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Article

The customary prohibition of the mandatory death penalty in international law

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ABSTRACT

The mandatory death penalty denotes the automatic imposition of capital punishment for certain predetermined offences, without regard for the circumstances of a crime, the personal conditions of the defendants, or the factual context of individual cases. Although the practice is highly controversial for its infringements upon the right to life and the right to a fair trial, it remains uncertain whether public international law contains a universal prohibition against it. This article argues that such a prohibition does exist, taking the form of customary international law. To substantiate this claim, the article provides a detailed analysis of state practice and other relevant evidence.

KEYWORDS: death penalty, mandatory death penalty, right to life, right to a fair trial, customary international law, discretion in sentencing.

1. INTRODUCTION

The mandatory death penalty (MDP) is perhaps one of the most controversial human rights practices in a retentionist state of capital punishment.[1] According to the most widely accepted definition in literature and practice, it entails the automatic imposition of capital punishment for certain predetermined offences, without regard for the circumstances of a crime, the personal conditions of the defendants, or the factual context of individual cases.[2] Recently, a series of political events has brought this system into sharper public focus. In 2023, the Israeli Parliament

[1] By retentionist states here, this article refers to any state which still retains capital punishment as a legal punishment, regardless of (1) whether it is for crimes during peacetime, wartime, or any period of public emergency and (2) whether the state retaining capital punishment has legally (or factually) introduced a moratorium system that temporarily reduces the handing down of death sentences or execution. As such, the so-called '*de facto* abolitionist states' are counted as retentionist as well. For a more in-depth analysis of how the label of '*de facto* abolition' may create further confusion, see Hood, 'The Enigma of de facto Abolition of Capital Punishment' in de Vicente Martinez, Gomez Iniesta, et.al (eds), *Libro Homenaje Al Profesor Luis Arroyo Zapatero: Un Derecho Penal Humanista, Volumen II* (2021) 925–938.

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initiated a plan of judicial reform, part of which involved introducing the MDP for terrorism-related crimes.[3] In early 2025, US President Trump similarly signed an executive order requiring that the 'the Attorney General shall [. . .] seek the death penalty regardless of other factors for every federal capital crime involving (i) The murder of a law-enforcement officer; or (ii) A capital crime committed by an alien illegally present in this country.'[4] The next month, an even more expansive proposal from Florida lawmakers, calling for the imposition of the MDP for illegal immigrants who committed 'a capital offense, including murder or rape of a child',[5] was enacted into state law.[6] In March, President Trump restated his position in a speech to Congress, seeking its approval to enshrine the MDP into law at the federal level.[7]

Such moves have ignited fierce debate.[8] Straightforwardly, the MDP may compromise the defendant's right to a fair trial and even constitute legally prohibited ill-treatment and an arbitrary deprivation of life.[9] In as early as 1983, the Inter-American Court of Human Rights (IACtHR) demanded in an Advisory Opinion[10] that the death penalty be imposed only for 'most serious common crimes not related to political offenses',[11] and that 'certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account'.[12] Similarly, Article 6(2) of the ICCPR expressly limits the use of capital punishment to 'the most serious crimes', which, according to the Human Rights Committee (HRC), refer only to crimes that result in the loss of life.[13] For this reason, it found in the *Lubuto* case that the Zambian MDP 'for aggravated robbery in which firearms are used' was violative of the provision in question.[14] Most recently, the HRC notes in General Comment 36 that the deprivation of the judiciary's discretion in death sentencing is 'arbitrary in nature'.[15] Against this backdrop, in a 2007 report presented to the UN General Assembly, the then UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Alston, noted that 'legislation dictating the mandatory imposition of the death penalty is prohibited

[2] For some discussion, see, eg Jabbar, 'Imposing a Mandatory Death Penalty: A Practice Out of Sync with Evolving Standards' in Steiker and Steiker (eds), *Comparative Capital Punishment* (2019) 138–159; Nowak, *The Global Decline of the Mandatory Death Penalty* (2016) 1–2.

[3] Dudai, '"The Moral, Just and Necessary Demand": The Resurgence of the Death Penalty in Israel,' Death Penalty Research Unit Blog, 13 March 2023, available at: blogs.law.ox.ac.uk/death-penalty-research-unit-blog/blog-post/2023/03/moral-just-and-necessary-demand-resurgence-death [last accessed 30 September 2025].

[4] The White House, 'Restoring the Death Penalty and Protecting Public Safety,' 20 January 2025, available at: whitehouse.gov/presidential-actions/2025/01/restoring-the-death-penalty-and-protecting-public-safety/ [last accessed 30 September 2025].

[5] Albritton and Perez, 'Memorandum,' 28 January 2025, available at: flsenate.gov/PublishedContent/Offices/2024-2026/President/Documents/1_28_25_Improvements_to_the_TRUMP_Act.pdf [last accessed 30 September 2025].

[6] Lieb and Payne, 'Florida Ups the Stakes for Crimes by Immigrants in the US Illegally,' 28 February 2025, available at: apnews.com/article/illegal-immigration-death-penalty-florida-13e0a9f943ca4146481789bf5f760ed6 [last accessed 30 September 2025].

[7] Police1, 'Trump Calls for Mandatory Death Penalty for Those Convicted of Killing Officers,' 5 March 2025, available at: police1.com/legal/trump-calls-for-mandatory-death-penalty-for-those-convicted-of-killing-officers [last accessed 30 September 2025].

[8] For example, despite passing the preliminary reading, the Israeli proposed bill has so far been unsuccessful due to the strong backlash from the general public. See World Coalition against the Death Penalty, 'How Likely is the Return of the Death Penalty in Israel?,' 22 May 2023, available at: worldcoalition.org/2023/05/22/how-likely-is-the-return-of-the-death-penalty-in-israel/ [last accessed 30 September 2025]. On the other hand, even some Republican-run states seem reluctant to carry out the will of President Trump on this matter. See, eg Hernández, 'Trump's Death Penalty Push Faces Resistance in Some Red States', 7 March 2025, available at: stateline.org/2025/03/07/trumps-death-penalty-push-faces-resistance-in-some-red-states/ [last accessed 30 September 2025].

[9] Jabbar, supra n 2 at 138.

[10] OC-3/83, *Restrictions to the Death Penalty* IACtHR Series A 3 (1983).

[11] ibid. at para 55.

[12] ibid.

[13] See, eg Human Rights Committee, General Comment No 36: The right to life (art. 6), 30 October 2018, at para 35. ('General Comment 36')

[14] *Lubuto v. Zambia*, Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995) [7.2]. See also *Thompson v. Saint Vincent and the Grenadines* (806/1998), CCPR/C/70/D/806/1998, at para 8.2.

[15] 'General Comment 36,' at para 37.

under international human rights law' because this position 'is generally consistent with [. . .] the approach adopted by almost every judicial or quasi-judicial human rights body in the world' and 'a wide range of national courts'.[16] Ellis has also asserted that 'International law prohibits the imposition of a MDP, even for the most serious crimes.'[17]

Whilst the position of banning the MDP itself is well-justified, the foregoing views create some ambiguity in terms of international lawmaking. They are premised on the idea that the ban derives from interpretations of other existing human rights, such as the right to life and the right to a fair trial. But these interpretations—whether from human rights treaty bodies or other actors—do not in and of themselves produce a general binding force under public international law. For example, while the HRC may interpret the notion of the 'most serious crimes' in a way it finds appropriate, this does not necessarily preclude states from interpreting it differently.[18] Furthermore, although human rights courts capable of delivering binding judgments are available in Africa, the Americas and Europe, this is not the case for Asia, where more than half of the currently MDP-implementing states are located.[19] As such, the idea of an international law prohibition is inevitably weakened when the views of Alston, Ellis and others are subject to more rigorous scrutiny. This is perhaps why, instead of asserting that the international legal prohibition is already in place, some authors speak of, for example, the 'evolving standards of decency'[20]—within the common-law context—and 'a global consensus away from mandatory capital punishment'.[21]

In truth, if one carries Alston's reasoning forward, a practical way to solidify the ban's universal, positive-law basis is to defend its status as part of customary international law—existing in relation to, but independently of, other human rights mentioned above. This issue was brought before the Singaporean Court of Appeal in 2010. The defendant, Yong Vui Kong, challenged the imposition of MDP on him for drug trafficking, alleging that the sentencing violated Article 9(1) of the Singaporean Constitution—'No person shall be deprived of his life or personal liberty save in accordance with law'—because the term 'law' included customary international law, which had banned the MDP.[22] In response, the Singaporean Attorney General rejected this view on the grounds that there was no sufficient evidence of customary international law—an argument ultimately adopted by the Court. Curiously, however, the customary status of the ban

[16] UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report to the General Assembly, 29, January 2007, A/HRC/4/20, at para 54. See also Amnesty International, 'Thailand: Time to Abolish the Death Penalty,' December 2017, available at: amnesty.org/ar/wp-content/uploads/2023/06/ACT5076112017ENGLISH.pdf [last accessed 30 September 2025].

[17] Ellis, 'Trial of the Libyan Regime: An Investigation into International Fair Trial Standards,' November 2015, at 51, available at: icc-cpi.int/sites/default/files/RelatedRecords/CR2018_02925.PDF#:~:text = Libya%20still%20has%20a%20mandatory%20death%20penalty,penalty%2C%20even%20for%20the%20most%20serious%20crimes [last accessed 30 September 2025].

[18] For a discussion on a diverse understanding of this concept, see, eg Holmes, 'Non-Universal Human Rights? How Article 6 (2) of the International Covenant on Civil and Political Rights Undermines Human Rights' (2020) 9 *International Human Rights Law Review* 99. For an analysis of how the ASEAN states have interpreted this idea more broadly, see Petcharamesree, 'Most Serious Crimes': Searching for a Common Interpretation in ASEAN?' in Petcharamesree et al (eds), *Unpacking the Death Penalty in ASEAN* (2023) 6, 15. Regarding the highly contested views on the bindingness of the HRC's jurisprudence, see, eg Takata and Hamamoto, 'Human Rights, Treaty Bodies, General Comments/Recommendations,' January 2023, available at: opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1730 [last accessed 30 September 2025].

[19] See below in section 3.A.

[20] Jabbar, supra n 2 at 157. First coined by the US Supreme Court in *Trop v Dulles*, 356 U.S. 86 (1958), the 'evolving standards of decency' has been employed to challenge the legality and constitutionality of MDP in some jurisdictions. For some recent discussion, see Sihm, 'Evolving Standards of Decency: On the Abolition of Capital Punishment,' 19 January 2024, available at: culawreview.org/journal/evolving-standards-of-decency-on-the-abolition-of-capital-punishment [last accessed 30 September 2025]. For a sceptical account, see Ryan, 'The Death of the Evolving Standards of Decency' (2024) 51 *Florida State University Law Review* 255.

[21] Novak, 'The Judicial Dialogue in Transnational Human Rights Litigation: Muruatetu & Anor v Republic and the Abolition of the Mandatory Death Penalty in Kenya' (2018) 18 *Human Rights Law Review* 771, 772.

