



**MEMORANDUM ON THE DEATH PENALTY
TO PRESIDENT MAADA BIO AND THE TASK FORCE COMMITTEE**

**Regarding the Review of the Findings of the Constitutional Review Commission with Particular
Regard to the Recommendation to Abolish the Death Penalty**

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TABLE OF CONTENTS

I. AUTHORS OF THE MEMORANDUM	3
II. EXECUTIVE SUMMARY	3
III. BACKGROUND: THE CONSTITUTIONAL REVIEW COMMITTEE ON ABOLITION	5
IV. ENDURING SUPPORT FOR ABOLITION SINCE THE CONSTITUTIONAL REVIEW COMMITTEE	7
A. GLOBAL TREND TOWARDS UNIVERSAL ABOLITION	7
B. SIERRA LEONE’S INCREASING INTERNATIONAL OBLIGATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY, WITH A VIEW TOWARD ABOLITION	10
I. OBLIGATIONS UNDER THE ICCPR	10
II. OBLIGATIONS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS	13
V. ABOLITION OF THE DEATH PENALTY: AN ISSUE OF UNIVERSAL HUMAN RIGHTS	14
A. PUBLIC OPINION AND THE DEATH PENALTY	15
B. DETERRENCE AND THE DEATH PENALTY	16
VI. CONCLUSION	17

I. Authors of the Memorandum

This Memorandum on the death penalty is submitted to President Maada Bio and the Task Force Committee by AdvocAid in collaboration with Professor Carolyn Hoyle, the Director of the Death Penalty Research Unit¹ at the University of Oxford, and the UK-based NGO, The Death Penalty Project.²

AdvocAid is the only organisation in Sierra Leone that provides free legal representation for women and men on death row to challenge their convictions and death sentences. Since 2006, AdvocAid has secured the release of six women and three men on death row through appeals or presidential pardon applications.

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The Death Penalty Project (DPP) is a non-profit organisation with special consultative status before the United Nations Economic and Social Council. DPP provides free legal representation to individuals facing the death penalty worldwide, with a focus on the Commonwealth. DPP also delivers targeted capacity building programmes to those working within the criminal justice system, commissions original research and engages with key stakeholders to support an informed debate on the death penalty. Since 2007, DPP has been working with AdvocAid, supporting women on death row and other vulnerable prisoners in Sierra Leone.

II. Executive Summary

Abolition of the death penalty in Sierra Leone was considered and recommended by the Constitutional Review Committee in 2016. While this recommendation initially failed to bring about abolition, there is considerable evidence that the time may now be right for change.

Following the presentation of the Sierra Leone Human Rights Commission's 2018 and 2019 annual reports, on December 17 2020, President Dr. Julius Maada Bio met with the Commission to discuss the constitutional review process and the government's stance on the death penalty. He stated:

¹ The Death Penalty Research Unit at the University of Oxford works with civil society, legal practitioners, policy-makers and academics around the world to produce, exchange and disseminate knowledge on the law and practice of capital punishment. For further information, please visit <https://www.law.ox.ac.uk/research-and-subject-groups/death-penalty-research-unit>.

² For further information about The Death Penalty Project, please visit www.deathpenaltyproject.org.

³ R. HOOD & C. HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* (5th ed. Oxford Univ. Press 2015).

“ . . . My Government believes in the sanctity of life of every citizen. We have maintained the moratorium on the death penalty for that reason. Although the recommendation by the Justice Cowan-led Constitutional Review Committee (CRC) was rejected by the last Government, a committee set up by my administration to revisit the issue has recommended accepting the Justice Cowan recommendation. So my Government has moved the needle significantly on this question and we will continue making progress[.]”⁴

With these words, President Bio demonstrates that a committee has already been in the process of reviewing the recommendations made by the CRC. By asserting that “we will continue making progress” on the question of abolition and referring to the Justice Cowan recommendation to abolish the death penalty, President Bio has signalled his willingness to move towards abolition.

At the same time, despite the global decline in death sentences, Sierra Leone continues to sentence people to death: four people in 2018, and a further 21 in 2019.⁵ By the end of 2019, there were a total of 63 people on death row in Sierra Leone⁶ —and by December 2020, there were 78.⁷ Although a *de facto* moratorium is in place and no executions have been carried out in over two decades, Sierra Leone continues to violate its international obligations. It continues to impose the mandatory death penalty on anyone convicted of murder and routinely violates the due process rights of those subject to the death penalty. Furthermore, those prisoners on death row, and their families, experience the stigmatisation and psychological impact of living under a sentence of death.

This Memorandum reflects on the findings of the previous Constitutional Review Committee, which reported in 2016 and considered the question of the abolition of the death penalty. It provides up-to-date information on the global trends and on the administration of the death penalty in Sierra Leone that reinforces the justification for abolition .

This Memorandum also draws on evidence from around the world that arbitrariness is inherent in all criminal justice systems which still impose and carry out the death penalty; that there is no evidence that the death penalty deters murder to a marginally greater extent than does the threat and application of life imprisonment; and that wrongful convictions are inevitable in each and every jurisdiction, but particularly those jurisdictions where procedural safeguards are inadequate. Given this overwhelming evidence of

⁴ Sierra Leone’s President Julius Maada Bio Talks on Constitutional Review, Human Rights, Death Penalty and Efforts at Criminal Justice Reforms, STATE HOUSE MEDIA AND COMMUNICATIONS UNIT (Dec. 17, 2020), *available at* <https://statehouse.gov.sl/sierra-leones-president-julius-maada-bio-talks-on-constitutional-review-human-rights-death-penalty-and-efforts-at-criminal-justice-reforms/>.

