

Pathways to Justice: Implementing a Fair and Effective Remedy following Abolition of the Mandatory Death Penalty in Kenya

An expert report submitted by The Death Penalty Project upon invitation by the Government Sentencing Task Force



THE
DEATH
PENALTY
PROJECT

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We would like to express our sincere gratitude to Professor Jeffrey Fagan, whose expert report *Deterrence and the Death Penalty Internationally and in Kenya* provides an invaluable complement to this report.

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Copies of this report may be obtained from:
The Death Penalty Project
87-91 Newman Street
London
W1T 3EY

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Contents

| | |
|--|-----------|
| Foreword | 6 |
| Part 1. Introduction | 9 |
| Part 2. Summary of the report and our key proposals | 13 |
| Part 3. Substituting a lawful sentence in place of a mandatory death sentence when criminal proceedings have concluded: approaches from various jurisdictions | 17 |
| Africa | 18 |
| <i>South Africa</i> | 18 |
| <i>Uganda</i> | 22 |
| <i>Malawi</i> | 27 |
| <i>Zimbabwe</i> | 32 |
| Caribbean | 32 |
| <i>Antigua</i> | 33 |
| <i>Jamaica</i> | 33 |
| Asia | 34 |
| <i>Singapore</i> | 34 |
| <i>Hong Kong</i> | 35 |
| Part 4. Recommendations on resentencing | 37 |
| Recommendations on resentencing procedure | 38 |
| A potential principled and practical solution: use of camp courts applying default sentences for resentencing | 40 |
| Secondary proposal: default sentencing and streamlining cases where there can be no practical effect of a full hearing | 44 |
| The question of entitlement to a full resentencing hearing | 46 |
| Part 5. Legislative proposals | 49 |
| Definition of murder | 50 |
| Life without parole..... | 50 |
| Annex: <i>Deterrence and the Death Penalty, Internationally and in Kenya</i> by Jeffrey Fagan | 53 |

Foreword

For more than 30 years, The Death Penalty Project (DPP) has fought on behalf of those whose right to life, a fair trial, and humane treatment is at stake. We achieve this primarily through strategic litigation that identifies, challenges and remedies miscarriages of justice. In addition, we seek to work with policymakers, judges, lawyers and others in criminal justice systems throughout the world on human rights issues that challenge capital sentencing regimes. After legal reform, we seek to advise and give practical assistance on the remedial measures to be implemented.

In December 2017, in *Muruatetu v Republic of Kenya*, the Supreme Court of Kenya declared the mandatory death penalty to be unconstitutional. In reaching its verdict, the Court relied on jurisprudence from other Commonwealth countries where the mandatory death penalty has been found to violate fundamental human rights. Over the past decade, there has been a significant global movement away from the mandatory death penalty, with the international community recognising it as a cruel and inhuman punishment incompatible with fundamental human rights. Kenya is the 13th country where we have successfully brought and/or supported local lawyers in constitutional challenges on the issue.

As part of our decade-long work in Kenya, DPP was admitted as *amicus curiae* in the *Muruatetu* appeal. After the *Muruatetu* judgment, we were invited to assist and advise the body tasked with developing a process for implementing the decision and giving relief to the thousands of individuals unconstitutionally sentenced to death. As part of this assistance, we submitted this report in late 2018. It draws on our experiences in other jurisdictions where capital sentencing laws have been struck down or abolished, thereby generating the need for prisoners already unlawfully sentenced to death to be given substitute sentences.

In addition, and to inform a broader call for abolition, we were asked to address the issue of deterrence. In this regard, we commissioned Professor Jeffrey Fagan (Isidor and Seville Sulzbacher Professor of Law, Columbia Law School) to produce a companion report entitled *Deterrence and the Death Penalty Internationally and in Kenya*, which is annexed to our recommendations. Professor Fagan's report makes clear that there is no evidence that executions have a greater deterrent effect on homicides than punishment by life incarceration, and that there should be no expectation that executions will deter homicides in Kenya (or elsewhere).

We have published this report because we believe it may also be of assistance to policymakers and advocates in other jurisdictions faced with similar challenges. Within the Commonwealth, for example, a disproportionate number of countries continue to impose the death penalty and retain the mandatory death penalty for murder, and for non-fatal offences such as aggravated robbery and drug-related offences. It is our hope that other jurisdictions will continue to steadily move away from this outdated practice and, as they do so, they will be required to implement effective remedies for those affected. International human rights law requires that retentionist states ensure strict adherence to safeguards governing the imposition of the death penalty, while progressively restricting its use, leading to ultimate abolition.

Where the death penalty is restricted or abolished – through, for example, a successful court challenge or progressive legislative reform – governments must decide on replacements for the (mandatory) death penalty that must themselves avoid infringing fundamental rights. Just consideration of these questions requires navigating other potential human rights infringements and ensuring that the satisfactory requirements of due process are met. What is more, resentencing procedures must be scalable and

practically accessible to the large number of individuals (thousands in the case of Kenya) entitled to relief. Our report addresses these challenges head on.

We wish to extend our gratitude to Virginia Nelder, Kenya Law Reform Commission, and all other members of the Sentencing Task Force for inviting us to assist them in their critical work, and for their partnership over the past year. We also extend our gratitude to Professor Fagan for lending his expertise to this important work. Finally, we must thank Joe Middleton of Doughty Street Chambers, and Amanda Clift-Matthews (In-house Counsel) for drafting this report, and Sophie Gebreselassie for her background research and initial draft, much of which was incorporated into the final version.