[22] *Yong Vui Kong v Public Prosecutor and another matter* [2010] SGCA 20 at para 6.

on the MDP has not been subject to comprehensive scholarly analysis, whether before or after this decision.

The present article aims to address this gap, and it is subdivided into four sections. In section 2, some general criteria for custom identification in the human rights context will be outlined, which serve as the nuts and bolts of the examination of custom's two traditional elements—'a general practice' and 'acceptance as law' (*opinio juris*). In section 3, the extent to which the MDP remains part of state practice will be explored in detail, with landmark cases and important developments being analysed. Section 4 summarizes the central claim of this article.

2. SOME METHODOLOGICAL AND DEFINITIONAL POINTS ON IDENTIFYING A PROHIBITIVE NORM OF THE MDP

A. Custom identification: the two-element theory and some evidentiary issues

The determination of 'a theory of custom-ascertainment' precedes any attempt to pinpoint the existence of a customary norm.[23] Article 38(1) of the ICJ Statute defines custom as 'a general practice accepted as law',[24] but its concise wording has proved to be the source of perpetual debates. While it would be far beyond the scope of the present article to analyse specific issues in detail, a useful starting point may be the International Law Commission's 2018 Conclusions on the Identification of Customary International Law, where some of the most widely accepted secondary rules regarding custom identification are outlined. First, despite some scholarly disagreement,[25] custom is defined as encapsulating two elements[26]: a general practice and 'a belief that this practice is rendered obligatory' (*opinio juris*), following the ICJ's ruling in the *North Sea Continental Shelf* case.[27] The former, commonly noted as the 'objective'[28] element of custom, is understood in a very broad sense. It includes, for example,

> diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.[29]

Doctrinally, what types of practice are of specific relevance depends on what norms are to be evaluated. In *Jurisdictional Immunities of the State*,[30] for example, the ICJ has observed that 'judgments of national courts' and 'legislation of [. . .] States which have enacted statutes dealing with immunity' are considered particularly relevant due to the 'context' in question.[31] Since immunity law concerns 'immunity from the local territorial jurisdiction',[32] a reliance on

[23] Koskenniemi, *From Apology to Utopia* (2005) 396.

[24] Article 38(1) Statute of the International Court of Justice 1945, XV UNCIO 355. For a specific discussion on referencing the Statute, see Baumgartner, 'Lost in Citation: How to Reference the UN Charter and the ICJ Statute,' Opinio Juris, 29 August 2023, available at: opiniojuris.org/2023/08/29/lost-in-citation-how-to-reference-the-un-charter-and-the-icj-statute/ [last accessed 30 September 2025].

[25] See, eg Lepard, *Customary International Law* (2010) 97–139; d'Aspremont, 'Non-State Actors and the Formation of International Customary Law: Unlearning Some Common Tropes' in Droubi & d'Aspremont (eds), *International Organisations, Non-State actors, and the Formation of Customary International Law* (2020) 172.

[26] Conclusion 2 on custom identification.

[27] *North Sea Continental Shelf (Federal Republic of Germany v Netherlands)* Judgment, ICJ Reports 1969, 3, at 44, para 77.

[28] See, eg Voyiakis, 'Customary International Law and the Place of Normative Considerations' (2010) 55 *American Journal of Jurisprudence* 163, 169; Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 *Netherlands International Law Review* 119, 123. Sender and Wood, 'The Emergence of Customary International Law: Between Theory and Practice' in Brölmann and Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (2016) 138.

[29] Conclusion 6 on custom identification.

[30] *Jurisdictional Immunities of the State (Germany v Italy)* Judgment, ICJ Reports 2012, 99.

[31] ibid., at 123, para 55.

[32] Higgins, *Problems and Process: International Law and How We Use It* (1994) 208–209.

these material sources to pinpoint custom-forming practice becomes easily justifiable. By parity of reasoning, with respect to *human rights* custom, the focus is to be placed on states' administrative, legislative and judicial acts within their jurisdictions.[33] In addition, in exploring the exact contours of an alleged custom, such domestic practice tends to offer specific information about how each human right is understood by individual states.[34] As such, in section 3, primary focus will be placed on the domestic legislations across states, as well as the judicial decisions on MDP. Furthermore, according to the classic doctrine, these domestic acts are directly attributable to the state and can create direct legal effects on individuals.[35] *Opinio juris*, as the normative acceptance of something as law, can thus be inferred therefrom.[36]

Indeed, skeptical writers have challenged this view according to the separation between international and domestic laws. For Moremen, if national courts' jurisprudence constitutes part of state practice in customary lawmaking, '[i]t may be difficult to tell [. . .] whether [the] sense of legal obligation [ie *opinio juris*] derives from international law, from domestic law, or a domestic auto-interpretation of international law.'[37] Werle and Jeßberger have similarly written in their latest edition of the textbook on international criminal law that '[I]t is doubtful that any conclusion can be drawn for customary international law when a domestic trial is based solely on domestic law, without any reference to international law.'[38] Hartman, along this same line, has even contended that the inference of *opinio juris* from domestic state acts constitutes 'the most troubling problem in constructing an intellectually honest and convincing theory for customary human rights norms'.[39]

However, such reproach is misplaced on a number of scores. The first, and perhaps more formalistic, reason is that the international jurisprudence has not erected such a distinction between domestic and international *opinio juris*. Discussion on this topic has so far remained theoretical and somewhat speculative. In various cases before the PCIJ and ICJ, such as *S.S. Lotus*,[40] *Questions relating to the Obligation to Prosecute or Extradite*,[41] and the above-mentioned *Jurisdictional Immunities of the State*, domestic legislations have been repetitively invoked to evaluate the status of international law.

Second, the skeptical view exaggerates the difference between 'international' and 'domestic' legal obligations, almost pitting them against each other. As Slaughter and Alvarez correctly

[33] See, eg Provost, *International Human Rights and Humanitarian Law* (2009) 131–132; Tully, 'Access to Electricity as a Human Right' (2006) 24 *Netherlands Human Rights Quarterly* 557, 586 (by implication); Gallani, 'Use of Comparative Law in Determining the Customary International Law of Human Rights' (2012) 24 *Florida Journal of International Law* 433.

[34] For example, in analysing the customary status of the right to free expression, the HRC declared in its General Comment No 10 that [I]n order to know the precise regime of freedom of expression in law and in practice, the Committee needs in addition pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right.See Human Rights Committee, General Comment No 10: The right to freedom of expression (art. 19), 29 June 1983, at para 3. For a more detailed account on the role of domestic practice, see Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 138.

[35] For writers discussing the '*opinio juris*-reflective' character of domestic judgments, see, eg Wolfke, *Custom in Present International Law*, 2nd edn (1993) 74; Bratspies, 'Reasoning Up: Environmental Rights as Customary International Law' in Knox, *The Human Right to a Healthy Environment* (2018) 129.

[36] See, eg *S.S. 'Lotus' (France v Turkey)* Judgment, PCIJ Reports 1927, Series A 10 at 15, 28 ('*S.S. Lotus*'); Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 8th edn (2019) 41.

[37] Moremen, 'National Court Decisions as State Practice: A Transnational Judicial Dialogue' (2006) 32 *North Carolina Journal of International Law and Commercial Regulation* 259, 274.

[38] Werle and Jeßberger, *Principles of International Criminal Law*, 4th edn (2020) 76–77.

[39] Hartman, 'Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty' (1983) 52 *University of Cincinnati Law Review* 655, 670.

[40] *S.S. Lotus*, at 28.

[41] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment, ICJ Reports 422. At paragraph 99, the Court notes thatThat prohibition [against torture] is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application [. . .] and it has been introduced into the domestic law of almost all States [. . .].

point out, to a very large extent, 'the essence of the international (state-to-state) obligation is to take domestic action: either to enforce existing laws or to pass new laws to restructure state-society relations.'[42] For instance, entering the legal regime of the WTO involves changing domestic legislation to eliminate barriers to international trade under certain conditions. And so is to adopt, for another example, a rule of 'three-mile territorial sea': for it to be operational, 'each state might be obliged to pass a statute prohibiting its nationals from violating the territorial waters of other state.'[43] In other words, traditionally 'international' obligations often involve a domestic aspect,[44] and the fact that a norm involves the articulation of obligations regarding domestic affairs fails to disprove its status as *international* law. In this respect, at least, human rights obligations do not seem strikingly different from legal obligations arising in other, more 'traditional' branches of international law.[45]

Another more standard, and perhaps classical, way to pinpoint *opinio juris* is through an analysis of written statements, declarations, verbal statements, etc., promulgated by states themselves.[46] There are various criteria according to which the inference of *opinio juris* from such materials may be justified. For example, the criticism of members of the international society concerning certain behaviour may indicate what is regarded as impermissible.[47] Schachter further points out that 'It is important as well to consider whether the conduct criticized is defended by the perpetrators as legitimate, or, as is often the case, denied on factual grounds.'[48] The case of *Nicaragua*[49] before the ICJ serves as an example in point, where the US's resort to an exception to the prohibition against the use of force could be interpreted as recognising the norm's status as customary international law.[50]

On the other hand, the general coherence between the words and deeds of states may also play a role in verifying *opinio juris* indicated in written statements.[51] In *Nuclear Weapons* Advisory Opinion,[52] the ICJ had to decide whether there existed a customary norm prohibiting the use of nuclear weapons. Despite confirming that the UN General Assembly Resolution 1653 and a series of following resolutions reflected a 'nascent *opinio juris*'[53] prohibiting the use of nuclear weapons, it eventually rejected that this nascent *opinio juris* could develop into a full-blown one due to conflicting state practice. These approaches are to be adopted to evaluate the claim that the use of the MDP has now been prohibited under customary international human rights law.

[42] Slaughter and Alvarez, 'A Liberal Theory of International Law' (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)*, APRIL 5–8, 2000, 240, 247; Tzanakopoulos, supra n 34, at 138.

[43] Slaughter and Alvarez, ibid. at 247.

[44] See, eg d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in Fauchald and Nollkaemper, *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2014) 142.

[45] Slaughter and Alvarez, supra n 42 at 247.

[46] See, eg Conclusion 10(2) on custom identification.

[47] Hart, *The Concept of Law* (2012) 56–57; Schachter, 'International Law in Theory and Practice' (1982-V) 178 *General Course in Public International Law* 21, 338; Tzanakopoulos, supra n 34 at 158–9.

[48] Schachter, ibid.

[49] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits, Judgment, ICJ Reports 1986, 14. ('*Nicaragua*')

[50] ibid. at 105, para 198.

[51] Tomka, 'Custom and the International Court of Justice' (2013) 12 *The Law & Practice of International Courts and Tribunals* 195, 211. A theoretical debate arising in this context is whether this position renders custom's definition circular. That is, if whether a statement reflects *opinio juris* is determined by whether states follow it, then *opinio juris* is effectively lost as a meaningful element of custom. For some relevant discussion, see, eg Koskenniemi, supra n 23 at 411–37; Byers, *Custom, Power and the Power of Rules* (1999) 136. Regarding this issue, the present article takes the view that custom's two elements can be conceptually separate but identified as a whole/simultaneously. For a similar view in a slightly different context, see Arajärvi, 'The Requisite Rigour in the Identification of Customary International Law: A Look at the Reports of the Special Rapporteur of the International Law Commission' (2017) 19 *International Community Law Review* 9, 35.