⁵ Death Sentences and Executions 2019, AMNESTY INT’L (21 April 2020), *available at* <https://www.amnesty.org/en/documents/act50/1847/2020/en/> (hereinafter “Death Sentences and Executions 2019”).

⁶ *Id.*

⁷ International Human Rights Day: The Death Penalty, ADVOCAID (Dec. 10, 2020), *available at* <https://advocaidsl.org/international-human-rights-day-the-death-penalty/>.

flawed and fallible criminal justice systems in *all* countries retaining the death penalty, the Memorandum argues that the death penalty should be abolished in Sierra Leone.

Finally, this Memorandum affirms that abolition of the death penalty can be achieved swiftly, without the need for the complex, costly, and protracted process of a Constitutional amendment. By immediately repealing or amending all criminal statutes that provide for the death penalty as a punishment for those convicted of certain crimes, capital punishment can be replaced by a humane and flexible system of imprisonment, bringing punishment of serious offences into line with international best practices. These measures—which do not require a constitutional amendment—will give full effect to the findings of the Constitutional Review Committee that the death penalty should be abolished. Such measures can be reinforced in the longer term by amending the right to life provision under the Constitution (Section 16) so that the death penalty is no longer an exception, and the Constitution contains an inviolable right to life.

III. Background: The Constitutional Review Committee on Abolition

In 2013, President Ernest Bai Koroma launched the constitutional review process by swearing in an 80-member Constitutional Review Committee (hereinafter, ‘CRC’), comprised of stakeholders including “women and youth groups, political parties, civil society organisations, democratic institutions, NGOs, business community, the media, and key independent bodies.”⁸

President Koroma made clear that the CRC should be “inclusive and seen to be the true voice of the people... in true spirit of modern constitutionalism.”⁹ With this in mind, the CRC was charged with reviewing the reports of the Truth and Reconciliation Commission (hereinafter, ‘TRC’), which reported in 2004, as well as the Peter Tucker Review Commission.¹⁰ The CRC’s mandate was “to collect public views in Sierra Leone and abroad, consult with relevant stakeholders including social, political and economic groups, examine constitutions of other countries and recommend provisions aiming at promoting an open, transparent and democratic society.”¹¹ Due to the impact of the Ebola virus in Sierra Leone, the mandate was extended from March 2015 to September 2016.¹²

The findings and observations of the CRC focused on three areas: the historical “evolution of Sierra Leone’s institutions;” the “aspirations of the people of Sierra Leone with regard to the social, economic, and political development of the country;” and the assurance that “Sierra Leone’s legal framework was at

⁸ Report of the Constitutional Review Committee, Republic of Sierra Leone, 22 (2016), *available at* https://constitutionalreviewblog.files.wordpress.com/2017/01/crc_final_report16.pdf (Hereinafter “CRC Report”).

⁹ *Id.* at 12-13.

¹⁰ *Id.* at 13.

¹¹ *Id.*

¹² *Id.*

par with international best practices.”¹³ A primary theme recognized in the CRC was the Protection of the Right to Life— focusing on the repeal of the death penalty.

Regarding the existence of capital punishment in Sierra Leone, the CRC first recognized the TRC’s “imperative recommendation. . . that the death penalty should be abolished and that section 16 of the 1991 Constitution should be amended accordingly.”¹⁴ The TRC recommendation was rooted in the tragic loss of life and dignity that occurred during Sierra Leone’s Civil War, and the need for the State to “now set the example by demonstrating that it places the highest value on all human life.”¹⁵ The CRC emphasized the movement towards abolition that was gaining traction in Sierra Leone, as well as globally. Evidence of this trend included that:

- Sierra Leone was *de facto* abolitionist, with its last executions taking place in 1998;¹⁶
- Political leaders in Sierra Leone, including Presidents, parliamentarians, and the Attorney General and Minister of Justice, opposed the death penalty, and in 2012, President Koroma announced that “ it is now government policy that the death penalty now operates as life imprisonment,” reinforcing the country’s moratorium on executions since 1998;
- Political leaders communicated their intention to abolish the death penalty to an international audience, by
 1. accepting the recommendation from the UN Human Rights Council to abolish the death penalty subject to constitutional review in 2011;¹⁷
 2. committing to the UN Office of the High Commission of Human Rights to review its position on the death penalty in 2012;
 3. voting in favour of a motion calling for a universal moratorium in a recorded vote at the UN General Assembly (UNGA) in 2014; and
 4. announcing to the UN Committee against Torture that Sierra Leone would shortly abolish the death penalty after former Attorney-General and Minister of Justice Hon. Franklyn Bai Kargbo “receiv[ed] firm instructions from the President on the issue”; and
- Numerous civil society organizations such as the Centre for Accountability and Rule of Law (CARL) and the National Commission for Democracy (NCD) called for abolition.¹⁸

The CRC made special mention of the “scope for huge injustice” that can result from Sierra Leone’s mandatory death penalty, “in that the nature of murders varies enormously.”¹⁹ It then quoted the Human

¹³ *Id.* at 27.

