



**MEMORANDUM ON ABOLITION OF THE DEATH PENALTY IN SIERRA LEONE
TO THE ATTORNEY GENERAL, CHIEF MINISTER, MINISTRY OF FOREIGN AFFAIRS, AND
DEPUTY MINISTER OF JUSTICE**

Regarding punishments to be enacted to replace the death penalty

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I. Authors of the Memorandum

This Memorandum on the death penalty is submitted 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

This memorandum on measures to *replace* the death penalty in Sierra Leone should be read as a supplement to the memorandum on the death penalty submitted on 1st March 2021. In that document the authors maintained that:

“[A]bolition 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

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).

punishment can be replaced by a humane and flexible system of imprisonment, bringing punishment of serious offences into line with international best practices.”

The President has made a public commitment to abolish the death penalty, and the Government has presented proposals to Cabinet to amend/repeal all existing statutes that provide for the death penalty in Sierra Leone: namely the Larceny Act, the Treasons Act, and the Offences Against the Persons Act. All political parties support abolishing the death penalty, but consideration of the measures required to replace the death penalty are key to future consideration by Parliament. This memorandum explains how other jurisdictions have confronted the opportunity for alternative sentences and considers the punishments these jurisdictions have enacted to replace the death penalty.

In legislating to replace the death penalty, it should be noted that mandatory minimum terms of imprisonment (e.g. life imprisonment) can breach an individual’s right to a fair trial and risk similar disproportionality.⁴ The best course is to replace a death sentence with maximum, non-mandatory, penalties of life imprisonment. Sentencing guidelines may be issued to clarify the range of penalties appropriate for specific offences, making clear what aggravating and mitigating factors are appropriate. Sentencing should allow for rehabilitation and reintegration of offenders, and the conditions of imprisonment should be designed to promote this.

The legislation to replace the death penalty should also provide for a judicial re-sentencing process for prisoners who have been sentenced to death. Those with pending appeals can be re-sentenced to one of the new penalties replacing the death penalty, and a judicial re-sentencing process should be established for those who have exhausted their criminal appeals. This will considerably reduce the need for commutations or other special procedures.

III. Alternatives to death in jurisdictions that have abolished the death penalty

Countries that have abolished the death penalty have replaced capital punishment with either a maximum sentence of life imprisonment or a term of imprisonment subject to a statutory maximum. Almost all the member states of the Council of Europe as well as Australia and New Zealand replaced the death penalty with a life sentence, either indeterminate or determinate, but always with the possibility of release on parole after serving a number of years in prison. Other countries—within South America, for example—prohibit

⁴ R v Smith [1987] 1 SCR 1045.

life imprisonment, although convicted persons may serve relatively long determinate prison sentences.⁵ In May 2021, Malawi’s Supreme Court ruled that the death penalty is unconstitutional. That means the death penalty has been abolished entirely in the country. President Lazarus Chakwera publicly announced his support for this historic ruling and celebrated the independence of the judiciary. The Malawi Supreme Court also ruled that all those sentenced to the death penalty who had been barred from resentencing must have a new sentencing hearing immediately. A life sentence is now the maximum sentence that can be given.

Our experience supports the recommendation that where life imprisonment is the alternative punishment to death, it must be supported by a review process that allows for early release where conditions are favourable to such release. Such review must be conducted by a fully functioning independent parole system.

The central consideration is that a replacement punishment is individualised so as to be proportionate to the gravity of the crime, the circumstances in which it was committed, the characteristics and culpability of the offender, and consideration of the impact of the crime on those directly affected by it and on the general community. It should thus not only reflect an element of retribution, potential deterrence, and rehabilitation, but also be regarded as just, fair, proportionate, and humane in its delivery. Crucially, the punishment must reflect mitigating factors as well as any aggravating features of the offence. This is developed below under parts [IV] and [V].

IV. Available alternative sentences for serious offences: avoiding cruel, inhuman, or degrading punishments

The judiciary is the appropriate body to exercise sentencing discretion in all cases. It should be independent from political considerations and pressure and be experienced in considering and balancing the interests of the victim, the perpetrator, and society when holding individuals accountable for the crimes they commit.

It is wrong to assume that death sentences should automatically be replaced with “natural life” imprisonment (spending the rest of one’s life in prison). Such an alternative is objectionable on both penological and legal grounds. This is not to deny that certain prisoners may never be fit for release into the general community, however, but all offenders should be provided with the opportunity to show—after a sufficient period of custody to satisfy the needs of retribution— that they are fit and safe to be released.