The Task Force has finalised and submitted its report and recommendations – in which it considered our report among contributions from other experts and civil society organisations – to the Attorney General in December 2018. The Attorney General is currently considering what proposals it will present to the legislature. We look forward to continuing this dialogue and to providing any assistance necessary to facilitate this important process in Kenya.

Parvais Jabbar and Saul Lehrfreund

Executive Directors

The Death Penalty Project

January 2019

PART ONE:

Introduction

1.1

The Death Penalty Project (the ‘DPP’) is providing this report at the invitation of the Task Force on Review of Mandatory Death Sentence under Section 204 of the Penal Code Act (hereinafter, the ‘Task Force’), with a view to supporting the fulfilment of its Terms of Reference. In particular, we hope our observations may help the Task Force to develop a legal framework to ensure that all prisoners affected by the ruling of the Supreme Court in *Muruatetu*¹ are judicially resentenced.²

1.2

The DPP is a legal action charity based in London. The DPP was privileged to be permitted by the Supreme Court of Kenya to intervene as *amicus curiae* in the *Muruatetu* case challenging the imposition of the mandatory death penalty, as international experts on the death penalty. We have been working in Kenya on death penalty-related issues for many years. We worked directly with Kenyan counsel on the challenge to the mandatory death penalty in *Mutiso v Republic*³ and were directly involved in similar challenges in Uganda,⁴ Malawi⁵ and Ghana.⁶ We have worked with judges, prosecutors, defence lawyers and other participants in the criminal justice system in many other countries in Africa, and in the common law jurisdictions in Asia and the Caribbean on human rights issues related to the death penalty and to the implementation of sentences of life imprisonment.

1.3

On 14 December 2017, the Supreme Court of Kenya issued a landmark ruling, finding that the mandatory death penalty contained in section 204 of the Penal Code was unconstitutional: *Francis Karioko Muruatetu & Anr v Republic Of Kenya*.⁷ The Court held further that a life sentence should not necessarily mean natural life, but rather it could mean a certain, judicially set minimum or maximum term.

¹ [2017] eKLR, Petition No. 15 of 2015 (as consolidated with Petition No 16 of 2015) [*Muruatetu*].

² Terms of Reference for the Task Force are set out in Gazette Notice No. 2610 (23 March 2018) and include a directive for the Task Force to ‘Prepare a detailed professional review with regard to the death penalty in the context of the judgment and the order made in the petition with a view to – i. Set up a legal framework to deal with sentence re-hearing cases similar to that of the petitioners; ii. Review the legislative framework on the death penalty in Kenya; iii. Recommend a guide to death sentencing; iv. Formulate parameters of what ought to constitute life imprisonment; v. Formulate amendments and enact a law to give effect to the judgment; vi. Prepare and forward a progress report to the Supreme Court within twelve (12) months from the date of the judgment; vii. Create awareness and sensitise stakeholders and the public on the judgment and its implications, and take into account their views on the same.’

³ [2011] EALR 242.

⁴ *Kigula & Ors v Attorney General* [2005] UGCC 8 (Constitutional Court of Uganda); *Attorney General v Kigula & Ors* [2009] UGSC 6 (Supreme Court of Uganda).

⁵ *Kafantayeni & Ors v Attorney General* [2007] MWHC 1.

⁶ *Johnson v Republic* [2011] 2 SCGLR 601.

⁷ See *Muruatetu*, note 1.

1.4.

In its remedial order, the Court tasked the Honourable Attorney General of Kenya, the Director of Public Prosecutions and other relevant agencies to prepare a professional review, setting up a framework to deal with sentence re-hearings of those people subject to the mandatory death penalty. The Court also ordered the Speakers of the National Assembly and the Senate, the Attorney-General and the Kenya Law Reform Commission to consider the legislative reform necessary to give effect to the Court's judgment on the parameters of what ought to constitute life imprisonment.⁸

1.5.

On 15 March 2018, the Attorney General constituted a Task Force, the Terms of Reference of which include preparing the aforementioned professional review to, *inter alia*, formulate the legal frameworks to deal with the sentence re-hearing cases and the parameters of what ought to constitute life imprisonment.⁹

1.6.

Section 2(b) of the Mode of Operation of the Task Force provides that the Task Force shall 'co-opt any resources persons as and when necessary, on a short-term basis, to assist in the achievement of the Terms of Reference'.¹⁰ DPP has been invited to share with the Task Force the benefit of its experience in other jurisdictions that have undertaken similar resentencing projects in recent years and any lessons learned.

1.7.

This report has been prepared with the assistance of Joe Middleton of Doughty Street Chambers, and Amanda Clift-Matthews, In-house Counsel at the DPP. We are pleased to be able to offer whatever engagement or support we can for the enormously important work being done by the Task Force.

⁸ Ibid at paragraph 112.

⁹ See note 2.

¹⁰ The Death Penalty Project was also asked by the Task Force to address the issue of deterrence. To best address this issue, it requested the expert technical assistance of Professor Jeffrey Fagan, Isidor and Seville Sulzbacher Professor of Law at Columbia Law School.