[52] *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, ICJ Reports 1996, 226.

[53] ibid, at 255, para 73.

B. Defining the ban on the MDP: how precisely should practice be coded?

It is worth reiterating the above-mentioned, widely adopted definition of the MDP—the deprivation of judicial discretion in sentencing for people who commit certain crimes. Superficially, in coding state practice, the most common method adopted in the literature is to read domestic criminal-law provisions and see whether the legislature provides sentencing alternatives to the death penalty regarding certain crimes. The advantage of doing so lies in the simplicity: one can have clear-cut answers as to whether the MDP exists in a state. The problem with this simple reading, however, lies in its inaccuracy. Just because a legal provision provides no alternative to capital punishment does not necessarily mean that *judicial discretion* becomes legally impossible or unavailable. For example, as will be seen in section 3.A., judicial discretion may be expressly acknowledged by courts in cases concerning crimes punishable only by death, even if the law itself does not expressly provide for it. In such cases, a more accurate characterisation is that the MDP is not carried out in practice. For this reason, the general approach to coding state practice in this article is to examine three main types of data: (i) domestic criminal laws imposing the MDP; (ii) the existence of any general mitigating provisions in a legal system, and if so, their scope of application; and (iii) any jurisprudence recognizing judicial discretion in cases concerning the MDP. In brief, for the present purpose, a coherent and holistic interpretation[54] of such material is necessary to extract correct information about the current status of the MDP in jurisdictions around the globe. Nevertheless, two potential concerns may arise here in response to this methodological/evidentiary choice. The former argues that the three types of evidence mentioned above are overinclusive, while the latter contends they are underinclusive.

First, even if courts declare judicial discretion permissible concerning MDP-applicable offences, a criminal provision that lists only the death penalty as the legal punishment may still produce a negative, 'anchoring effect'[55] on defendants. This places an undue burden on them to demonstrate extenuating circumstances sufficient to justify a lesser sentence, with the 'default' option always being the death penalty. Accordingly, unless such provisions are amended, it cannot be said that the MDP has been abandoned in practice. On this view, a straightforward reading of criminal-law provisions is precisely what is required to ascertain a prohibitive norm of the MDP, since this such effect in question is exactly what the ban on the MDP should prohibit.

Second, it might also be contended that the most exact way of coding state practice is not to focus on whether judicial discretion is verbally recognized in court decisions and jurisprudence. Rather, the more important point is whether that discretion is *genuinely* and *effectively* implemented in practice, or whether it is nothing more than a symbolic gesture. If it is the latter, the practice cannot be said to conform to a putative customary ban on the MDP. In this regard, even a holistic observation of the previous sources of data—as will be undertaken by this article in the following sections—would seem overly underinclusive.

The two concerns need to be addressed separately, although some aspects of them are related. To begin with, the existence and impact of the anchoring effect (if any) is essentially a matter of fact, not of norm. To emphasize it when coding practice may digress from the core normative

[54] See below in the same section. For example, it is a common phenomenon that governmental sectors may hold different legal positions on different issues. In cases where competing views and practices are present, it is sensible to accord more evidentiary weight to acts of the sector which enjoys a higher or final interpretative authority in the domestic distribution of power. See, eg Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International & Comparative Law Quarterly* 57, 62; Lepard, supra n 25 at 177.

[55] Much literature has been produced to address the problem of anchoring effect. However, articles addressing the specific context of mandatory death sentencing remain appear to be few and far between. For some general studies on this psychological bias and (death) sentencing, see, eg Bentele and Bowers, 'How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse' (2001) 66 *Brooklyn Law Review* 1011; Fowler, 'A Shortcut to Death: How the Texas Death-Penalty Statute Engages the Jury's Cognitive Heuristics in Favor of Death' (2017) 96 *Texas Law Review* 379; Gravett, 'The Myth of Rationality: Cognitive Blases and Heuristics in Judicial Decision-Making' (2017) 134 *South African Law Journal* 53.

subject as to whether judicial discretion remains legally permissible in cases concerning capital punishment. To be sure, the anchoring effect may suggest itself as a human rights concern and should thus be prohibited by (international) law. However, that discussion will go beyond the most widely accepted definition of the MDP and the scope of this article.

On the other hand, an insistence on the 'effective' exercise of judicial discretion would not produce a clearer picture of MDP-related state practice. First, this approach necessitates a clearer definition of what effectiveness requires and entails. Accompanying this issue is a practical difficulty of data gathering. As is widely acknowledged, the documentation of state practice has never been straightforward—even when it comes to the seemingly clear-cut question of whether the MDP exists. For instance, the practice of the MDP in a handful of states, such as Bahrain, Palestine, Somalia and South Sudan, is not readily available. In a recent document submitted by human rights NGOs for the HRC, the Kuwaiti government also appeared reluctant to provide further details on offences punishable by the MDP.[56] When there is already some deficiency of information, an overly detailed definition of what is being sought can be counterproductive and unrealistic. For this reason, the article's focus on mitigating clauses and judicial recognition of sentencing discretion largely reflects a choice influenced by data availability and convenience.

Lastly, even setting aside these practical issues, it seems debatable to what extent one must inquire about the *exact* practice of human rights to produce a (customary) norm about that practice. To elaborate, even if judicial discretion is not effectively exercised in the sentencing practice of a state, this does not change the fact that judicial discretion remains in place—at least from a normative perspective. Unless the ineffective exercise of discretion is accompanied by an *opinio juris* justifying it, this reality cannot be characterized as undermining the requirement for judicial discretion and the prohibition against the automatic, mandatory imposition of capital punishment. The same logic may explain why, for example, an act of torture cannot be invoked to challenge the prohibitive norm against it.

A final definitional point warrants further exposition. In some states, a system of 'presumptive'[57] death penalty either used to be[58] or has been[59] part of judicial practice. Under this system, the death penalty is imposed for certain offences unless 'the accused person [can] prove beyond a fair preponderance of the evidence why he or she should *not* be executed'.[60] Indeed, given its potential infringement of the defendant's fair-trial rights, this 'presumptive' use of capital punishment has always been controversial. According to the definition on the MDP provided above, however, such practice (if any[61]) is coded as a discretionary, rather than mandatory,[62] death penalty.

[56] The Advocates for Human Rights et al, 'Kuwait's Compliance with International Covenant on Civil and Political Rights: The Death Penalty', 12 September 2023, available at: theadvocatesforhumanrights.org/Res/TAHR%20WCADP%20Kuwait%20CCPR%20Death%20Penalty%20Final.pdf [last accessed 30 September 2025]. According to two different sources in 2012 and 2017, the country at least retains mandatory death penalty for blasphemy and drug offenses. See Amnesty International, 'Kuwait: Blasphemy Death Penalty Law would Violate International Law,' 11 May 2012, available at: amnesty.org/fr/wp-content/uploads/2021/07/mde170012012en.pdf [last accessed 30 September 2025]; Sander, 'The Death Penalty for Drug Offences: Global Overview 2017,' March 2018, available at: hri.global/files/2018/11/13/HRI-Death-Penalty-Report-2018-v2.pdf 38–39 [last accessed 30 September 2025].

[57] The author thanks the anonymous reviewer for suggesting this term. This may also be called the 'doctrine of extenuating circumstances.' See, eg Novak, 'Guilty of Murder with Extenuating Circumstances: Transparency and the Mandatory Death Penalty in Botswana' (2009) 27 *Boston University International Law Journal* 173.

[58] See, eg Novak, 'Capital Sentencing Discretion in Southern Africa: A Human Rights Perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases' (2014) *African Human Rights Law Journal* 24.

[59] See below.

[60] Novak, supra n 58 at 26. (italics in original)

[61] For instance, formally speaking, Article 203 (2) of the Penal Code of Botswana imposes this 'presumptive' death penalty system for murder, whereas the judicial practice effectively invalidated it. See, eg Kelaletswe v State [1995] BLR 100 (Botswana CA). On the other hand, whilst the Penal Code lists the death penalty as the only punishment for 'treason' and 'instigating invasion' in sections 34 and 35, section 40 explicitly allows the judiciary to take account of extenuating circumstances on its own initiative. As Novak observes, this system

[62] Novak, supra n 57 at 173.

With these understandings in mind, the following sections explore the relevant practice which may be drawn to support a customary prohibition of the MDP.

3. EXAMINING THE PRACTICE OF THE MDP

A. A general decline in practice of the MDP

To establish a customary prohibition, one needs to demonstrate a widespread and conformative practice, ie the non-mandatory imposition of capital punishment. Before entering the substantive analysis, it is important to remember that the MDP is defined as domestic legislation imposing the death penalty without recognising the judicial discretion in sentencing. In other words, just because the death penalty is prescribed as the only form of punishment for certain crimes in domestic legislations does not necessarily mean that the MDP within the foregoing definition is imposed.[63] The crucial decisive factor remains whether death sentences for such crimes are not subject to any general leniency provision. If so, a coherent interpretation of state practice[64] indicates that no MDP is in fact present.

In the early 1990s, as is the case today, retentionist states of capital punishment were primarily concentrated in the Americas, Africa and Asia. The practice of the MDP, however, was far more prevalent. To start with, while the US Supreme Court held that the MDP was unconstitutional in as early as 1976,[65] it took around two decades for the same practice to emerge in the Caribbean region.[66] At the turn of the 21st century, the MDP system of four states in this region was found violative of their human rights treaty obligations by the Inter-American Commission on Human Rights (IACommHR).[67] Around the same time, the Judicial Committee of the Privy Council (JCPC), the apex court of various British territories and Commonwealth countries, took a similar position.[68] In three judgments heard and delivered together by the JCPC in 2002, the MDP systems in Belize,[69] St Lucia[70] and St Christopher and Nevis[71] were all found to be violative of their respective constitutions. For instance, in *Reyes*,[72] the appellant was charged and convicted of murder, which, according to Section 102(3)(b) of the then Criminal Code in Belize, was classified as a crime subject to the MDP. The JCPC held that the MDP, which 'den[ies] the offender the opportunity . . . to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate',[73] violated Section 7 of the Belize Constitution that prohibited torture and other forms of ill-treatment. This position has since been reiterated in subsequent rulings.[74] Indeed, the actual enforcement of abolition takes various forms in different states, depending on the normative contexts. Belize removed its MDP system for murder by including life imprisonment as a legal punishment in

[63] Somewhat curiously, the literature on the MDP has often not clarified at this level what is meant by retaining the MDP.

[64] See section 2.B.

[65] *Gregg v Georgia*, 428 U.S. 153 (1976).

[66] Tittemore, 'Summary of Comments on the Current and Future Status of Litigation on the Issue of the Mandatory Death Penalty in the Commonwealth Caribbean' (2005) 99 *Proceedings of the Annual Meeting (American Society of International Law)* 74, 75.