¹⁴ *Id.* at 106.

¹⁵ CRC Report at 107.

¹⁶ *De facto* abolitionist countries are those which retain the death penalty for ordinary crimes but have not executed anyone during the past 10 years or more.

¹⁷ This recommendation took place during the Universal Period Review process in 2011. According to the CRC Report, it emphasized “the fact that Sierra Leone has made a commitment to review its position on the death penalty to the United Nations Office of the High Commission of Human Rights (OHCHR).” *See* CRC Report at 106.

¹⁸ *Id.* at 107-08.

¹⁹ *Id.* at 107.

Rights Committee in full, which found that “the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR)” because it does not account for a defendant’s personal circumstances or the individual circumstances of the particular offence in question.²⁰ Moreover, the CRC reported that the mandatory death penalty also “constitutes inhuman or degrading punishment” and “[i]f the penalty remains mandatory, Sierra Leone will continue to fail in its obligation to comply with Article 7 of the ICCPR which states that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’”²¹

The Report also provided data regarding national discussions on abolition during the 2014-16 consultations across the country. Despite the aforementioned support for abolition, the report stated that Sierra Leoneans “were highly divided,” as were members of the CRC plenary discussion.²² Accounting for those divergent opinions, the CRC ultimately made the recommendation *first* to abolish the death penalty but suggested that an alternative would be to leave Section 16 of the 1991 Constitution unchanged.²³

The government published its official response to the recommendations of the CRC in a White Paper dated November 10, 2017. In the White paper, the government announced a rejection of “102 of the total 134 recommendations.”²⁴ Although the government accepted the recommendation to incorporate the terms “human dignity” and “equality” into the Constitution, it rejected making these principles justiciable.²⁵ Critically, the recommendation to abolish the death penalty was also rejected.²⁶

IV. Enduring support for abolition since the Constitutional Review Committee

A. Global trend towards universal abolition

The last three decades have witnessed an unprecedented global rate of abolition of the death penalty. Of the 193 member states of the United Nations, 107 countries have abolished the death penalty in law for all crimes, and a further eight countries have abolished the death penalty in law for ordinary crimes.²⁷ Moreover, 72% of all countries in the world—143 countries—have abolished the death penalty in law or practice.²⁸

²⁰ *Id.* at 107-08.

²¹ *Id.* at 108.

²² *Id.* at 108.

²³ *Id.* at 109.

²⁴ Sierra Leone’s Constitutional Review up in Smoke – The People Lose Again, SIERRALIT, *available at* <https://sierralii.org/content/sierra-leone’s-constitutional-review-smoke—people-lose-again> (accessed Jan. 15, 2021).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Death Sentences and Executions 2019.

²⁸ *Id.*

The trend towards universal abolition has continued apace since the CRC's recommendations in 2017. The number of executions occurring globally has decreased each year,²⁹ with 2019 seeing the lowest figure in more than a decade.³⁰ Additionally :

- Among the 87 countries that retain the death penalty in law, only 20 countries executed anyone in 2019.³¹ Less than 10% of all countries in the world actually inflicted this punishment.
- Only a few months ago, in December 2020, the plenary session of the UNGA adopted a resolution calling for a moratorium on global executions—with a view towards full abolition.³² This is the eighth time the UNGA has adopted a resolution calling for a moratorium on executions since 2007. The number of states voting in favour of this resolution has risen from 104 in 2007 to 121 in 2018 and 123 in 2020. The number of states voting against the resolution has steadily decreased. The growing support for the resolution provides incontrovertible evidence of a dynamic towards the universal abolition of the death penalty.
- In the African Union, 39 countries are now abolitionist in law and practice. In 2019, only five of 55 countries carried out executions: Egypt, South Sudan, Sudan, Somalia, and Botswana.³³
- In West Africa, Guinea joined Benin, Côte d'Ivoire, Senegal, and Togo in abolition of the death penalty in 2016, and Burkina Faso abolished the death penalty for ordinary crimes in 2018. The Gambia recently moved closer to abolishing the death penalty, with President Barrow commuting the death sentences of 22 prisoners and becoming a State party to the Second Optional Protocol.³⁴ In Ghana, the President announced willingness to consider abolition, at least for five of the six capital offences.³⁵
- In other parts of the African Union, there has been marked progress towards abolition. The Central African Republic has recently made plans to establish a committee to examine a bill on the abolition of the death penalty within the National Assembly.³⁶ In April 2019, Equatorial Guinea announced a draft law to abolish the death penalty, and in 2020, Chad abolished the death penalty for all crimes.³⁷

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² UN: Opposition to the Death Penalty Continues to Grow, AMNESTY INT'L (Dec. 16, 2020), *available at* <https://www.amnesty.org/en/latest/news/2020/12/un-opposition-to-the-death-penalty-continues-to-grow/>.

³³ Death Sentences and Executions 2019.

³⁴ Report of the Secretary-General on the Question of the death penalty, U.N. Doc. A/HRC/45/20, 2 (Aug. 13, 2020) (hereinafter "Report of the Secretary-General").

³⁵ *Id.* at 3.

³⁶ Death Sentences and Executions 2019.