PART TWO:

Summary of the report and
our key proposals

2.1.

The Task Force faces a formidable challenge in proposing a principled and practically achievable strategy for implementing the Supreme Court’s ruling in *Muruatetu* that the imposition of a mandatory death penalty is unconstitutional. Informed by our experience, our suggestions for how this might be achieved – and how the legality of replacement sentences for the mandatory death penalty might be ensured – have been divided into three parts:

- **Part A** of our report addresses the way in which other common law jurisdictions have addressed the practical and procedural challenges of resentencing, following the abolition of the mandatory death penalty. This comparative overview includes developments in Africa, Asia and the Caribbean. There is a particular emphasis on the resentencing processes in Malawi and Uganda, in which DPP was directly involved.

One of the key features to emerge from these resentencing exercises, particularly in Malawi and Uganda, is the enormity of the practical challenges posed by resentencing and the potential drain on judicial and other resources. The lessons learned from these experiences in other jurisdictions inform our observations in Part B on potential resentencing solutions for Kenya.

- **Part B** sets out some concrete suggestions for how resentencing might be approached in Kenya. Our primary suggestions seek to balance the need for principled solutions and the reality that any strategy needs to be practically achievable, bearing in mind the very large cohort of prisoners who will fall to be resentenced in light of *Muruatetu*. We also offer some suggestions in response to the Task Force’s ‘Summary of Recommendations of the Task Force on the Review of the Mandatory Death Penalty’, dated 3 October 2018.
- **In Part C**, we have set out some brief observations on the current definition of murder and the proposal for life without parole to form part of a potential sentencing regime. We recommend amending the definition of murder to reflect the proposed sentences and we remind the Task Force of the recent decision of the Constitutional Court of Zimbabwe in the *Makoni* case,¹¹ in which the Court held that life imprisonment without the prospect of qualifying for parole was incompatible with fundamental constitutional rights.

¹¹ *Obediah Makoni v Commissioner of Prisons and Minister of Justice Legal & Parliamentary Affairs*, Const. Application No CCZ 48/15, Judgment No CCZ 8/16, 13 July 2016.

2.2. Our key proposals are as follows:-

- i. We invite the Task Force to consider a resentencing process using ‘camp courts’. These would dispense streamlined justice in situ at prisons, applying discretionary sentences for robbery with violence and murder, while according – so far as possible – with the ordinary principles of justice and criminal procedure. This suggestion is inspired, in part, by the successfully streamlined processes that were instituted in Malawi (see pages 27-32).

- ii. Recognising that the Task Force may, ultimately, not opt for a resentencing scheme that provides streamlining for all or the majority of prisoners, we suggest at least streamlining the sentencing process for a portion of the *Muruatetu* cohort for whom a sentencing hearing will not make any practical difference. We note that there will be prisoners who have already served the maximum sentence that can be imposed under the new legislative proposals for that offence, or who will have served any minimum period of life imprisonment that will become applicable for that offence. In such circumstances, a full sentencing hearing may be otiose where the inevitable outcome is immediate release or immediate consideration for release by the Parole Board.

- iii. We would encourage the Task Force to consider applying the approach now adopted in Zimbabwe, where life imprisonment without the prospect of parole has been acknowledged to be incompatible with fundamental constitutional rights.

- iv. We also seek to discourage the Task Force from proposing lengthy mandatory minimum sentences or mandatory minimum periods of detention before eligibility for parole. This is because of the inherent risk that such sentences would violate fundamental human rights. We suggest that a judicial discretion to depart from minimum terms of imprisonment or minimum periods of detention, at least in exceptional cases, be included and clearly stated in the amending legislation.

PART THREE:

Substituting a lawful sentence in place of a mandatory death sentence, when criminal proceedings have concluded: approaches from various jurisdictions

3.1.

This part considers the approaches adopted in other jurisdictions where there has been a change in the law or a change in the understanding of the law, which has meant that the mandatory death sentences imposed on this category of prisoners can no longer be carried out. These changes have followed the abolition of the mandatory death penalty or, in the case of South Africa, the abolition of the death penalty itself.

3.2.

The following brief survey focuses on the *procedural* aspects of the resentencing exercises conducted in these jurisdictions. For a detailed overview of the rich body of jurisprudence that has emerged out of these historical examples and a comprehensive discussion of the legal principles that apply in the capital resentencing context (including considerations that arise when offenders need to be resentenced under a newly discretionary capital regime and courts' treatment of those considerations), see Joe Middleton and Amanda Clift-Matthews with Edward Fitzgerald QC, *Sentencing in Capital Cases* (The Death Penalty Project: 2018).¹² This report draws heavily from that text.

AFRICA

South Africa

3.3.

In 1995, the Constitutional Court of South Africa ruled in *S v Makwanyane*¹³ that the death penalty was unconstitutional in that it violated fundamental rights under South Africa's 1993 Constitution. Consequently, the Court ordered the following (at [149] and [150]),

‘This, and other capital cases which have been postponed by the Appellate Division pending the decision of this Court on the constitutionality of the death sentence, can now be dealt with in accordance with the order made in this case...