[67] Tittemore, 'Summary of Comments on the Current and Future Status of Litigation on the Issue of the Mandatory Death Penalty in the Commonwealth Caribbean' (2005) 99 *Proceedings of the Annual Meeting (American Society of International Law)* 74, 75. For jurisprudence, see, eg Cases 12.067 *Michael Edwards,* 12.068 *Omar Hall* and 12.086 *Brian Schroeter and Jeronimo Bowleg v. Bahamas* Report No 48/01.

[68] For a more detailed discussion on jurisprudence in the Caribbean area in early 21th century, see Yearwood and Newton, 'The Retention of the Mandatory Death Penalty in Trinidad and Tobago: An Ongoing Human Rights Concern' (2022) 1 *Human Rights in the Global South* 13–34.

[69] *Reyes v R* [2002] 2 AC 235.

[70] *R v Hughes* [2002] 2 AC 259

[71] *Fox v R* [2002] 2 AC 284.

[72] *Reyes*, supra note 69.

[73] ibid, 256, at para 43.

[74] In these cases, the MDP in such states as 'Bahamas, Jamaica, Dominica, Antigua and Barbuda and Grenada' was found unconstitutional. See Nowak, supra note 21 at 781.

Section 106 of its Criminal Code.[75] On the other hand, the MDP of Barbados was, on several occasions,[76] declared by the IACtHR to be violative of the American Convention on Human Rights. However, substantive reform did not occur until after the Caribbean Court of Justice (CCJ)[77] ruled the system unconstitutional in 2018.[78] Moreover, unlike many other states, which could outlaw the MDP by legal amendment, Barbados had to amend its Constitution to remove a clause explicitly recognising the existence of the MDP.[79]

The case of Grenada is particularly noteworthy, as it illustrates the limitations of relying solely on the text of domestic criminal law provisions to ascertain state practice regarding the MDP. Superficially, the state retains the death penalty as the only punishment for certain crimes, such as murder. However, 'after the Eastern Caribbean Supreme Court ruled that the application of the death penalty should be applied only in light of "exceptional and appropriate circumstances" and should always be subject to effective judicial review',[80] some discretion for death sentencing[81] was allowed in such cases. In a similar vein, the JCPC ruled in *Coard*[82] that section 230 of the Grenadian Criminal Code, which imposed the MDP for murder, 'must be interpreted to mean [. . .] that the death penalty for murder is discretionary: a person convicted of murder may be sentenced to death but may instead be given a lesser sentence.'[83] Another similar example of this kind is the MDP system in El Salvador, which the state's Military Code prescribes for a wide range of crimes. However, the available data clearly suggests that even in such cases, judicial discretion has been permitted.[84] For this reason, the UN Secretary-General wrote in a 2005 report that the Salvadoran practice regarding the MDP was 'encouraging.'[85]

On the other hand, as has been explained above in section 2.B., the meaning state practice carries is a product of interpretation, especially when the available information is incomplete for law ascertainment purposes. For example, while the JCPC declared the MDP of Dominica unconstitutional in the 2005 case of *Balson*, the state has not officially and completely removed legal provisions imposing the MDP from its domestic legislation.[86] However, if one takes into account the fact that Dominica has not carried out any execution since 1986 and that no one was sentenced to death after the MDP was declared unconstitutional, it is sensible to characterize Dominica as having adhered to the practice of prohibiting the MDP. The inability of major legal amendments can thus be characterized as an incidental outcome shaped by political conditions.

[75] The Advocates for Human Rights et al, 'Belize Stakeholder Report for the United Nations Universal Periodic Review: The Death Penalty,' 18 July 2023, available at: theadvocatesforhumanrights.org/Res/AHR%20Belize%20UPR%20Death%20Penalty%20Final%202.pdf [last accessed 30 September 2025].

[76] *Case of Boyce* et al *v Barbados* IACtHR Series C 169 (2007) at para 51; *Case of Tyrone Dacosta Cadogan v Barbados* IACtHR Series C 204 (2009) at para 58–59.

[77] Mounsey, 'Barbados Parliament Passes Constitutional Amendment Eliminating Mandatory Death Penalty Sentences,' 15 April 2019, available at: constitutionnet.org/news/barbados-parliament-passes-constitutional-amendment-eliminating-mandatory-death-penalty [last accessed 30 September 2025].

[78] This was accompanied by a review of death sentences for inmates previously subject to the MDP. See Moratorium on the Use of the Death Penalty: Report of the Secretary-General, A/75/309 (13 August 2020).

[79] The Constitution (Amendment) Bill, 2019 (Barbdos).

[80] The Greater Caribbean for Life, The Caribbean Institute for Human Rights, et.al, 'Shadow Report on the Death Penalty in the Republic of Grenada,' 2015, at 3, para 6, available at: upr-info.org/sites/default/files/documents/2015-01/js2_upr21_grd_e_main.pdf [last accessed 30 September 2025]. For another case where the MDP of Grenada was found incompatible with fundamental human rights before the Inter-American Commission on Human Rights, see Case 11.743, *Baptiste v. Grenada* Report No 38/00.

[81] ibid.

[82] *Coard & Ors v. The Attorney General* (Grenada) [2007] UKPC 7.

[83] ibid. at para 26.

[84] Report of the Secretary-General, E/2005/3 (9 March 2005) 20, at para 73.

[85] ibid.

[86] *Bally Sheng Balson v The State* [2005] UKPC 2. The Advocates for Human Rights et al, 'Joint Stakeholder Report for the United Nations Universal Periodic Review: The Death Penalty,' 8 April 2024, available at: theadvocatesforhumanrights.org/Res/Dominica%20UPR%20DP%20Final.pdf [last accessed 30 September 2025].

Overall, the current status of practice shows that Trinidad and Tobago has become the only outlier in the Caribbean area to continue the MDP for murder,[87] even after the regime was challenged before the IACtHR and the JCPC. In *Hilaire and Others*,[88] thirty-two defendants were tried and sentenced to death for separate crimes of murder under the MDP system of the Offences Against the Person Act.[89] The IACtHR found the legislation to be violative of the American Convention on Human Rights for failing to consider the different seriousness of each murder.[90] Despite the Court's decision to the contrary, Trinidad and Tobago challenged the Court's jurisdiction and declined to appear before it.[91] In the 2022 *Chandler* case,[92] the MDP's constitutionality was also examined before the JCPC. The appellant was sentenced to death according to the legislation mentioned above in 2011. The Court took the view—and, importantly, the state conceded—that the MDP amounted to 'cruel and unusual punishment' in contravention of section 5(2)(b) of the 1976 Constitution.[93] Unusually, however, due to the special design of the 1976 Constitution of Trinidad and Tobago, the JCPC found it impossible to invalidate the MDP by itself, as section 6 bars any pre-existing laws—including the legislation in question, enacted in 1925—from being held unconstitutional.[94] The Court ultimately dismissed the appeal and left the matter to Parliament.

State practice conforming to a ban on the MDP is also readily observable in Africa. For some states, such as Algeria[95] and Morocco,[96] the MDP has not been part of their legal systems, and the discretionary power of judges on sentencing is explicitly recognized in domestic laws. The 1954 Penal Code of Libya and its 1974 amendment[97] list a series of crimes punishable by death only, including murder and a series of national security- and military-related crimes. However, a general mitigating provision is also in place, stating that 'extenuating circumstances' can be considered '[i]n all cases'.[98] Furthermore, no evidence suggests that, despite this provision, the death penalty is automatically imposed concerning these offences.

On the other hand, states which previously retained the MDP but later moved towards its abolition followed a similar path as their Caribbean counterparts, with court rulings playing a key role. In Malawi, whilst the complete abolition of the death penalty per se has encountered some setbacks,[99] the state's MDP system was struck down by the High Court in the 2007 case

[87] Casciani, 'UK Judges Refuse to Ban Death Penalty in Trinidad and Tobago,' 16 May 2022, available at: bbc.co.uk/news/uk-61468346 [last accessed 30 September 2025]. The practice of Trinidad and Tobago will be discussed later in this same section.

[88] *Case of Hilaire, Constantine and Benjamin* et al, IACtHR Series C No 94 (2002).

[89] ibid., at para 2–3.

[90] ibid., at para 103.

[91] ibid., at paras 16–17.

[92] *Chandler v The State* [2020] UKPC 19 [2022].

[93] ibid., at para 12.

[94] ibid. at para 96.

[95] Since its passage in 1966, Article 53 of the Algeria Penal Code offers the possibility of reducing the death sentence to ten years' imprisonment, providing that extenuating circumstances are present. See Ordinance No. 66–156 of 8 June 1966.

[96] Criminal Code (promulgated by Dahir No. 1–59-413 of 28 Joumada II 1382 (November 26, 1962), and amended up to Law No. 103–13), available at: wipo.int/wipolex/en/legislation/details/19793 [last accessed 30 September 2025].

[97] Law No. (80) of 1975 amending and repealing certain provisions of the Penal Code, available at: security-legislation.ly/latest-laws/law-no-80-of-1975-amending-and-repealing-certain-provisions-of-the-penal-code [last accessed 30 September 2025].

[98] Article 29 of the Penal Code (1954). For an English translation, see DCAF, 'Penal Code,' available at: security-legislation.ly/latest-laws/penal-code/ [last accessed 30 September 2025].

[99] The Supreme Court of Appeal in Malawi ruled the death penalty per se to be unconstitutional in 2021, granting the resentencing of inmates subjected to the MDP system before 2007, granting the resentencing of inmates subjected to the MDP system before 2007. See *Khoviwa v R* (MSCA Miscellaneous Criminal Appeal 12 of 2017) [2021] MWSC 3 (28 April 2021); Nowak, 'Malawi and the Puzzle of Constitutional Death Penalty Clauses,' 1 June 2021, avaliable at:blogs.law.ox.ac.uk/research-and-subject-groups/death-penalty-research-unit/blog/2021/05/malawi-and-puzzle [last accessed 30 September 2025]. However, the *Khoviwa* ruling was later reversed by the Supreme Court in 2024. See death Penalty Information Center, 'Malawi Supreme Court Retreats from Opinion that Declared the Death Penalty Unconstitutional,' 24 August 2021 (updated 14 March 2025), available at: deathpenaltyinfo.org/malawi-supreme-court-retreats-from-opinion-that-declared-the-death-penalty-unconstitutional [last accessed 10 November 2025].

of *Kafantayeni*.[100] In the 2005 *Kigula*[101] case, the defendant challenged the mandatory death sentence imposed on her for murdering her husband. The Constitutional Court of Uganda invalidated the MDP, paving the way for the resentencing of death row inmates subject to the system. In 2019, the Ugandan Parliament further passed an act to, among other things, 'remove the mandatory death penalty prescribed by [the Penal Code Act and the Anti-Terrorism Act, 2002]'.[102]