³⁷ Report of the Secretary-General, at 2. According to the UN Human Rights Office of the High Commissioner, "[a]t the end of April 2020, the 155 members of the Chadian National Assembly adopted an amendment to law 003/PR/2020, the so-called 'anti-terrorism' law, to remove a provision that maintained capital punishment for terrorism-related offences. That revision enabled Chad to fully abolish capital punishment, after the National Assembly had promulgated a penal code in 2017 that abolished the death penalty for ordinary crimes." *See* Civil society organizations pave the road to end capital punishment in Chad, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, (9 October 2020), *available at* <https://www.ohchr.org/EN/NewsEvents/Pages/chad-death-penalty.aspx>.

- The Ministry of Justice, Legal, and Parliamentary Affairs in Zimbabwe recommended abolition, and Zambia announced it was open to a consultative process towards abolition.³⁸
- Kenya already abolished the mandatory death penalty in 2017 through a Supreme Court decision.³⁹ Building on this, in 2019, the Task Force created to review capital punishment in Kenya recommended that Parliament abolish the death penalty entirely. If not abolished, the Task Force recommended it “should only be reserved for the rarest of rare cases involving intentional and aggravated acts of killing.”⁴⁰

Many retentionist states point to the United States in support of their own position, but across that country there is also a movement away from the death penalty: In 2019 New Hampshire became the 21st state to abolish capital punishment for all crimes and in 2020, Colorado became the 22nd state to abolish. Furthermore, the Governor of California announced a state moratorium on executions.⁴¹ A total of 32 states have either abolished the death penalty or have not carried out executions in over ten years.⁴² On 22nd February 2021, state lawmakers gave final approval to a bill that will end capital punishment in Virginia. The legislation will now be signed into law by the Governor, making Virginia the 23rd U.S. state to stop executions⁴³—after having the punishment in place for over 400 years.⁴⁴ Just five states and the U S federal government carried out executions in 2020.⁴⁵ Among these states, only one—Texas—had more than one person executed. Despite ten federal executions ordered by former President Trump in 2020, the new President, Joe Biden, became the first US president to make abolition of the federal death penalty part of his presidential campaign platform.⁴⁶ Even with Trump’s aberrational

³⁸ Zimbabwean gov’t presses ahead to abolish death penalty: minister, XINHUA (Dec. 19, 2018), *available at* www.xinhuanet.com/english/2018-12/19/c_137685230.htm; Zambia gov’t says ready for talks to abolish death penalty, XINHA (Dec. 10, 2019), www.xinhuanet.com/english/2019-12/10/c_138621147.htm.

³⁹ Supreme Court of Kenya, *Francis Karioko Muruatetu & another v. Republic et al.* (2017). ^[SEP]

⁴⁰ Death Sentences and Executions 2019; *see also* Report of the Task Force on Review of the Mandatory Death Sentence under Section 204 of the Penal Code, Vol. 1, p. 108.

⁴¹ Death Sentences and Executions 2019.

⁴² Report of the Secretary-General, at 2.

⁴³ Sarah Rankin, *Virginia Senate passes death penalty abolition bill*, AP NEWS (Feb. 3, 2021), *available at* <https://apnews.com/article/virginia-passes-death-penalty-abolition-d8d4ec134a565955f2b1f675320662b3> (when introducing the bill, a Senator stated “I cannot think of anything that is more awful, unspeakable and wrong for a government to do than to use its power to execute somebody who didn’t commit the crime they’re accused of.”).

⁴⁴ Virginia was the location of the first recorded execution in the then-European colonies, in 1608. *See* Madeleine Carlisle, *Why It’s So Significant That Virginia Looks Set to Abolish the Death Penalty*, TIME (Feb. 9, 2021), <https://time.com/5937804/virginia-death-penalty-abolished/>.

⁴⁵ Execution List 2020, DEATH PENALTY INFORMATION CENTER (Dec. 11, 2020), <https://deathpenaltyinfo.org/executions/2020>.

⁴⁶ Via Death Penalty Information Center (DPIInfoCtr). “#TheDeathPenaltyIn2020—During the 2020 presidential campaign, citing the more than 170 people exonerated from U.S. death rows since 1973, @JoeBiden pledged to work to end the federal #deathpenalty.” Jan. 20, 2021, 1:22 pm. Tweet.

increase of federal executions during the last six months of his presidency, the number of death sentences imposed in the US has fallen from over 300 in the mid-1990s to only seventeen in 2020.⁴⁷

B. Sierra Leone’s Increasing International Obligations on the Administration of the Death Penalty, with a View Toward Abolition

International attitudes regarding capital punishment continue to evolve with the knowledge that every criminal justice system, however well-developed, is susceptible to error and miscarriages of justice. Recognizing that the death penalty is different from other punishment, and that mistakes are irreversible, international human rights law requires fair trial guarantees to be respected in *all* death penalty cases without exception. The understanding is that those facing a death sentence should be afforded special protection and guarantees to ensure a fair trial *above and beyond* what may be provided in non-capital cases. The CRC noted that Sierra Leone already had international obligations requiring the country to move towards abolition. Sierra Leone has ratified international treaties including the International Covenant on Civil and Political Rights (ICCPR) in 1996⁴⁸ and the African Charter on Human and Peoples’ Rights in 1983.⁴⁹

i. Obligations under the ICCPR

While Article 6(1) of the ICCPR establishes that the death penalty can constitute an exception to the right to life if not arbitrarily imposed, Article 6 goes on to list various safeguards in the application and implementation of the death penalty. It may only be imposed for the *most serious crimes*, it cannot be pronounced unless *rigorous procedural rules* are respected, and may not be imposed on pregnant women or juveniles.⁵⁰ Further, Article 6(6) of the ICCPR places the death penalty in its real context and reflects the position that countries that retain the death penalty have an overriding obligation to do nothing further “to *delay or to prevent*” the total abolition of capital punishment.⁵¹ The worldwide movement towards abolition of the death penalty reveals that the majority of UN member states have accepted their obligations under Article 6 to make abolition of the death penalty a reality.