The following order is made:

In terms of section 98(5) of the Constitution [*the court's power to make a declaration of unconstitutionality*], and with effect from the date of this order, the provisions of paragraphs (a), (c), (d), (e) and (f) of section 277(1) of the Criminal Procedure Act, and all corresponding provisions of other legislation sanctioning capital punishment which are in force in any part of the national territory in terms of section 229, are declared to be inconsistent with the Constitution and, accordingly, to be invalid.

¹² Joe Middleton and Amanda Clift-Matthews with Edward Fitzgerald QC, *Sentencing in capital cases* (The Death Penalty Project, 2018), available at www.deathpenaltyproject.org/knowledge/sentencing-in-capital-cases-2018/

¹³ [1995] ZACC 3.

In terms of section 98(7) [*the court's power to order the State to refrain from unconstitutional action*] of the Constitution, and with effect from the date of this order:

- (a) the State is and all its organs are forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid; and
- (b) all such persons will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments.’
[Emphasis added]

3.4.

At that time, there were between 300 and 400 prisoners under sentence of death. All prisoners under sentence of death who had cases pending on appeal were resentenced by the appellate courts. But that still left a large number of prisoners under sentence of death for whom criminal proceedings had already concluded. Legislation was enacted to provide a means by which their sentences could be substituted. That took the form of the Criminal Law Amendment Act No. 105 of 1997:

- (1) The Minister of Justice shall, as soon as practicable after the commencement of this Act, refer the case of every person who has been sentenced to death and has in respect of that sentence exhausted all the recognised legal procedures pertaining to appeal or review, or no longer has such procedures at his or her disposal, to the court in which the sentence of death was imposed.
- (2) The court shall consist of the judge who imposed the sentence in question or, if it cannot be so constituted, the Judge President of the court in question shall designate any other judge of that court to deal with the matter in terms of subsection (3).
- (3) (a) The court shall be furnished with written argument on behalf of the person sentenced to death and the prosecuting authority.
(b) The court—
 - (i) shall consider the written arguments and the evidence led at the trial; and
 - (ii) may, if necessary, hear oral argument on such written arguments, and shall advise the President, with full reasons therefor, on the appropriate sentence to be substituted in the place of the sentence of death and, if applicable, on the date to which the sentence shall be antedated.
- (4) The President shall set aside the sentence of death and substitute for the sentence of death the punishment advised by the court.
- (5) No appeal shall lie in respect of any aspect of the proceedings, finding or advice of the court in terms of subsection (3).’

3.5.

In other words, prisoners with no criminal proceedings outstanding were to have their sentences substituted under a statutorily prescribed scheme. That scheme compelled the Minister of Justice to ensure all prisoners affected had their cases referred back to the courts. It permitted the substituted sentence to be determined by a judge and for the prisoner to first make written representations. But it was streamlined to the extent that there was no right to an oral hearing, no right to call evidence in support and no right of appeal. The eventual commutation of sentence was effected by the exercise of clemency, although the President was obliged to substitute the judge's recommendation as to the appropriate sentence.

3.6.

This process was challenged in the case of *Sibiya*¹⁴ because the resentencing procedure lacked full fair trial guarantees. However, the Court of Appeal found the process to be constitutionally compatible. It said:

‘The death penalty was not declared invalid with retrospective effect. The order of this Court was to have prospective effect only. It follows that all death sentences imposed before 6 June 1995 remained valid sentences.’ ([10])

3.7.

It further found:

‘The applicants and all other people in their position therefore had their death sentences imposed upon them, in terms of the law as it stood at the time. They had been tried, convicted and sentenced to death by a high court at a time when the Bill of Rights was not in force.’ ([30])

3.8.

The Court of Appeal also took into account that the provisions were enacted to deal with an ‘extraordinary situation’ and that it was necessary that the ‘substitution of sentence occur quickly and efficiently’. ([33])

¹⁴ Case CCT 45/04, 25 May 2005.

3.9.

It is questionable whether the Constitutional Court in *Makwanyane* was correct to make its order prospective from the date of judgment only, or whether its ruling should have had retrospective effect from the date of the coming into force of the 1993 Constitution – that is, the date when the rights that were violated by the death penalty also came into force. Applying the law retrospectively in this way is an accepted principle of constitutional interpretation. It would have meant that prisoners sentenced to death after the introduction of the new Constitution would have been entitled to a resentencing hearing, even if their criminal proceedings had concluded.

3.10.

However, the Court's ruling that the decision in *Makwanyane* had no application to the imposition of the sentences which were imposed and confirmed on appeal before the introduction of the 1993 Constitution is unassailable. *Makwanyane* applied only to their execution in that, while the penalty had been lawfully imposed at the time, to carry it out would have been to deprive that person of their right to life in circumstances now considered to be cruel and inhuman.

Delays in resentencing

3.11.

It took nine years for the resentencing process under the Act to be completed and 11 years from the decision in *Makwanyane*. It was not until 26 July 2006 that the final remaining person sentenced to death in South Africa (out of 300 to 400) received a substitute sentence.

3.12.

Concerned about the very lengthy delays, in May 2005 the Court of Appeal began what it termed a 'supervisory' function to ensure speedy progress of the resentencing exercise for the remaining prisoners (around 40) that still by that date had not yet had lawful sentences substituted for their death sentences. The Court ordered the State to report on the progress of the resentencing programme at monthly to three-monthly intervals. It concluded its supervisory role in November 1996.¹⁵

¹⁵ *Sibiya v Director of Public Prosecutions* Case CCT 45/04 30, 30 November 1996.