⁵ For a global survey of life imprisonment and the vast range of penal practices that fall under the umbrella of life imprisonment, see Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis*, Cambridge, MA Harvard University Press, 2019.

Mandatory minimum terms of imprisonment (e.g. life imprisonment with a minimum term of 30 years) have been described by courts elsewhere as the ‘*epitome of arbitrariness*’⁶ or ‘*palpably*’ arbitrary.⁷ Without individualised sentencing, these mandatory terms can breach an individual’s right to a fair trial and risk similar disproportionality.⁸ There is a wealth of law throughout the Commonwealth to support this conclusion,⁹ and mandatory minimums or mandatory minimum terms within a life sentence (that have been prescribed by legislation as opposed to having been judicially individualised) are discouraged as they do not allow judges to consider mitigating features and assess the characteristics and the culpability of the individual offender.

If a *mandatory* sentence to imprisonment for life is enacted as the new punishment in replacement for death, the same human rights concerns that have led national courts and international tribunals to condemn the *mandatory* death penalty are equally likely to arise. The central complaint is that a mandatory sentence of life imprisonment prevents a judge from tailoring the punishment to the circumstances of any given case, in breach of the right to a fair trial, and thus exposes defendants to the risk of disproportionate sentences.¹⁰ Clearly, mandatory sentences of imprisonment for life disregard defendants’ human rights.

There should be a range of punishments available to the judge in order to fashion a sentence that fits the crime and the offender’s individual culpability. This range should include imprisonment proportionate to the severity of the crime, or in special circumstances, a suspended sentence of imprisonment or a sentence ordering detention in a mental health facility or reformatory institution.¹¹ In order to avoid arbitrary sentencing, such punishments must be administered in conformity with established guidelines to ensure equitable treatment between like cases.

In relation to Article 3 of the European Convention on Human Rights, which—like the International Covenant on Civil and Political Rights (ICCPR)—prohibits cruel, inhuman and degrading treatment, the European Court of Human Rights has declared that a whole life sentence without the possibility of review amounts to cruel, inhuman, and degrading punishment because the applicants had no hope of release or

⁶ *Francis v State*, Nos 5 & 6 of 2010 (Court of Appeal Trinidad & Tobago).

⁷ *August v the Queen* [2018] CCJ 7 (Per Saunders JA) para.144 (Caribbean Court of Justice).

⁸ *R v Smith* [1987] 1 SCR 1045.

⁹ See, for example, *R v Nur* [2015] SCC 15 and *R v Lloyd* [2016] SCC 13 from the Canadian Supreme Court; *Attorney-General of Belize v Zuniga* [2014] 2 CCJ (AJ) from the Caribbean Court of Justice.

¹⁰ *de Boucherville v Mauritius* [2008] UKPC 37 para.23.

¹¹ *R v Lichniak* [2003] 1 AC 903.

review of sentence.¹² However, if, despite our concerns, a mandatory sentence of life imprisonment *is* chosen to replace the death penalty in Sierra Leone, safeguards are essential in order to ensure some form of review and opportunity for release. Sentencing guidelines would need to be established in order to specify minimum periods to be served before the possibility of release is reviewed. International and domestic courts have reasoned that there must be a review of a prisoner’s life sentence after no more than 25-30 years to determine fitness for release under supervision or licence.¹³ In the event that Sierra Leone introduces a mandatory sentence of life imprisonment, we would therefore recommend a review of those mandatory sentences after no more than 25 years.

V. Models and good practices for sentencing in countries without the death penalty

In abolishing capital punishment, the best course is to replace a death sentence with maximum, non-mandatory, penalties of life imprisonment. Thereafter, additional guidance in the form of sentencing guidelines may be issued to clarify the range of penalties appropriate to common types of circumstances for specific offences, thus making clear what aggravating and mitigating factors are appropriate for consideration. This can be done either by regulation or through practice direction. Sentencing guidelines—adopted by a range of common law jurisdictions—ensure consistency, without removing those critical elements of judicial discretion and the convicted person’s right to be heard and to receive proportionate punishment.

a. Sentences of imprisonment should allow for rehabilitation and reintegration of the offender, and the conditions of imprisonment should promote such outcomes

If maximum, non-mandatory sentences of imprisonment for life are to be proposed to replace sentences of death, then ensuring the proper reducibility of those sentences in accordance with international human rights standards is crucial. That requires the creation of a fully functioning parole system that would allow the reintegration of an offender after rehabilitative goals have been met.