When restating the position of the Centre for Accountability and Rule of Law (CARL) in its report, the CRC noted that the mandatory death penalty already constitutes a violation of Article 6(1) of the ICCPR—arbitrary deprivation of life— as it does not account for a “defendant’s personal circumstances or

⁴⁷ Execution List 2020, DEATH PENALTY INFORMATION CENTER (Dec. 11, 2020), <https://deathpenaltyinfo.org/executions/2020>.

⁴⁸ Human Rights Committee Treaty Database, Sierra Leone, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries (accessed June 19, 2019).

⁴⁹ Ratification Table: African Charter on Human and Peoples' Rights, <http://www.achpr.org/instruments/achpr/ratification/> (accessed June 19, 2019).

⁵⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art. 6 (hereinafter “ICCPR”).

⁵¹ ICCPR Art. 6.

the individual circumstances of the particular offense.”⁵² The CRC further emphasized CARL’s position that the mandatory death penalty “constitutes inhuman or degrading punishment” and “[i]f the penalty remains mandatory, Sierra Leone will continue to fail in its obligation to comply with Article 7 of the ICCPR which states that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’”⁵³

Although the death penalty is not the mandatory punishment for the offences of aggravated robbery and treason in Sierra Leone, the imposition of the death penalty for crimes that do not result in loss of human life violate Article 6(2) of the ICCPR.⁵⁴ The ICCPR restricts the imposition of the death penalty to the *most serious crimes*, and this provision has been interpreted restrictively so that capital punishment (pending abolition) may only be imposed for the most serious offences of intentional homicide.

The comprehensive provisions of Article 14 of the ICCPR set out in detail the minimum requirements for a fair trial, which must be respected in all capital cases. The UN Human Rights Committee (HRC) has consistently held that if Article 14 of the ICCPR is violated during a capital trial, that violation also breaches Article 6(1)’s prohibition on arbitrary deprivation of life. Fair trial violations that may render the imposition of a death sentence arbitrary include, *inter alia*, the use of forced confessions, lack of effective representation during all stages of criminal proceedings (including pre-trial and the appeals process), lack of interpretation, excessive and unjustified delays, and a general lack of fairness in the criminal process.⁵⁵ The HRC has repeatedly emphasised that in capital cases, the duty to observe rigorously all the guarantees for a fair trial is even more imperative than in other cases.⁵⁶ Additionally, the United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions has stated that “proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments.”⁵⁷

The UN Human Rights Committee adopted General Comment No. 36 on Article 6 of the ICCPR on October 30, 2018.⁵⁸ This interpretation of the right to life provision under the ICCPR draws heavily on

⁵² CRC Report at 108.

⁵³ ICCPR Art. 7.

⁵⁴ ICCPR Art. 6(2) (“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant. . .”).

⁵⁵ ICCPR Art. 14.

⁵⁶ *Thomas v Jamaica Communication*, No. 272/1988 (3 November 1993), para. 13.

⁵⁷ *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, UN Doc. E/CN.4/1997/60, 24 December 1996, para. 81.

⁵⁸ H.R. Comm., General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter “General Comment No. 36”].

case law from the HRC and has a dedicated section on the imposition of the death penalty. General Comment No. 36 explicitly states that the mandatory use of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6 (1) of the ICCPR.⁵⁹ The HRC also discusses the significance of Article 6(6) of the ICCPR, which declares that “nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.” In this General Comment, the HRC said this paragraph reaffirms the position that all state parties to the ICCPR must be on

“an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights.”⁶⁰

The HRC explained that Article 6(6) is the manifestation of the “pro-abolitionist spirit of the Covenant” and that given the growing number of states that have rejected the death penalty, “considerable progress may have been made towards establishing an agreement among the State parties to consider the death penalty as a cruel inhuman and degrading form of punishment.”⁶¹

With most death row prisoners in Sierra Leone unable to appeal against their convictions and death sentences to the Court of Appeal, in violation of Article 14(5) of the ICCPR, access to justice is clearly a major challenge. It is also impossible to discuss fairness and the death penalty without addressing the issue of wrongful convictions and miscarriages of justice. In its General Comment, the HRC makes clear that the execution of persons whose guilt has not been established beyond a reasonable doubt constitutes an arbitrary deprivation of life in violation of Article 6(1) of the ICCPR. The HRC goes on to state that State parties “must therefore take all feasible measures in order to avoid wrongful convictions in death penalty cases, and to re-examine past convictions on the basis of new evidence,” and tasks State parties to “consider the implications for the evaluation of evidence presented in capital cases on new reliable studies suggesting the prevalence of false confessions and the unreliability of eyewitness testimony.”⁶²

Two provisions of the ICCPR are specifically relevant to the infliction of the death penalty on those with mental illness and disability: Article 6, which prohibits the arbitrary deprivation of life, and Article 7, which bans cruel, inhuman and degrading treatment and punishment. When these provisions are read

⁵⁹ General Comment No. 36 (“...mandatory death sentences that leave domestic courts with no discretion as to whether to designate the offence as a crime warranting the death penalty, and whether to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature. The availability of a right to seek pardon or commutation on the basis of the special circumstances of the case or the accused is not an adequate substitute for the need for judicial discretion in the application of the death penalty.”).