Lessons from South Africa

3.13

The South African experience illustrates how not all prisoners sentenced to death before a judicial declaration of that sentence's incompatibility with the Constitution are necessarily entitled to a resentencing hearing (although, of course, they are entitled not to be executed under that penalty). Instead, South Africa provides an example of a quasi-judicial mechanism that can be introduced by legislation to provide for a fair resentencing programme.

3.14.

But even resentencing hearings that do not have full fair trial safeguards can be time-consuming. Regular reporting to the courts by the State on the progress of the resentencing programme may assist with momentum and compliance.

Uganda

3.15.

On 10 June 2005, in *Kigula & Ors v Attorney General* in response to a petition filed on behalf of all 417 prisoners on death row, the Constitutional Court of Uganda held that the mandatory death penalty in all contexts was inconsistent with constitutionally guaranteed rights to life, protection from inhuman treatment, fair hearing and equality.¹⁶ The Court also held that inordinate delay in carrying out a death sentence is inconsistent with the right to a fair hearing.¹⁷

3.16.

On 21 January 2009, the Supreme Court upheld the Constitutional Court's judgment, adding that the mandatory death penalty also violated constitutional separation of powers between the legislature and the judiciary.¹⁸ The Supreme Court ordered as remedy that all sentences already confirmed by the Supreme Court would be considered under the Executive's mercy power within three years. In those cases where, after three years, no determination had been made, sentences would be deemed to be commuted to life imprisonment without remission. For those individuals whose sentences were still pending appeal, the Supreme Court ordered their sentences remitted to the High Court to be reheard on mitigation of sentence only and reconsidered. By February 2009, the number of prisoners on death row was roughly 700. Approximately 530 of these individuals were eligible for resentencing.

¹⁶ See Constitutional Court Petition No. 6 of 2003, pp. 62, 137.

¹⁷ *Ibid.*

¹⁸ See Constitutional Appeal No. 3 of 2006, 21 January 2009, p. 45.

Resentencing hearings: first phase (2009-2011) and second phase (2012-present)

3.17.

The resentencing exercise in Uganda occurred in two waves. The first took place between the Supreme Court's 2009 *Kigula* ruling and 2011. Approximately 60 sentences were re-heard during this period. The second wave began in 2012, after the creation of a governmental Task Force to address the post-*Kigula* resentencing process. These efforts continue to the present.

3.18.

Having helped the legal team in Uganda in drafting submissions on behalf of the petitioners in *Kigula*, the DPP also assisted in the provision of legal representation for those subsequently entitled to sentence re-hearings. Together with the Ugandan NGO Foundation for Human Rights Initiative, a local project office was established at the law firm Katende, Ssempebwa & Company, which acted for the whole class of petitioners and provided legal representation. Case preparation for the sentence re-hearings was carried out primarily between 2007 and mid-2009, and involved: establishment and continuous updating of the schedule of death row prisoners; obtaining trial transcripts and relevant court documents; conducting prisoner interviews and preparing case summaries; obtaining psychiatric reports (a team of psychiatrists was instructed and mental assessments were carried out on 548 prisoners on death row); and collecting witness statements (a total of 25 witnesses were located and statements obtained).

3.19.

Approximately 60 individuals went back to court to be resented between 2009 and 2011.

3.20.

Case law from this resentencing period indicates the following matters emerged as relevant to determining the appropriate substitute sentence: age; mental health of the prisoner, including any addictions;²¹ physical health of the prisoner, such as any terminal or incurable illnesses;²² capacity for reform; continuing dangerousness; length of time already detained;²³ remorse; character of the prisoner, including education, family connections and religious links; attempts to reconcile with the victim and/or their family;²⁴ and views of the victim's family.²⁵

¹⁹ See *Attorney General v Kigula & Ors* [2009] UGSC 6, pp. 63–64.

²⁰ *Ibid.*

²¹ *Uganda v Bwenge Patrick*, HCT-03-CR-SC-190/1996, 11 November 2009.

²² *Musitwa Lubega v Uganda*, Criminal Appeal No. 73/2003, 23 March 2009.

²³ *Bagatagira Mujuni v Uganda* Session Case No. HCT-05-SC-0137 of 2000, 1 December 2009.

²⁴ *Losike Apanapira Peter v Uganda*, Criminal Appeal No. 22 of 2005, 12 February 2010.

²⁵ *Ibid.*

3.21.

Progress on the sentence re-hearings stalled in 2011. In 2012, the government formed the Kigula Task Force to establish a more systematic and uniform resentencing process. An initial session was planned for 2013, covering 136 cases remitted to the High Court. Preparation for these sessions included the development of a scheme of Pre-sentence and Social Inquiry Reports and mental health assessments for every inmate appearing for resentencing.²⁶ The development of the Pre-sentence Reports included interviews with the prisoner on his or her background, progress in prison and reasons for his or her offending behaviour, as well as consultation of official documents, such as medical and prison reports. Social workers also conducted independent assessments of the prisoner's capacity to reform and developed Social Inquiry Reports from information garnered through inquiries in the offenders' home communities regarding background and ability for reintegration. Mental health reports were also produced, in part via assessments carried out by a consultant psychiatrist.²⁷

3.22.

