#footnote-ref-32)
33. Information on file with Reprieve. [↑](#footnote-ref-33)
34. ‘The available figures on prisoners on death row in Tanzania suggest a number currently in the hundreds. In December 2020, then President Magufuli commuted the death sentences of 256 individuals to life sentences’: see The Advocates for Human Rights et al., *United Republic of Tanzania’s Compliance with International Covenant on Civil and Political Rights* at paragraphs 4 and 22, <https://www.theadvocatesforhumanrights.org/uploads/tanzania_death_penalty_loipr_human_rights_committee_final.pdf>. [↑](#footnote-ref-34)
35. Tanzania viewpoint: What President Samia has achieved in her first year, BBC news, 19 March 2022, <https://www.bbc.co.uk/news/world-africa-60765848>. [↑](#footnote-ref-35)
36. Cornell Centre on Death Penalty Worldwide, Republic of Kenya

<https://deathpenaltyworldwide.org/database/#/results/country?id=38>. [↑](#footnote-ref-36)
37. *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR. [↑](#footnote-ref-37)
38. Death Penalty Case Re-Visited By Kenya Supreme Court, 09 July 2021, <https://africanlii.org/article/20210709/death-penalty-case-re-visited-kenya-supreme-court>. [↑](#footnote-ref-38)