⁶⁰ *Id.* at para 50.

⁶¹ General Comment No. 36, para 51.

⁶² *Id.* at para 43.

together with the UN Safeguards⁶³ and other sources, including reports and decisions of UN bodies as well as international and domestic jurisprudence, it is clear that the imposition of the death penalty and the execution of those with mental disorder is unlawful. In General Comment 36, the HRC has made clear that “State parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis to others, such as persons whose serious psycho-social and intellectual disabilities impeded their defence . . . They should also refrain from executing persons that have diminished ability to understand the reasons for their sentence.”⁶⁴ Despite the general acceptance that mental disorder should operate to protect the rights of those with mental disorder facing the death penalty, capital punishment continues to be imposed on those suffering from mental illness or mental disability in Sierra Leone. This is a serious human rights concern.

ii. Obligations under the African Charter on Human and Peoples’ Rights

The rights to life and to a fair trial under the African Charter on Human and Peoples’ Rights (ACHPR) mirror those enshrined under the ICCPR. Article 4 of the ACHPR protects against the arbitrary deprivation of life, stating: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”⁶⁵ Article 7 guarantees the right to a fair trial by mandating certain minimum procedural protections, including the right to appeal, the presumption of innocence, the right to a defence, and the right to be tried within a reasonable time.⁶⁶ Article 5 of the ACHPR prohibits “cruel, inhuman or degrading punishment.”⁶⁷

In 2019, the African Court on Human and Peoples’ Rights determined that the mandatory death sentence violates the right to life and fair trial under the African Charter. In *Ally Rajabu and Others v. Tanzania*, the Court found that Tanzania’s mandatory death penalty for murder denied the convicted person the right to be heard and present mitigating circumstances, and therefore “[did] not uphold fairness and due process as guaranteed under Article 7(1) of the Charter.”⁶⁸ Further, the Court noted that it read Article 4 “to the effect that the failure of the mandatory imposition of the death sentence to pass the test of fairness

⁶³ United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, Approved by ECOSOC Resolution No. 1984/50 (May 25, 1984), *available at* <https://www.un.org/ruleoflaw/blog/document/safeguards-guaranteeing-protection-of-the-rights-of-those-facing-the-death-penalty/>.

⁶⁴ General Comment No. 36, para 49.

⁶⁵ African Charter on Human and Peoples’ Rights art. 4, adopted June 1, 1981 (entered into force Oct. 21, 1986) [hereinafter “African Charter”].

⁶⁶ *Id.*, art. 7.

⁶⁷ *Id.*, art. 5.

⁶⁸ *Ally Rajabu and Others v. United Republic of Tanzania*, Application No. 007/2015, Judgment, African Court on Human and Peoples’ Rights, ¶111 (Nov. 28, 2019), www.african-court.org/en/images/Cases/Judgment/Judgment_Summary_Application_007-2015-SEP/Ally_Rajabu_and_Others_v_Tanzania_Final.pdf.

renders that penalty conflicting with the right to life under Article 4”—finding that Tanzania’s mandatory death sentence also violated Article 4 of the Charter.⁶⁹ The Court ordered the State to repeal its mandatory capital punishment provision.⁷⁰

Based on the preceding case law and provisions of international legal obligations, it is clear that, at a minimum, Sierra Leone must abolish the mandatory death sentence for murder in order to comply with its international obligations under the ICCPR and the African Charter.

V. Abolition of the Death Penalty: An Issue of Universal Human Rights

After the Sierra Leone Civil War, the Special Court for Sierra Leone was created to hold people accountable for some of the gravest crimes that exist: crimes against humanity and war crimes that attempted to destroy the fabric of society in Sierra Leone. Yet the Special Court did not have the power to impose the death penalty. Similarly, all other international tribunals set up to adjudicate crimes against humanity have rejected capital punishment as a sanction for the gravest crimes, including the International Criminal Court.⁷¹ This raises the question: If the death penalty is not available for the most atrocious crimes against humanity, how can it still be justified for lesser crimes?

The premise of the anti-capital punishment movement, simply put, is that the execution of *captive* citizens, whatever crimes they had committed and wherever they reside in the world, is a fundamental denial of their humanity and right to existence. As psychologist Dr. Louis West put it, “the killing of a helpless captive is a brutally degrading experience. If only those who have participated in an execution could vote on the death penalty, it would be abolished tomorrow.”⁷² Thus, the human rights approach rejects the most persistent justifications for capital punishment, namely, retribution and the need to denounce and expiate through executing those whose crimes shock society by their brutality. It also challenges the view that the death penalty is a political necessity because it is demanded by a large majority of the population, or that without satisfying public opinion, the government and the criminal justice system would lose legitimacy. Advocates for abolition also challenge the claim that the death penalty must be retained, as an

⁶⁹ *Id.* at ¶114.

⁷⁰ *Id.* at ¶171.