Ten judges, ten defence advocates and ten prosecutors were assigned for the special session covering 136 sentence redeterminations.²⁸ Advocates report that, as a result of the session, 85 of the 136 resentenced were given fixed terms of imprisonment, 22 were given life sentences, 15 were released, nine were given death sentences (which were subsequently appealed), four were referred to a psychiatric facility, and one was given a Minister's Order because of minority status.²⁹ Ultimately, 127 individuals left the condemned section of the prison as a result of the session.

3.23.

The Chief Justice simultaneously issued discretionary sentencing guidelines in 2013.³⁰ The guidelines provide a starting point and sentencing ranges for capital offences, affirm the principle of the 'rarest of the rare' and the relevance of both aggravating and mitigating circumstances (detailing specific circumstances relevant to capital offences), and recognise the importance of proffer of relevant materials from both sides on these matters.³¹

²⁶ Blog post by Tanya Murshed, Uganda conducts resentencing hearings in the wake of the *Kigula* decision, 14 July 2014, available at blog: deathpenaltyworldwide.org/2014/07/uganda-conducts-resentencing-hearings-in-the-wake-of-the-kigula-decision.html. Ms Murshed was the Uganda Project Director for the Centre for Capital Punishment Studies (CCPS), a UK-based NGO founded in 1992 by Peter Hodgkinson OBE. CCPS reports having been identified as a key stakeholder by the *Kigula* Task Force.

²⁷ *Ibid.* For more information about the need for a Social Inquiry Report and psychiatric and/or psychological evidence in every capital case, please see, *Sentencing in Capital Cases*, Note 12 at pp. 78-82.

²⁸ See Murshed, note 26.

²⁹ *Ibid.*

³⁰ The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, available on the website of the Justice Law and Order Sector (www.jlos.go.ug). We understand that work has been undertaken in the past year to redraft the Guidelines as they apply to capital cases, but any amendments to the 2013 version do not yet appear to have been approved.

³¹ *Ibid.* at paragraphs 20-21, 55 and 60. Aggravating circumstances include degree of harm and whether the victim was particularly vulnerable and whether there was gratuitous degradation of the victim, and mitigating circumstances include guilty plea, mental disorder linked to the commission of the offence, an element of self-defence (not rising to a defence), previous good character and remorse.

3.24.

The overall procedural characteristics of the hearings were as follows.³² Those *Kigula* beneficiaries who were able to go back to the High Court for resentencing were automatically granted hearings and no affirmative applications had to be made. Names to appear would be put on the Court's noticeboard. The sentence re-hearings took place in open court, before the original sentencing judge where possible and with the offender always physically present. Depending on the number of sentence re-hearings a judge had to conduct, the hearings were integrated into a judge's normal case schedule, but sometimes special sessions were organised in the trial courts, as described above. There was no expedited process for any cases, though batch sentence re-hearings were sometimes conducted.

3.25.

Resentencings were based only on mitigation, and written submissions were made (with no set timeline) in cases where prisoners had representation. While the length of each hearing depended on the availability of the judge and the parties, hearings would not extend over a week. Some sentences were determined on the same day of the hearing. New sentences could be appealed to the Court of the Appeal, and subsequently to the Supreme Court.

Challenges – inconsistency and delay

3.26.

A 2012 report by Penal Reform International (PRI), discussing the post-*Kigula* sentence re-hearings during the 2009–2011 period, identified a number of challenges created in the immediate wake of the judgment.³³ As many *Kigula* beneficiaries had been on death row for extended periods of time, availability of the initial sentencing judges became an issue. Insufficient availability of lawyers with relevant mitigation experience and a lack of authoritative jurisprudence on assessing mitigation also hindered the process. PRI also noted a lack of awareness among prisoners regarding the benefit of the hearings and the submission of mitigating evidence and arguments, which – combined with inexperience in investigating and presenting mitigation evidence among lawyers – weakened the effectiveness of the hearings. Finally, there was no process to fast-track these hearings, in part leading to the halt of progress seen in 2011.

³² We are grateful to Susan Kigula, prisoners' rights advocate and named plaintiff in the *Kigula* case, for providing information for this summary.

³³ See Penal Reform International, *The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda* (2012) available at www.penalreform.org/wp-content/uploads/2013/05/East-Africa-research-report-on-death-penalty-and-life-imprisonment.pdf

³⁴ See, for example, Murshed, note 26.

³⁵ Justice Centres Uganda, JCU represents death row convicts, 11 November 2016, available at: www.justicecentres.go.ug/index.php/free-extensions/latest-news/item/86-jcu-represents-death-row-convicts. See also Betty Amamukirori, Court reduces sentences of death row convicts, *New Vision*, 25 August 2016, available at: www.newvision.co.ug/new_vision/news/1433643/plea-hearing-death-row-convicts

3.27.

Challenges continued into the second phase of the resentencing process hearings beginning in 2013. Advocates reported that, despite the issuance of the sentencing guidelines and the duty they imposed on both sides to provide information on the offender, detailed information was still often not being presented to the court. Advocates also reported judges applying an inconsistent approach to sentencing, including with regard to consideration of post-conviction mitigation, application of the ‘rarest of the rare’ standard and relevance of pre-sentence reports (with some judges disregarding the reports altogether).³⁴

3.28.