Once a sentence of imprisonment is imposed, the state has a duty to meet the legitimate penal aims of incarceration. Article 10(3) of the ICCPR states that the ‘*essential aim*’ of the penitentiary is ‘*reformation*

¹² *Vinter and others v UK*, [2013] ECHR 786. In the recently decided case of *Viola v Italy* [2019] ECHR 217, the European Court of Human Rights reiterated that it was impermissible to deprive persons of their freedom without striving towards their rehabilitation and a chance to regain their freedom at some date. The Court found that a life sentence that restricted the prospects for release and the possibility of review of sentence to an excessive degree would amount to a violation of Article 3 of the ECHR.

¹³ See *Lendore; August; Makoni v Commissioner of Prisons* Judgment No. CCZ 8/16 (Zimbabwe) p.14; and a large number of cases from the European Court of Human Rights on this, including *TP and AT v Hungary* App Nos 37871/14 and 73986/14, 4 October 2016.

and social rehabilitation'. The United Nations Human Rights Committee has reiterated that “*No penitentiary system should be only retributory; it should essentially seek the reformation and social; rehabilitation of the prisoner*”.¹⁴

Therefore, while the prisoner is incarcerated, he or she should have access to rehabilitative programmes—including those to address drug addiction and violence—as well as education and skills training in order to prepare for release at some time in the future. Such measures reduce significantly risks to the wider society, as well as to fellow prisoners and prison officers before release. The basic rights of prisoners to access the necessary support and resources to develop skills and manage mental health and behavioural conditions must be extended to all prisoners, even those sentenced to life imprisonment, so that when they are released, they can return to their communities and participate as fully as possible in society. Restorative justice mechanisms can help some prisoners to prepare for release as well as to prepare any victims of their offences, and the wider community, for their return and successful reintegration.

VI. Key considerations for alternative sentencing structures

a. No Mandatory sentencing

If a mandatory sentence to imprisonment for life replaces a sentence of death, the same frustrations that have caused domestic courts and international tribunals to speak out against the mandatory death sentence are equally likely to arise with a mandatory sentence of imprisonment for life, because it prevents a judge tailoring the punishment to the circumstances of any given case. In the same way that a mandatory death sentence breaches the right to a fair trial because the individual cannot persuade a judge to impose a lighter sentence, the individual is denied that opportunity with mandatory imprisonment for life. It also carries with it the same risk of disproportionate sentences. Mandatory sentences of imprisonment for life offend the same human rights principles. There should be a range of punishments available to the judge so that the sentence can be fashioned to meet the crime and the offender’s individual culpability.

b. How to resentence prisoners currently under sentence of death

Those who are currently under sentence of death will now require a sentence to be substituted for their sentence of death. These prisoners will be at different stages of their criminal proceedings and punishment: some will have cases pending on appeal, while others will have been sentenced to death a long time ago and spent many years in the distressing position of being under sentence of death. Each of these categories

¹⁴ General Comment 21, Human Rights Committee, para 10.

should be identified and considered, although the assumption is that a significant proportion of prisoners on death row remain within the judicial process and their cases are pending appeal.

Prisoners who were already sentenced to death with no pending appeal will be entitled to benefit from the reforms, once enacted, and to be re-sentenced by the appellate court on appeal, or through a referral by the appellate court back to the high court. There is no prohibition against bringing an appeal where the sentence imposed was one fixed by law, such as a mandatory death sentence.

It is also important to note that the clemency process cannot bypass an appeal process because doing so would deprive a prisoner of equal protection under the law. Any legislation that purports to remove the right of appeal where deprivation of liberty is at stake would fundamentally interfere with the judicial process and would likely be unconstitutional.

The large number of individuals sentenced to death who still have pending appeals can be re-sentenced to one of the new penalties replacing the death penalty in the normal course of their criminal proceedings at the hearing of their appeal. That means that the number of prisoners that will require their sentences of death to be substituted for alternative sentences by way of commutation or other special procedure is considerably reduced.

VII. Recommendations

We therefore recommend that the government seek to:

- I. Repeal all death penalty laws;**
- II. Enact alternative penalties that do not unduly restrict judicial discretion to determine the appropriate punishment in each case;**
- III. Facilitate prisoners on death row with pending appeals to be re-sentenced by the appellate courts;**
- IV. Enact legislation to provide for a judicial re-sentencing process for prisoners who have been sentenced to death, but who have exhausted their criminal appeals.**