⁷¹ Rome Statute of the International Criminal Court: Some Questions and Answers, U.N. DEP'T OF PUBLIC INFORMATION (Oct. 1998), *available at* <https://legal.un.org/icc/statute/iccq&a.htm#:~:text=Consistent%20with%20international%20human%20rights,the%20gravity%20of%20the%20case> (“Consistent with international human rights standards, the International Criminal Court has no competence to impose a death penalty. The Court can impose lengthy terms of imprisonment of up to 30 years or life when so justified by the gravity of the case.”).

⁷² U.S. Senate, Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, Vol. 7 Part 1, 2 (Jan. 1968).

essential weapon of criminal justice, without which there would be a greater incidence of murder and other capital offences.

A. Public Opinion and the Death Penalty

Although public opinion cannot be entirely ignored, a country concerned for human rights should not merely accept public opinion as one of the main reasons for retaining the death penalty, not least because public opinion is often based on misconceptions about the assumed deterrent effect of capital punishment, the fairness and safety of its application, the absence of error, and other human rights considerations .

It was of great significance that in post-apartheid South Africa, the newly created Constitutional Court abolished the death penalty in 1995, even though it recognized that “the majority of South Africans agree that the death penalty should be imposed in extreme cases of murder.”⁷³ The Court declared the death penalty incompatible with both the prohibition against cruel, inhuman, or degrading punishment, and with “a human rights culture” which would “protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.”⁷⁴ Reflecting on this issue, the international human rights lawyer, Professor William Schabas, identified the paradox that “[d]emocracy leans towards abolition, but retentionists defend the death penalty in the name of the will of the people.”⁷⁵ He asks: “Do human rights need to be protected from public opinion?”⁷⁶ And he answers unequivocally:

While it is desirable that the human rights norms that are enshrined in international instruments and national constitutions find a favourable echo in public opinion, they surely cannot be dependent on it. Human rights instruments ... are, first and foremost, aimed at protection of individuals from the state. ... If public opinion were to be canvassed each time individual rights were in jeopardy, there would be little doubt that human rights would come out the loser. Yet it would contradict the *raison d'être* of human rights law to make its efficacy contingent on public opinion, one of the very forces it is aimed at counteracting and neutralising.⁷⁷

In fact, no countries have abolished the death penalty because of popular demand as reflected in opinion polls. Political leadership—not organic shifts in public opinion—is necessary if governments wish to abolish the death penalty. The experience internationally is that abolition has been the responsibility of political leaders exercising their judgment based on an informed and rational appreciation of the case for

⁷³ *State v Makwanyane* [1995] (3) S.A. 391, *quoted* in William A. Schabas, ‘Public Opinion and the Death Penalty’, Paper presented to the *EU–China Seminar on Human Rights*, Beijing, 10–12 May 2001, *reprinted* in PETER HODGKINSON AND WILLIAM A. SCHABAS (EDS.), *CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION*, 309-331 (2004).

⁷⁴ *State v Makwanyane* (1995) (3) SA 391, para. 88.

⁷⁵ Schabas, *supra* n.73, at 309.

⁷⁶ *Id.*

⁷⁷ *Id.* at 328; *see also* WILLIAM SCHABAS, *WAR CRIMES AND HUMAN RIGHTS ESSAYS ON THE DEATH PENALTY, JUSTICE, AND ACCOUNTABILITY*, 157 (2008).

abolition, irrespective of public demand or support for it. The experience of virtually all abolitionist countries is that the public has followed political leadership, and later shifted towards endorsement of its position on abolition. Experience has also shown that those who grew up with the expectation that death would be the punishment for murder are relatively slow to abandon this idea, but the next generation, growing to maturity with no such experience, is far more likely to regard capital punishment as a barbaric relic of the past, abandoned as civilization has progressed.

B. Deterrence and the death penalty

On the point of deterrence, the death penalty—as it is practiced in democratic states under the rule of law through the occasional execution, or by leaving it unenforced on the statute book, as in Sierra Leone—has not been shown convincingly to provide more protection for citizens than the alternative punishment of lengthy imprisonment.⁷⁸ The real question is whether a system of capital punishment enforced through executions leads to a lower incidence of murder (and also other capital crimes) than does a penalty system which does not threaten criminals with death.

The best evidence—from a range of scientific studies on deterrence and the death penalty—has failed to provide convincing evidence in support of the assumption that the threat of execution is a uniquely effective deterrent. While most empirical studies have been carried out in the US, comparing states that use the death penalty with similar states that do not, the limited evidence from beyond the US supports these findings. Analysis of hundreds of deterrence studies in the US and Europe demonstrates that while deterrent effects can be found in relation to minor crimes, there were no such effects on murder for any punishment, including execution.⁷⁹ And a review of five decades of research evidence on deterrence for the American National Research Council concluded that the belief in deterrence is unreliable and, in many studies, wrong.⁸⁰ Furthermore, homicide rates have been declining since the early 1990s across all American states, both retentionist and abolitionist. States that abolished in the last two decades did not see increasing murder rates and nor did those that kept the death penalty. Moreover, over the last 20 years, homicide rates in states with the death penalty have been higher than in states without it.⁸¹

Some research has sought to establish whether a moratorium or abolition appear to produce a rise in the rate of murder, or whether the introduction of the death penalty reduces the rate of murder. Of course,

⁷⁸ Rome Statute of the International Criminal Court, *supra* n.71 (“Deterrence is not just effected by the death penalty. Deterrence is brought about by the entire criminal justice process from investigation, followed by prosecution, trial, delivery of the judgement, sentencing and punishment.”).