Delay has also clearly featured in the post-*Kigula* resentencing process. Difficulties in locating files led to many sentence re-hearings being delayed well into 2016 and 2017; for example, in 2016, 26 men and three women – beneficiaries of the *Kigula* judgment, whose sentence re-hearings had been delayed as a result of missing case files – finally came before a High Court judge for resentencing.³⁵ After the hearing, 12 were released and the remaining 17 had their sentences reduced to terms of imprisonment ranging from between three and 18 years. Moreover, one advocate has reported that several cases were listed, only for the Court to be informed on the morning of the hearing that the prisoner had died while awaiting resentencing.³⁶ As of the time of writing, there are reportedly *Kigula* beneficiaries still waiting to be resentenced.

Lessons from Uganda

3.29.

The most obvious lesson from the ongoing post-*Kigula* resentencing exercise is the time- and resource-intensive nature of providing individualised sentence re-hearings for all those eligible for resentencing following the invalidation of the mandatory death penalty, and the attendant risks of delay. The Ugandan experience also shows the risk of inconsistencies in resentencing judgments rendered following the invalidation of the mandatory death penalty, even after the promulgation of sentencing guidelines; these are challenges unsurprising in the context of a newly discretionary regime, where the court and advocates may be unfamiliar with evaluating and presenting evidence as to sentence, including mitigation evidence, in capital cases. Relatedly, the Ugandan experience also shows that awareness and buy-in among prisoners with regard to the sentence re-hearing process may not necessarily be uniform – which is particularly problematic in a system of individualised sentence re-hearings that require prisoners to permit and assist their lawyers in gathering and presenting mitigating evidence.

³⁵ Justice Centres Uganda, JCU represents death row convicts, 11 November 2016, available at: www.justicecentres.go.ug/index.php/free-extensions/latest-news/item/86-jcu-represents-death-row-convicts. See also Betty Amamukirori, Court reduces sentences of death row convicts, *New Vision*, 25 August 2016, available at: www.newvision.co.ug/new_vision/news/1433643/plea-hearing-death-row-convicts.

³⁶ Declan O’Callaghan, *The Death Penalty in Uganda: Recent Developments*, (University of Pennsylvania: 2018) (on file with authors). Mr O’Callaghan is a Barrister in the United Kingdom who acted as *amicus curiae* in several resentencing cases.

3.30.

The Ugandan experience also indicates that government ownership of the resentencing process, including establishment of an oversight body to guide the resentencing process, can be important to make sure that the process remains on track.

Malawi

3.31.

On 27 April 2007, the High Court of Malawi ruled in *Kafantayeni & Ors v Attorney General*³⁷ that the mandatory imposition of death for the offence of murder amounted to inhuman and degrading treatment or punishment, in violation of section 19(3) of the Constitution, and, by denying judicial discretion on sentencing, violated the right to a fair trial guaranteed under section 42(2)(f). Accordingly, the Court set aside the death sentences of the plaintiffs and ordered ([11]) each of the plaintiffs to be brought once more before the High Court for a judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the judge in regard to the individual offender and the circumstances of the offence.³⁸

3.32.

The Supreme Court of Appeal affirmed *Kafantayeni in Twoboy Jacob v Republic*³⁹ three months later. Three years later, in *Yasini v Republic*⁴⁰, the Supreme Court ruled further that all murder convicts who had been sentenced to the mandatory death penalty were entitled to resentencing (even if their death sentences had subsequently been commuted to life imprisonment) and that it was the duty of the Director of Public Prosecutions to bring all such prisoners before the High Court for sentencing re-hearings.⁴¹ The Penal Code was amended in 2011 to come into compliance with these decisions, introducing a statutory discretionary death penalty for murder.⁴²

³⁷ Constitutional Case No. 12 of 2005 [2007] MWHC.

³⁸ *Ibid* at p. 11.

³⁹ MSCA Criminal Appeal No. 18 of 2006.

⁴⁰ MSCA Criminal Appeal No. 29 of 2005.

⁴¹ In the 2016 judgment in *Republic v Maiche* (9 of 2016) [2015] MWHC 559, the High Court affirmed that individuals whose mandatory death sentences had been confirmed by the Supreme Court of Appeal after *Kafantayeni* was decided were also entitled to resentencing under *Kafantayeni*.

⁴² Malawi Penal Code, secs. 38, 210, Act 22 of 1929, Laws of Malawi Ch. 7:01, as amended through to 2012. (*Any person convicted of murder shall be liable to be punished with death or with imprisonment for life.*) This amendment does not apply, however, to resentence hearings in which the prosecution and defence may pursue other sentences and where, in many cases, determinate sentences of imprisonment have been passed.

Resentencing hearings

Guidelines

3.33.

In 2013, a Special Committee was appointed by the Chief Justice to oversee the implementation of the *Kafantayeni* and *Yasini* judgments. The Committee set out the following procedural guidelines to govern the sentence rehearings:⁴³

1. *The Registrar should conduct an audit of category (a) cases in all Registries.*
2. *Cases should be notified to the Director of Public Prosecutions, Legal Aid Department and legal firms or lawyers that represented the convicts.*
3. *Cases should be set down for sentence re-hearing before the trial judge unless he or she is not available.*
4. *When the case is called, the state should address the court first. The re-hearing process should follow the normal adversarial process. The state may call witness or submit relevant reports in terms of section 260(2) of the Criminal Procedure and Evidence Code.*
5. *The defence will be called upon to give its version and, likewise, call witnesses or submit reports in terms of section 260(2) of the Criminal Procedure and Evidence code.*
6. *The state has right to reply.*
7. *The judge will, after hearing both sides, pass sentence. The burden and standard of proof remain the same.*

Facts and figures

3.34.