Noteworthily, in a number of cases, the end of the MDP in African states was followed by other progressive agendas. For example, Zimbabwe abolished the MDP through a constitutional reform, which expressly granted domestic courts 'a discretion whether or not to impose the [death] penalty'.[103] At the end of 2024, following the passage of the Death Penalty Abolition Act,[104] Zimbabwe took a step further to become the 128th abolitionist state of capital punishment[105] in all circumstances. In the 2010 case of *Mutiso*[106] before the Court of Appeal of Kenya at Mombasa, the classic definitional issue of the MDP was raised. The appellant, Mutiso, was formerly convicted of murder and was subject to the MDP under section 204 of the Penal Code, which stipulates that 'Any person who is convicted of murder shall be sentenced to death.'[107] Noteworthily, in response to Mutiso's complaint that the MDP was arbitrary because it did not account for the circumstances of individual cases, the Director of Public Prosecutions noted that

> We now concede that notwithstanding the mandatory provisions of section 204 of the Penal Code, a trial Judge still retains a discretion not to impose the death penalty and instead impose such sentence as may be warranted by the circumstances and facts of the particular case. That is our position. The word "shall" in section 204 should now be read as "may".[108]

In any case, the Court expressly found that the MDP constituted 'inhuman or degrading punishment or treatment and [violated the right to a] fair trial'.[109] Moreover, the previous tribunal, which convicted Mutiso according to section 204 without exercising judicial discretion, was acting arbitrarily.[110] Along with the jurisprudence mentioned above, the *Mutiso* judgment provided a stepping stone on which the Supreme Court of Kenya declared the MDP to be unconstitutional in 2017.[111] This progressive interpretation was later found by the High Court at Kitale to '[apply] *mutatis mutandis* to the provisions of Section 8(2) of the Sexual Offences Act, which imposes the mandatory life imprisonment for the offence of defilement' in the 2018 *Samwel* case.[112] In conclusion, with regard to safeguarding the fundamental rights of death row prisoners, the progress in Africa over the past decades has been substantial. According to data from the British government in 2015, the invalidation of the MDP in Malawi, Kenya and Uganda

[100] *Kafantayeni & Ors v Attorney General* (2007) (Constitutional Case No 12 of 2005) [2007] MWHC 1.
[101] *Kigula and 416 others v Attorney General*, Constitutional petition, Case No 6 of 2003. For a later Supreme Court judgment affirming this position, see *Attorney General v Susan Kigula & 417 Ors* [2009] UGSC 6 (21 January 2009).
[102] Law Revision (Penalties in Criminal Matters) (Miscellaneous Amendments) Act, Act 19, 2021.
[103] Article 48(2)(a) of the Constitution of Zimbabwe 2013.
[104] Death Penalty Abolition Act, Act No. 4 of 2024.
[105] Hoyle and Jabbar, 'Celebrating Abolition in Zimbabwe Twenty Years after Its Last Execution,' 8 January 2025, available at: blogs.law.ox.ac.uk/death-penalty-research-unit-blog/blog-post/2025/01/celebrating-abolition-zimbabwe-twenty-years#:~:text = On%20New%20 Year's%20Eve%202,024,country%20to%20end%20capital%20punishment. [last accessed 30 September 2025].
[106] *Godfrey Ngotho Mutiso v Republic* (Criminal Appeal 17 of 2008) [2010] KECA 487 (KLR) (30 July 2010) (Judgment)
[107] ibid. at para 1–2.
[108] ibid. at para 31.
[109] ibid. at para 36.
[110] ibid. at para 37.
[111] Mwangi, 'Francis Karioko Muruatetu v. REPUBLIC. Pet. No. 15 & 16/2015' (2018) 112 *American Journal of International Law* 707, 711. For a closer examination of the case, see Chenwi, 'The Downfall of the Mandatory Death Penalty in Kenya' (2019) 63 *Journal of African Law* 25.
[112] *David Esokon Samwel v Republic* (2020) eKLR, Judgment of 3 March 2020, at para 9.

alone contributed to the commutation of 4000 former death row inmates.[113] Lastly, as of 1 January 2025, nearly half of the sovereign states on the African continent—including Rwanda, Burundi, Togo, Gabon and Benin, to name just a few[114]—have officially abolished the death penalty, and, as a result, face no issues relating to the MDP.

A steady accumulation of conforming practice has been equally noticeable in Asia, in spite of its pluralistic composition and the varying human rights records among states. In South Asia, a handful of states have prohibited the use of capital punishment in their constitutions, such as Bhutan[115] and Nepal.[116] In some retentionist states of capital punishment, the MDP has not been part of their legal systems. For example, in Vietnam, while the death penalty may be imposed for a variety of crimes, some of which may not even involve the loss of life,[117] the death penalty has always been optional rather than mandatory. In other retentionist states of capital punishment, the MDP has also been challenged on various grounds. One of the earliest examples is the 1983 case of *Mithu*[118] before the Indian Supreme Court. There, the Court had to decide whether section 303 of the 1860 Indian Penal Code, which prescribed the MDP for murder committed by life-convicts, was constitutional. Since the provision targeted such a specific group of people, debates over equality rights were raised. Eventually, in addition to the common reasoning that the MDP violated the right to life and personal liberty enshrined in Article 21 of the Indian Constitution, the Court held that the law in question 'assumes that life-convicts are a dangerous breed of humanity as a class', which 'is not supported by any scientific data' and compromised the right to equality protected under Article 14.[119] This conclusion was echoed by the Supreme Court of Bangladesh in the 2010 case of *Bangladesh Legal Aid and Services Trust*,[120] where the MDP and sentencing discretion were approached through a somewhat unusual lens of the legislature acting *ultra vires* to undermine the judiciary's authority regarding sentencing.

To date, four out of five Central Asian states—Kazakhstan, Kyrgyzstan, Turkmenistan and Uzbekistan—have abolished capital punishment in all circumstances.[121] The only state to have retained the death penalty as a form of legal punishment in this area, Tajikistan, has not carried

[113] British High Commission Dar es Salaam, 'The UK and EU Mark International Day Against the Death Penalty,' 9 October 2015, available at: gov.uk/government/news/the-uk-and-eu-mark-international-day-against-the-death-penalty [last accessed 30 September 2025].

[114] FIACAT, 'Abolition of the Death Penalty in Sub-Saharan Africa,' available at: fiacat.org/en/our-actions/project-for-the-abolition-of-the-death-penalty-in-subsaharan-africa#:~:text=By%20January%201st%202023%2C%2026,death%20penalty%20for%20all%20crimes [last accessed 30 September 2025].

[115] Article 7(18) of the Constitution of the Kingdom of Bhutan, July 18, 2008.

[116] Article 12(1) of the Constitution of the Kingdom of Nepal 2047 (1990).

[117] The most prominent example is the death penalty for drug trafficking. See, eg Article 194 of Criminal Code, Law No. 100/2015/QH13 of November 27, 2015.

[118] *Mithu v State of Punjab* (1983) AIR 1983 SC 473.

[119] ibid. The finding of the MDP's unconstitutionality was reiterated by the same court in 2012. See *State of Punjab v Dalbir* (2012) AIR 2012 SC 1040. Some recent developments are worth mentioning. In 2024, a new legislation in West Bengal introduced, among other things, the MDP for '[p]ersons committing an offence of rape and inflicting injury which causes death or causes the woman to be in a vegetative state.' See the Aparajita Women and Child Bill, 2024, 2 September 2024, at 7, available at: prsindia.org/files/bills_acts/bills_states/west-bengal/2024/Bill14of2024WB.pdf [last accessed 30 September 2025]. For a brief introduction to this bill and some other Indian jurisprudence on sentencing, see Nirajan, 'Explained: Aparajita Women and Child Bill, 2024,' December 20, 2024, available at: https://p39ablog.com/2024/12/aparajita-bill-explained/ [last accessed 30 September 2025]. In July 2025, however, President Droupadi Murmu raised some doubts about the bill, remarking on the disproportionality and cruelty of some amendments. The bill was later returned to West Bengal for further consideration. See Pradhan, 'President Returns West Bengal's Aparajita Bill, Flags Harsh Rape Penalties', *Indian Express*, 25 Jul 2025, available at: newindianexpress.com/nation/2025/Jul/25/president-returns-west-bengals-aparajita-bill-flags-harsh-rape-penalties [last accessed 30 September 2025].

[120] *Bangladesh Legal Aid and Services Trust v Bangladesh* (2010) 30 BLD (HCD) 194. For a comparison between the abolishment of the MDP in India and Bangladesh, see Novak, 'Abolition of the Mandatory Death Penalty in India and Bangladesh: A Comparative Commonwealth Perspective' (2015) 28 *Pacific McGeorge Global Business & Development Law Journal* 227–254.

[121] Amnesty International, 'Death Sentences and Executions 2024,' 8 April 2025, available at: amnesty.org/en/documents/act50/8976/2025/en/ [last accessed 30 September 2025]. ('Death Penalty Report 2024')

out any execution since 2004.[122] There is no evidence indicating that the Tajikistani criminal laws impose the MDP. Meanwhile, the country's Criminal Code explicitly confers upon judges the discretion to administer lighter penalties where appropriate.[123]

In some East Asian states, the MDP seems to exist in name only. For instance, although Article 81 of the Japanese Penal Code provides that '[a] person who conspires with a foreign state and thereby causes the state to exercise armed force against Japan'[124] is punished by death only, this provision has never been invoked since its enactment. Furthermore, Article 66 of the same legislation recognizes the judicial discretion of sentencing, with the commutation of capital punishment being referred to in Article 68(1). No other legal provision seems to limit or exclude this discretion in sentencing for this crime of conspiracy,[125] and Article 81 is the only offence punishable by the MDP in Japan. A similar practice is found in Thailand, where the MDP is prescribed for certain offences, while the Thai Criminal Code expressly enumerates the legal effects of reductions in capital punishment.[126] Moreover, while the MDP legislations are present in Indonesia, the jurisprudence suggests that judicial discretion of sentencing is exercised in such cases.[127]

Article 93 of the South Korean Criminal Act prescribes the MDP for those 'who [fight] against the Republic of Korea by joining an enemy country'.[128] The Military Criminal Act also provides a broad regime of MDP for, among other things, leading an insurrection,[129] espionage,[130] unlawfully initiating[131] and continuing[132] combat, etc. In spite of the seemingly wide-ranging MDP regime, the practice concerning its actual imposition is virtually non-existent. In 2007, the South Korean Constitutional Court ruled that Article 53(1) of the Military Criminal Act, which provided the MDP for anyone 'murder[ing] his or her superior', to be unconstitutional.[133] As the Court pointed out, the provision failed to distinguish whether there was a subordination relationship between the perpetrator and victim and whether the crime was committed during peacetime or wartime. As such, the indiscriminate imposition of capital punishment was disproportionate. Although this Constitutional Court decision only led to the South Korean legislature removing the MDP for this particular crime, there is no inherent reason why arguments for the previous Article 53(1)'s unconstitutionality are not generally applicable to the remaining MDP provisions mentioned above. As such, bearing in mind that South Korea

[122] World Coalition against the Death Penalty, 'Tajikistan,' last updated 23 May 2023, available at: worldcoalition.org/pays/tajikistan/ [last accessed 30 September 2025].

[123] Article 60(3) of the Criminal Code of the Republic of Tajikistan.