⁷⁹ Dieter Dolling, Horst Entorf, Dieter Hermann, and Thomas Rupp, *Is Deterrence Effective? Results of a Meta-Analysis of Punishment*, 15 EUR. J. OF CRIME POLICY RESEARCH 201 (2009).

⁸⁰ NATIONAL RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY (D. Nagin and J.V. Pepper, eds.) (2012).

⁸¹ Murder Rate of Death Penalty States Compared to Non-Death Penalty States, DEATH PENALTY INFORMATION CENTER (last visited Feb. 26, 2021), *available at* <https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states>.

murder rates are affected by many factors beyond the criminal justice process. If the death penalty has a deterrent effect, we would not expect a fall in murder rates following abolition. And yet the murder rate *decreased* in multiple countries after abolition, including Australia, Canada and across eastern Europe.⁸² While South Africa maintains a high murder rate, it is *still* lower than it was prior to abolition.⁸³ A study comparing murder rates in Singapore, which uses the death penalty for murder, with Hong Kong, which has abolished the death penalty, shows no difference in murder rates since executions ended in Hong Kong 30 years ago.⁸⁴

It is clear that there is no evidence that the death penalty deters murder to a greater extent than the threat of life imprisonment. The consensus among social scientists and legal scholars is that the death penalty serves no valid penological purpose and is ineffective as a measure to prevent crime. In all jurisdictions, it would seem, murder rates rise and fall independently of the imposition of death sentences or the conduct of executions.

Notwithstanding, even if it were shown that retention of the death penalty could have a marginally greater deterrent effect than lengthy imprisonment, it could only be achieved by high rates of execution, speedily enforced across most categories of serious crime.⁸⁵ This would increase the probability of innocent or wrongfully convicted persons being executed and increase arbitrariness.

VI. Conclusion

Arbitrariness is endemic in capital punishment systems and will always be. Race, gender, and caste are clearly correlated with legal decision making in all retentionist countries. Research has also found that mental health and disability often intersect with poverty and class to create acute vulnerabilities in the criminal process, which limit defendants' abilities to defend themselves and to present mitigating evidence at trial or on appeal.

The research evidence reviewed for this Memorandum strongly indicates that arbitrariness is inherent in all criminal justice systems through which the death penalty continues to be imposed. Indeed, it is highly unlikely that any system could guarantee the absence of arbitrariness. Many other countries have

⁸² News Report, Morning - Human Rights Council Holds Biennial High-Level Panel Discussion on the Question of the Death Penalty, U.N. GENEVA (Feb. 23, 2021), *available at* <https://www.un Geneva.org/en/news-media/meeting-summary/2021/02/il-ressort-du-debat-biennal-du-conseil-des-droits-de-lhomme-sur> (remarks of Carolyn Hoyle).

⁸³ *Id.*

⁸⁴ Franklin E. Zimring, Jeffrey Fagan, and David T. Johnson, *Executions, Deterrence, and Homicide: A Tale of Two Cities*, 7 J. OF EMPIRICAL LEGAL STUDIES 1-29 (2010).

⁸⁵ Professor Roger Hood and Dr. Carolyn Hoyle reached this conclusion after a thorough review of the evidence on Deterrence, reported in the authoritative 4th edition of *The Death Penalty: A World-wide Perspective*. See R. HOOD & C. HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, 347-349 (5th ed. Oxford Univ. Press 2015).

discovered that it is impossible to design a system of capital punishment that does not violate human rights, which in turn has been the justification for abolition.

It is submitted that some 23 years after the last execution was carried out, Sierra Leone should not impose punishments that are inflicted arbitrarily and inhumanely. It is time for Sierra Leone to accept that the imposition of the death penalty inevitably violates the right to life and the prohibition on torture or other cruel, inhuman or degrading treatment or punishment, and that the country should therefore pursue its agreed commitment to abolition as swiftly as possible.

Abolition of the death penalty in Sierra Leone should not be difficult. Capital punishment can be replaced by a humane and flexible system of imprisonment with the immediate repeal or amendment of all criminal statutes that provide for the death penalty as a punishment for those convicted of certain crimes, a position that was previously recommended by the Human Rights Commission of Sierra Leone.⁸⁶

These measures, which do not require a costly and protracted constitutional amendment, will give full effect to the findings of the Constitutional Review Committee that the death penalty should be abolished. Such measures could be reinforced in the longer term by amending the right to life provision under the Constitution (Section 16) so that the death penalty is no longer an exception and the Constitution contains an inviolable right to life.⁸⁷

⁸⁶ The HRCSL also called for an amendment to the Constitution to incorporate the principle of an inviolable right to life; *see* CRC Report at 106.

⁸⁷ Over half of the countries that have abolished capital punishment since 1988 have ensured through their own constitutions—for example in Namibia, Mozambique, and Belgium—or through interpretation of the constitution by the courts—for example in South Africa and the Ukraine—that the death penalty cannot be reintroduced. *See* Roger Hood and Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a “New Dynamic”*, 38 CRIME AND JUSTICE 1, 11 (U. Chicago Press, 2009), available at <https://www.jstor.org/stable/10.1086/599200>.