[124] Act No.45 of 1907.

[125] This observation also corresponds to that of the Secretary-General of UN Economic and Social Council. See Report of the Secretary-General, supra n 78 at 20, para 73.

[126] Section 52 of the Criminal Code B.E.2499 (1956). In a sense, the example of China may be considered a variation of the Japanese and Thai practice. In China, formally speaking, a number of crimes are punishable only by death. It is noteworthy, however, that Article 48 of the Chinese Criminal Law stipulates that 'If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence.' In the latter case, a commutation may be granted. As such, it is theoretically possible for someone to be sentenced to death according to China's MDP system on the on hand, and yet receive the two-year 'probation,' on the other. In this case, it becomes difficult to say whether, and to what extent, the MDP system remains intact. For a brief introduction, see Huang, *On the Alternative Punishment to the Death Penalty in China* (2024) 72–73.

[127] For an introduction to some cases, see Simandjuntak, 'Spectacle of the Scaffold? The Politics of Death Penalty in Indonesia,' 28 August 2015, at 1, 6, available at: iseas.edu.sg/wp-content/uploads/pdfs/ISEAS_Perspective_2015_46.pdf [last accessed 30 September 2025].

[128] Criminal Act, 1953 (Act No. 293).

[129] Article 5(1) of the Military Criminal Act, Act No. 14181, May 29, 2016.

[130] Article 13(1) of the Military Criminal Act, Act No. 14181, May 29, 2016.

[131] Article 18 of the Military Criminal Act, Act No. 14181, May 29, 2016.

[132] Article 19 of the Military Criminal Act, Act No. 14181, May 29, 2016.

[133] Constitutional Court of Korea, 2006 Heonga 13, Judgment of 29 November 2007. For a brief introduction in English, see Hands off Cain, 'South Korea. Automatic Death Penalty Ruled Unconstitutional,' 3 December 2007, available at: english.nessunotocchicaino.it/notizia/south-korea-automatic-death-penalty-ruled-unconstitutional-9333262?utm_source=chatgpt.com [last accessed 30 September 2025].

has not carried out any executions for nearly three decades,[134] the practice of MDP is practically absent as well.

In comparison, the case of Taiwan serves as an example of the comprehensive removal of the MDP. In 1990, the Taiwan Constitutional Court (TCC) held that the kidnapping for ransom, punishable only by death under the 1957 Robbery Punishment Act, did not prevent the judiciary from exercising its discretion in sentence determination according to some already-existing provisions in the Criminal Code.[135] For this reason, albeit seemingly imposing the MDP, the provision in question was not unconstitutional. In 2006, the Taiwanese legislature took a straightforward step to amend all criminal provisions which listed the death penalty as the sole legal punishment,[136] whether committed during peacetime or wartime. In a 2024 ruling, the TCC ordered the review of a death row inmate's sentence imposed under the MDP regime before 2006,[137] stating that the MDP was exceedingly cruel, disproportionate, and violative of the right to life.[138]

In 2016, Plaçais commented that Malaysia had been taking a somewhat '[paradoxical]' position on drug issues: it adopted progressive policies to help people with drug problems on the one hand, and maintained capital punishment for drug-related crimes, on the other.[139] Although reformist promises were repeatedly made by the government, no concrete progress on this matter was observed.[140] Against this backdrop, she concluded that 'international pressure,' including that created through the Universal Periodic Review (UPR), was of crucial importance.[141] At the time of her writing, drug-trafficking was subject to the MDP system in the country, along with such serious offences as 'murder, treason, and terrorism'.[142] However, roughly since then, efforts to limit the use of capital punishment started to see gradual results. In 2018, Malaysia began a *de facto* moratorium that suspended all executions, which has remained in place up to the time of writing. In 2022, a bill that proposed to remove the MDP was put forward and passed by the Parliament the next year.[143] The bill also abolished life imprisonment without parole, granting judges more discretion in sentencing. Up to 2024, more than 1000 cases previously involving the MDP were reviewed, with most of the death sentences being commuted to imprisonment.[144]

[134] Cho, 'South Korea's Changing Capital Punishment Policy: The Road from de facto to Formal Abolition' (2016) 10 *Punishment & Society* 171.

[135] *Da Fa Guan Shi Zi Di 263 Hao* (J.Y. Interpretation No. 263) (19 July 1990) (R.O.C.). It should be noted that during the 'White Terror' era, the MDP was used extensively, often in the context of national security and national defense. For a general introduction of the Taiwanese legal system during that period, see, eg Huang, 'Frozen Trials: Political Victims and Their Quest for Justice' in Cohen, Alford, et.al (eds), *Taiwan and International Human Rights* (2019) 81–85.

[136] Li and Lin, 'The Status Quo of the Death Penalty Issues in Taiwan' (2010) 1 *East Asian Law Journal* 115, 118.

[137] TCC Judgment 113-Hsien-Pan-8 (20 September 2024) (R.O.C.), at para 136. For a press release on the judgment, see Constitutional Court R.O.C. (Taiwan), 'The TCC delivers its Judgment 113-Hsien-Pan-8 (2024),' 20 September 2024, available at: cons.judicial.gov.tw/en/docdata.aspx?fid=5506&id=353656 [last accessed 30 September 2025]. It is noteworthy that the judgment is also the TCC's latest confirmation of capital punishment's constitutionality. For a brief introduction, see Peng, 'Continuing to "Tinker with the Machinery of Death"? Taiwan Constitutional Court's Death Penalty Judgment', Oxford Human Rights Hub, 28 October 2024, available at: ohrh.law.ox.ac.uk/continuing-to-tinker-with-the-machinery-of-death-taiwan-constitutional-courts-death-penalty-judgment/ [last accessed 30 September 2025].

[138] ibid. at para 88.

[139] Plaçais, 'The Death Penalty for Drug Trafficking in 2016' in Ensemble Contre la Peine de Mort, *6th World Congress against the Death Penalty Oslo* (2016) 85–6.

[140] ibid.

[141] ibid.

[142] Fourth Universal Periodic Review of Malaysia Submission by the United Nations Country Team in Malaysia (UNCT), 21 July 2023, available at: uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=12546&file=EnglishTranslation#:~:text=The%20Abolition%20of%20Mandatory%20Death,murder%2C%20treason%2C%20and%20terrorism [last accessed 30 September 2025].

[143] The Abolition of Mandatory Death Penalty Act 2023 [Act 846].

[144] UN Human Rights Office of the High Commissioner, 'Abolition of the Death Penalty is Gaining Momentum Worldwide,' 10 March 2025, available at: ohchr.org/en/stories/2025/03/abolition-death-penalty-gaining-momentum-worldwide [last accessed 30 September 2025].

Lastly, in West Asia, where numerous retentionist states of capital punishment are located, the MDP is also more prevalent than in other parts of Asia. It appears that most retentionist states of capital punishment in this area implement the MDP for certain crimes. In Iran[145] and Afghanistan,[146] however, extenuating circumstances can be considered by judges even if the defendant faces charges involving offences punishable only by death.

In any case, overall, the global trend towards abolishing the MDP, gaining its momentum from the 'judicial dialogue'[147] and legal transplant[148] across jurisdictions, creates a general picture of consistent, custom-forming practice. This is even more so if one considers the doctrinal teaching of the ICJ in *Nicaragua* that 'absolutely rigorous conformity'[149] of such practice with an alleged norm is unnecessary. Indeed, for the consideration of comprehensiveness, it remains necessary to examine the state practice inconsistent with the present article's proposed customary prohibition. Drawing on news reports, UN documents, statements of NGOs during the UPR process, etc., an investigation of the available information[150] suggests that the following 24 states[151] have retained the MDP as of the end of 2024: Brunei Darussalam,[152] Cameroon,[153] Ghana,[154]

[145] The Advocates for Human Rights et al, 'Iraq Stakeholder Report for the United Nations Universal Periodic Review: The Death Penalty,' 16 July 2024, at para 11, available at: theadvocatesforhumanrights.org/Res/Iraq%20UPR%20DP%20v2.pdf [last accessed 30 September 2025].

[146] UN Assistance Mission in Afghanistan, 'Corporal Punishment and the Death Penalty in Afghanistan,' May 2023, at 11, available at: unama.unmissions.org/file/21156/download?token=4a7i4xoE [last accessed 27 September 2025].

[147] See, eg Nowak, supra n 21.

[148] See, eg Barak-Erez, 'Legislation as Transplantation' in Lupo and Scaffardi (eds), *Comparative Law in Legislative Drafting: The Increasing Importance of Dialogue amongst Parliaments* (2014) 19; Schadbach, 'The Benefits of Comparative Law: A Continental European View' (1998) 16 *Boston University International Law Journal* 331, 387.

[149] *Nicaragua*, 98, at para 186.

[150] The practice of Egypt has remained somewhat unclear. On the one hand, Article 17 of the 1937 Egyptian Penal Code provides for the possibility of the death penalty being 'replaced by a life hard labor or temporary hard labor penalty.' For this reason, the Cornell Center on the Death Penalty Worldwide codes Egypt as not implementing the MDP. See Cornell Center on the Death Penalty Worldwide, 'Egypt,' 18 October 2023, available at: dpw.lawschool.cornell.edu/database/#/results/country?id=22 [last accessed 30 September 2025]. See also The Advocates for Human Rights et al, 'Egypt's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Suggested List of Issues Relating to the Death Penalty', 23 January 2023, available at: theadvocatesforhumanrights.org/Res/Egypt%20CAT%20DP%20FINAL.pdf [last accessed 30 September 2025]. However, the same Penal Code formally retains the MDP for such crimes as premeditated murder (Article 230). As some authors point out, Article 17 becomes automatically inapplicable when it comes to cases involving the MDP. However, it is unclear why that is the case, and the authors have not cited this view to any authority. See, eg Penal Reform International, 'Towards the Abolition of the Death Penalty and Its Alternative Sanctions in the Middle East and North Africa: Algeria, Egypt, Jordan, Lebanon, Morocco, Tunisia and Yemen,' March 2012, at 30, available at: cdn.penalreform.org/wp-content/uploads/2013/05/MENA-research-report-on-death-penalty-and-alternative-sanctions-ENGLISH-March-20121.pdf [last accessed 30 September 2025]. See also Arafa, '15 Years After the Uprisings: The Legendary Story of the Egyptian's Capital Punishment' (2023) 17 *UNSW Law Society Court of Conscience* 29, 33. On the other hand, however, It remains unclear whether Article 17, as some authors point out, is automatically inapplicable in cases where the MDP is prescribed. However, it must be noted that the Egyptian representative seems to indicate before the HRC that the MDP *stricto sensu* does exist. See Summary Record of the 3958th Meeting, CCPR/C/SR.3958 (6 March 2023) at para 23.

[151] For some earlier documentation of such practice, see, eg Legal and Human Rights Centre, 'Mandatory Death Penalty Challenge Come for the First Mention,' 29 October 2018, available at: humanrights.or.tz/en/news-events/mandatory-death-penalty-challenge-come-for-the-first-mention [last accessed 30 September 2025]; Kadri, 'Forced to Kill: The Mandatory Death Penalty and Its Incompatibility with Fair Trial Standards,' May 2016, at 1, 8, available at: geneva-academy.ch/joomlatools-files/docman-files/Publications/Other%20publications/Forced%20to%20Kill%20-%20The%20Mandatory%20Death%20Penalty%20and%20its%20Incompatibility%20with%20Fair%20Trial%20Standards.pdf [last accessed 30 September 2025].

[152] The Advocates for Human Rights et al, 'Brunei Darussalam: Joint Stakeholder Report for the United Nations Universal Periodic Review: The Death Penalty,' 8 April 2024, at 2–3, available at: theadvocatesforhumanrights.org/Res/Brunei%20UPR%20DP%20Final.pdf [last accessed 30 September 2025].

[153] Laws on Countering Terrorism Worldwide, 'Cameroon,' 2024, available at: counterterrorlaw.info/country/cameroon [last accessed 30 September 2025]; Capital punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E/2025/75 at para 70.

[154] Article 3(3) of the Constitution of the Fourth Republic of Ghana (Promulgation) Law, 1992. Noteworthily, Ghana sentenced several people to death for high treason in early 2024. See Dubawa, 'EXPLAINER: Ghanaian Court Sentences Six Persons to Death over 2019 Coup Plot,' 30 January 2024, available at: ghana.dubawa.org/explainer-ghanaian-court-sentences-six-persons-to-death-over-2019-coup-plot/ [last accessed 10 November 2025].

Guyana,[155] Israel,[156] Jordan,[157] Kuwait,[158] Lao People's Democratic Republic,[159] the Maldives,[160] Mauritania,[161] Myanmar,[162] Niger,[163] Nigeria,[164] Pakistan,[165] Qatar,[166] Saudi Arabia, [167] Singapore,[168] Sri Lanka,[169] Sudan,[170] Syria,[171] Tanzania,[172] Trinidad and Tobago,[173] United Arab Emirates and Yemen.[174]

Generally, it is fair to say that the 24 states above, accounting for less than 30 per cent of the retentionist states of capital punishment and 15 per cent of all states worldwide, belong to a very small minority today. It is also reasonable to see such inconsistent practice as not undermining the general consistency of practice in favour of the ban on the MDP. Moreover, depending on the context in which the prohibition of the MDP is raised, non-conforming practices may be reduced to an even smaller, almost negligible minority. For example, some writers have focused specifically on the MDP for drug-related offences, which is implemented by a very limited number of states mentioned above. One may also zero in on the MDP for other offences, such

[155] Cornell Center on the Death Penalty Worldwide, 'Co-operative Republic of Guyana (Guyana),' available at: dpw.lawschool.cornell.edu/database/#/results/country?id = 30 [last accessed 30 September 2025]; Anti-Terrorism and Terrorist-Related Activities Act 2015, Act No 15 of 2015.

[156] Article 2 of the Crime of Genocide (Prevention and Punishment) Law 5710–1950; Article 1(1)(a) of the Nazi and Nazi Collaborators (Punishment) Law 5710–1950.

[157] The Jordanian Penal Code (1960) provides for many of offenses punishable by death only: treason (Articles 110, 111, 113, 120), espionage (Article 124–126), 'assault[ing] the life or freedom of His Majesty the King' (Article 135, section 1), 'unlawfully work[ing] on changing the State's constitution' (Article 136), 'rap[ing] a girl who did not reach fifteen years of age' (Article 292), and more generally, crimes that 'led to the death of a person' (Article 381).

[158] See supra n 56.

[159] The Advocates for Human Rights et al 'The Lao People's Democratic Republic Stakeholder Report for the United Nations Universal Periodic Review: The Death Penalty', 11 October 2024, at 6, available at: theadvocatesforhumanrights.org/Res/Laos%20UPR%20DP%20FINAL.pdf [last accessed 30 September 2025].

[160] See below in section 3.B.

[161] The Advocates for Human Rights et al, 'The Islamic Republic of Mauritania's Compliance with The Convention on the Elimination of All Forms of Discrimination against Women: The Death Penalty', 2023, at 3–4, available at: theadvocatesforhumanrights.org/Res/Mauritania%20-%20Alternative%20report%20on%20death%20penalty%20FINAL%202.pdf [last accessed 30 September 2025].

[162] Death Penalty Report 2024, at 13.

[163] Laws on Countering Terrorism Worldwide, 'Niger,' available at: counterterrorlaw.info/country/niger [last accessed 30 September 2025].

[164] The Advocates for Human Rights et al, 'Nigeria Stakeholder Report for the United Nations Universal Periodic Review: The Death Penalty,' 18 July 2023, at 2, available at: theadvocatesforhumanrights.org/Res/AHR%20WCADP%20ASF%20Nigeria%20UPR%20Final.pdf [last accessed 30 September 2025].

[165] The Catholic Herald, 'Christian Mother of Four Sentenced to Death for "Blasphemous" WhatsApp Messages in Pakistan', 21 September 2024, available at: thecatholicherald.com/mother-of-four-sentenced-to-death-for-whatsapp-messages-in-pakistan/ [last accessed 30 September 2025].

[166] The Advocates for Human Rights et al, 'Qatar's Compliance with the International Covenant on Economic, Social and Cultural Rights: The Death Penalty', 28 August 2023, at 3, available at: theadvocatesforhumanrights.org/Res/Qatar%20DP%20CESCR%20Final.pdf [last accessed 30 September 2025].

[167] Death Penalty Report 2024, at 14.

[168] For a detailed introduction, see Hoyle and Hutton, 'National Sovereignty Versus Universal Human Rights: Drugs and the Mandatory Death Penalty in Singapore,' 2024, available at: ora.ox.ac.uk/objects/uuid:b6d7a05e-1ed5-45f7-b513-a17f3be5f99a/files/rgm80hw51r [last accessed 30 September 2025].

[169] Satkunanathan and Sato, 'Who Wants the Death Penalty? Results of A Public Perception Twitter Survey on the Death Penalty in Sri Lanka,' Eleos Justice, 8 September 2021, available at: monash.edu/law/research/eleos/blog/eleos-justice-blog-posts/who-wants-the-death-penalty-results-of-a-public-perception-twitter-survey-on-the-death-penalty-in-sri-lanka [last accessed 30 September 2025].

[170] See below in the same section.

[171] The Advocates for Human Rights et al, 'Syrian Arab Republic Stakeholder Report on the Death Penalty for the United Nations Universal Periodic Review,' 15 July 2021, at para 13, available at: theadvocatesforhumanrights.org/Res/Syria%20UPR%20Death%20Penalty%20Final.pdf [last accessed 30 September 2025].

[172] According to Article 197 of the Tanzania Penal Code (Chapter 16), 'Any person convicted of murder shall be sentenced to death' with the exception of pregnant women.

[173] See below.

[174] According to a 2016 source, both countries impose the MDP for drug crimes. See Kadri, 'Forced to Kill: The Mandatory Death Penalty and its Incompatibility with Fair Trial Standards,' May 2016, at 7, available at: ibanet.org/MediaHandler?id=4ab71f35-62d0-4fea-9f45-9b57d620001e [last accessed 30 September 2025].

as those related to religion.[175] In this context, similarly, only a handful of states—including Mauritania, Pakistan and Sudan[176]—will be coded as non-conforming states.

In addition to this simple number-counting, a more careful scrutiny of the non-conforming practices reveals that it reflects neither (i) an *opinio juris* supporting a norm contrary to the prohibition of the MDP, nor (ii) an *opinio non juris* contesting the prohibition as customary international law. First, the MDP system in some states remains in place largely because of incidental political conditions. As the example of Trinidad and Tobago has illustrated, the MDP's continued existence has little to do with any particular legal justification for its imposition and more to do with the political processes required to amend the oppressive legislation. A somewhat comparable example may be the practice of Tanzania. In numerous cases before the African Court on Human and Peoples' Rights, such as *Rajabu*,[177] *Henerico*,[178] *Misalaba*,[179] *Bonge*,[180] *and Zabron*,[181] the Tanzanian MDP system was repetitively found incompatible with the state's treaty obligation to safeguard, amongst other things, the right to life under Article 4 of the African Charter on Human and Peoples' Rights.[182] Importantly, Tanzania provided no argument at all to justify the MDP regime.[183] Instead, it merely asked the Court to reject the applicants' remaining claims—for example, those concerning admissibility and whether execution by hanging constituted torture or other prohibited ill-treatment.[184] Since the African Court has the authority to issue binding judgments, and the states' non-compliance has not been accompanied by any justification, the continued existence of the MDP in Tanzania can be characterized as a *violation* of international law, not as an attempt to create a new (exception to a) norm.[185]

Second, *opinio juris* can also be inferred from statements, declarations, or any other written or verbal statement. As will be argued in the next section, many MDP-implementing states have not been consistent in defending their practice on an international level. In comparison, direct support for a universal ban on the MDP is expressed by an overwhelming majority of states in the international community.

[175] For example, certain Islamic states have endorsed a series of UNGA resolutions on '[c]ombating defamation of religions,' which'[w]elcom[ed] . . . the enactment or strengthening of domestic frameworks and legislation to prevent the defamation of religions,' '[u]nderscor[ed] the need to combat defamation of religions,' and purported to authorize limitations on the right to freedom of expression based on 'respect for religions and beliefs.' See Blitt, 'Defamation of Religion: Rumors of Its Death Are Greatly Exaggerated' (2011) 62 *Case Western Reserve Law Review* 347, 349. For the original resolutions, see GA Res 61/164, 21 February 2007, A/RES/61/164; GA Res 64/156, 8 March 2010, A/RES/64/156. For Tesón, this marks the explicit justification of religion-related crimes. See Tesón, 'Fake Custom' in Lepard (ed), *Reexamining Customary International Law* (2017) 95.

[176] Sudan imposes the MDP for 'insist[ing] upon apostasy [. . .] and not being [. . .] convert[ed] to Islam.' See Article 126(2) of the Criminal Act 1991 (1991). For the practice of Mauritania and Pakistan, see supra n 161 and 165.

[177] *Ally Rajabu and Others v. United Republic of Tanzania*, Application No. 007/2015, Judgment (Merits and reparations), 28 November 2019. ('*Rajabu*')

[178] *Gozbert Henerico v. United Republic of Tanzania*, Application No. 056/2016, Judgment (Merits and reparations), 10 January 2022. ('*Henerico*')

[179] *Makungu Misalaba v. United Republic of Tanzania*, Application No. 033/2016, Judgment (Merits and reparations), 7 November 2023. ('*Misalaba*')

[180] *Ibrahim Yusuph Calist Bonge & Others v. United Republic of Tanzania*, Application No. 036/2016, Judgment (Merits and reparations), 4 December 2023. ('*Bonge*')

[181] Nzigiyimana Zabron v. United Republic of Tanzania, Application No. 051/2016, Judgments (Merits and reparations), 4 June 2024. ('*Zabron*')

[182] See, eg *Rajabu*, at paras 110–111; Misalaba, at para 157; *Bonge*, at para 120; *Zabron*, at para 145.

[183] See, eg *Rajabu*, at para 93.

[184] In both cases, the Court also ordered that the Tanzanian government '[undertake] all necessary measures to repeal from its Penal Code the provision for the mandatory imposition of the death sentence.' See *Rajabu*, at para 163; *Henerico*, at para 207.

[185] Practice inconsistent with a proposed customary norm can be characterized either as a violation of that norm or an act that builds new law. On this general point, see, eg Dixon, *Textbooks on International Law*, 7th edn (2013), 38; Tzanakopoulos, supra n 34 at 158–62.

B. *Opinio juris* favouring the prohibition of the MDP

Although no human rights treaties make direct reference to the MDP, the 'Moratorium on the Use of the Death Penalty' resolutions before the UN General Assembly have a relevant role to play. The first resolution, adopted in 2007,[186] calls upon retentionist states of the death penalty to follow international standards and provide procedural protections for those subject to it. Since then, updated versions of the resolution have been adopted once every two years, with the safeguards being increasingly detailed. In the latest resolution, adopted on 17 December 2024, the General Assembly urges retentionist states '[t]o reduce the number of offences for which the death penalty may be imposed, including by considering removing the mandatory application of the death penalty'.[187] The resolution garnered 130 supportive votes in total. Of equal importance is that even some states that implemented the MDP voted in favour of,[188] or abstained from,[189] the resolution. In other words, no clear demonstration of political willingness can be found in terms of supporting the continuous, legal existence of the MDP.

Traditionally, states do not often disclose their positions on the MDP in the jurisdiction of other states. Nor do they regularly criticize other states' human rights records in general, except in extreme situations involving heinous human rights breaches. Against this background, the UPR process offers a valuable source of information. The mechanism, originally established in 2006 by the UN General Assembly resolution 60/251,[190] involves all UN member states' reporting of their human rights practices and receiving recommendations from other states. The UN member states, whether members of the UN Human Rights Council or not at the same time, may participate in the review process by 'pos[ing] questions, comments and/or mak[ing] recommendations to the States under review'.[191] The reviewed state, in return, may be given the opportunity to respond to questions and recommendations other states put forward.

During the previous cycles of the UPR process, the issue of the MDP was raised on various occasions. Similar to the voting behaviour surrounding the Moratorium Resolutions, responses from states that implement the MDP have been diverse. For instance, in 2015, the Maldives declared that Sierra Leone's proposal for '[c]onsider[ing] abolishing the death penalty and eliminat[ing] mandatory death penalty sentences'[192] was unacceptable. The Iranian government similarly stated in 2020 that it did 'not [support]'[193] Denmark and Georgia's suggestions[194] for removing the MDP. In comparison, many other states have taken a somewhat non-committal position.[195] For instance, in the third round of UPR, Ukraine commented that '[Mauritania's] making the death penalty mandatory in cases of apostasy and blasphemy raised serious concerns.'[196] No response was made to this note. On the other hand, when facing the British proposal for introducing 'a three-tiered classification of murder' and precluding

[186] Moratorium on the Use of the Death Penalty, A/62/439/Add.2 (18 December 2007).
[187] Moratorium on the Use of the Death Penalty, A/RES/79/179 (17 December 2024) 8(f).
[188] These states include Ghana, Jordan, Myanmar and Sri Lanka.
[189] The following states fall within this category: Cameroon, Guyana, Lao People's Democratic Republic, Niger, Nigeria, Sri Lanka and United Arab Emirates.
[190] Resolution adopted by the General Assembly on 15 March 2006, A/RES/60/251 (3 April 2006).
[191] Human Rights Council, 'Basic facts about the UPR,' available at: ohchr.org/en/hr-bodies/upr/basic-facts [last accessed 18 September 2025].
[192] Report of the Working Group on the Universal Periodic Review: Maldives, A/HRC/30/8 (13 July 2015) at para 144.32.
[193] Report of the Working Group on the Universal Periodic Review: Islamic Republic of Iran: Addendum, A/HRC/43/12/Add.1 (20 February 2020) at para 19.
[194] Report of the Working Group on the Universal Periodic Review: Islamic Republic of Iran, A/HRC/43/12 (27 December 2019) at paras 26.116 and 26.120.
[195] Whether, and to what extent, a 'noted' recommendation will be implemented in practice varies from context to context. For a relevant study, see UPR Info, 'Beyond Promises: The Impact of the UPR on the Ground,' 2014, at 5, 33–6, available at: upr-info.org/sites/default/files/documents/2014-10/2014_beyond_promises.pdf [last accessed 7 November 2025]
[196] Report of the Working Group on the Universal Periodic Review: Mauritania, A/HRC/47/6 (9 April 2021) at para 99.

the mandatory sentences of death,[197] the government of Trinidad and Tobago said it had 'no comment on this issue', with the recommendation being merely 'noted.'[198] Jordan responded similarly to a Brazilian recommendation to 'revise the laws that call for [capital punishment's] mandatory imposition', stating that this had been 'examined' and 'noted.'[199] Even Singapore, which imposes the MDP for 'drug crimes, treason and kidnapping',[200] did not take a position similar to that of the Maldives and Iran. Instead, it stated that proposals for removing the MDP from Switzerland,[201] Austria,[202] and Germany[203] would 'be examined,' with further '[responses provided] in due time'.[204]

Still another group of states, which formally maintain the death penalty and the MDP, have expressed their will to change, sometimes making indirect reference to international law. For instance, in the second cycle of UPR (2012), an Italian recommendation on repealing the MDP[205] 'enjoy[ed] the support of the Government of Pakistan' and has been 'in the process of implementation'[206] according to the Pakistani government. Ghana accepted similar recommendations made to it by Liechtenstein and Austria in 2017, although no further information on the progress of outlawing the MDP was specifically provided.[207] In outlining its progress in human rights, Guyana specifically noted in the third cycle of the UPR that it had amended a law in 2010, which previously prescribed the MDP.[208] In the fourth cycle in 2025, Guyana further expressed its support for the Dutch proposal for '[e]stablish[ing] a formal moratorium on executions, remov[ing] all legal provisions for mandatory death sentences with a view to abolishing the death penalty and commut[ing] sentences to the death penalty to prison terms.'[209] Similarly, in the 2021 UPR process, Trinidad and Tobago supported Belgium's proposal for '[repealing] provisions allowing for the imposition of the death penalty as the mandatory punishment for some offences and replac[ing] them with an alternative sentencing framework'.[210] More generally, in 2016, Niger accepted various recommendations for offering a moratorium and for abolishing the death penalty per se.[211] In 2024, Cameroon stated that it 'practised a de facto moratorium on the death penalty [and] intended to continue aligning its legislation with international standards.'[212]

It might be wondered whether such views, expressed during the UPR process, can be considered reflective of the *opinio juris* about the putative customary ban on the MDP; and if so, what type of *opinio juris* they can reflect. As indicated earlier, international judicial practice has long recognized formally non-binding solutions as evidence of *opinio juris*, provided that the context suggests so. The UPR process is a dialogical mechanism which states voluntarily join

[197] Report of the Working Group on the Universal Periodic Review: Trinidad and Tobago, 15 July 2016, A/HRC/33/15 at para 108.51.
[198] Report of the Working Group on the Universal Periodic Review: Trinidad and Tobago: Addendum, A/HRC/33/15/Add.1 (21 September 2016) at para 21.
[199] Report of the Working Group on the Universal Periodic Review: Jordan, A/HRC/40/10 (7 January 2019) at para 137.8.
[200] Report of the Working Group on the Universal Periodic Review, A/HRC/48/16 (22 July 2021) at para 59.125.
[201] ibid.
[202] ibid. at para 59.123.
[203] ibid. at para 59.138.
[204] ibid. at para 59.
[205] Report of the Working Group on the Universal Periodic Review: Pakistan, A/HRC/22/12 (26 December 2012) at para 122.19.
[206] Report of the Working Group on the Universal Periodic Review: Pakistan: Addendum, A/HRC/22/12/Add.1 (13 March 2013).
[207] Report of the Working Group on the Universal Periodic Review: Ghana, A/HRC/37/7 (26 December 2017) at paras 146.80 and 147.20.
[208] Report of the Working Group on the Universal Periodic Review: Guyana, A/HRC/44/16 (20 March 2020) at para 14.
[209] Report of the Working Group on the Universal Periodic Review: Guyana, A/HRC/60/16 (24 June 2025) at para 103.47.
[210] Report of the Working Group on the Universal Periodic Review: Trinidad and Tobago, A/HRC/49/16 (20 December 2021) at para 109.61.
[211] Report of the Working Group on the Universal Periodic Review: Niger, A/HRC/32/5 (12 April 2016).
[212] Report of the Working Group on the Universal Periodic Review: Cameroon, A/HRC/55/16 (11 January 2024) at para 11.

and exchange views on human rights standards. Despite its highly voluntary character, the UPR may nonetheless create a context where a response to recommendations is expected, and where a lack of response may constitute acquiescence.[213] After all, to argue that states can participate in the UPR without having to respond to recommendations is to eviscerate its dialogical purpose and reduce the process to a hollow shell.

Hence, when states maintaining the MDP refrain from explicitly justifying such practice—something they were completely free to do, as illustrated by the practice of the Maldives and Iran—such abstention may be construed as tacit acceptance of the ban on the MDP as law.[214] This is especially true when MDP-implementing states do not defend their practice, and instead express their explicit support for recommendations on abolishing it or pledge to bring domestic practice in line with the progressive agenda. These views, albeit inconsistent with their own domestic practice when expressed, are nonetheless consistent with the practice of the vast majority of other states in the international society. Against this background, although a handful of states have remained adamant in maintaining the MDP, thereby showing a clear *opinio non juris*, their view does not change the overall picture of a general practice accompanied by a sign of explicit/tacit acceptance of the ban as custom.

4. CONCLUSION

Based on the foregoing analysis, there are good reasons to argue that a customary prohibition of the MDP exists in international law. As a stand-alone legal norm, it is related to—but remains independent from—our interpretations of, for example, the scope of the 'most serious crimes' under Article 6(2) of the ICCPR or the meaning of a 'fair trial.' As a result, it provides a more straightforward legal basis for challenging the automatic imposition of the death sentence. In a world where a general and international prohibition of the death penalty has yet to emerge,[215] tightening restrictions on its application—including the ban on the MDP—serves as an important means of promoting human rights ideals.

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213 See, eg *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, Malaysia v Singapore, ICJ Reports 2008, 12, at para 121.

214 From a more doctrinal perspective, this is perhaps analogous to the case where *opinio juris* can be inferred from '[f]ailure to react over time to a practice . . . provided that States were in a position to react and the circumstances called for some reaction.' See Conclusion 10(3) on custom identification.

215 See, eg Helfer and Wuerth, 'Customary International Law: An Instrument Choice Perspective' (2016) 37 *Michigan Journal of International Law* 563, 591; Naldi, 'The Prohibition on the Death Penalty in International Law' (1991) 38 *Netherlands International Law Review* 373, 379–380.

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