At the time of the *Kafantayeni* judgment, in 2007, the number of prisoners who stood to be resentenced was approximately 190: 23 on death row and about 164 individuals (including four women) who had had their death sentences commuted to life imprisonment by the Executive.⁴⁴ However, sentence re-hearings did not begin in earnest until 2015 (continuing through 2017), after the initiation of a resentencing project by the Malawi Human Rights Commission, in partnership with a coalition of stakeholders, including the judiciary, the Director of Public Prosecutions, the Legal Aid Department and members of the Bar (many of whom provided *pro bono* representation). Over a period of roughly two years, 156 hearings were set and, ultimately, 154 sentences handed down (one individual died pending hearing and another pending judgment).

⁴³ See generally *The Republic v Lackson Dzimbiri* (4 of 2015) [2015] MWHC 1 (01 June 2015) pp. 9-10 (listing the guidelines and discussing their genesis).

⁴⁴ See Cornell University Law School and Malawi Human Rights Centre, *Malawi Capital Resentencing Project: selected jurisprudence* (2017), p. i.

3.35.

The 155 completed resentencing hearings were held on 77 hearing dates over two years and three months, involving 14 judges, 29 defence attorneys and 14 attorneys from the office of the Director of Public Prosecutions. Time taken for decisions to be rendered post-hearing ranged from same day to one year, with the median being 16 days.⁴⁵

- i. *Hearing dates.* The 155 resentencing hearings were held over 77 dates, from 11 February 2015 to 31 May 2017.
- ii. *Average decision times.* The median decision time was 16 days. Of the 154 sentencing hearings, a third were decided on the same day; nearly half were decided within two weeks; and roughly 15 per cent took longer than two months. Only one decision took more than a year.
- iii. *Judicial caseload.* 155 resentencing hearings were heard by a total of 14 judges. Each judge heard between two and 37 matters each, with the average and median number of matters heard by each judge at 11 and eight respectively. Judges who handled the highest number of resentencing hearings did so on multiple hearing dates held over several months. For example, the judge who heard 37 matters – the most cases – heard these matters over approximately 20 dates spanning from February 2015 to May 2017 (hearing between one and four matters per date). This judge took an average of approximately 1.5 months to render his sentencing decisions, with about half of these decisions rendered within a month of the hearing. The second-highest volume judge, who heard 25 matters, did so on 15 hearing dates over a two-year period. More than two-thirds of these matters were decided within three weeks (where half of these – that is, one-third of the total – were decided the same day as the hearing). The remaining third were decided within seven to 14 weeks of the hearing.
- iv. *Counsel.* 29 defence attorneys represented the 156 prisoners, with caseloads ranging between one and 20 clients each. The median number of clients per attorney was four; five attorneys represented 10 or more individuals, while 14 attorneys from the office of the Director of Public Prosecutions, sometimes working in teams of two, covered the 155 hearings.

Resentencing principles

3.36.

Over the course of this resentencing process, the High Courts issued written judgments refining considerations of aggravating and mitigating factors, and dealing with other issues related to redetermination of sentence, including, for example, burden of proof, missing files, the impact of prior violations of constitutional rights (e.g. denial of the right to appeal)⁴⁶ and the relevance of post-conviction

⁴⁵ Sandra Babcock, Faculty Director at the Center on the Death Penalty Worldwide, Cornell Law School, provided the data on which this summary is based.

⁴⁶ See for example *Republic v John & Ithobowa*, Sentence Rehearing Cause No. 13 of 2015, p.8 (addressing the cumulative weight of a previously unlawful sentence and breach of other rights and stating 'the pronouncement of the unconstitutional death sentence then and the resultant long confinement under death row detention after declaring the death penalty unconstitutional, militate against the imposition at this stage of death or life imprisonment' and resentencing petitioners to determinate periods of 24 and 20 years, including time already served). See also *Republic v Mtambo (Malawi)*, Sentence Rehearing Case No. 2 of 2015.

conduct. These judgments fill the gap left by the absence of comprehensive guidance from the Supreme Court of Appeal on the issue of discretionary capital sentencing.⁴⁷ For example, while the ‘rarest of the rare’ approach was not expressly articulated in either *Kafantayeni or Twoboy Jacob*, the approach was explicitly adopted in subsequent cases.⁴⁸

3.37.

A particularly influential judgment on the development of sentencing principles is the case of *R v Makolija*.⁴⁹ Outlined in the judgment’s dicta, these principles were relied upon in many of the subsequent sentence re-hearings held between 2015 and 2017, and included: the idea that the death penalty should be reserved for the ‘worst of the worst’; the recognition that considerations such as age, lack of prior offending and other personal circumstances of the offender should be taken into account, as well as the manner in which the offence was committed; the mitigating power of duress, provocation and lesser participation; and the significance of other factors, including remorse and good conduct in prison.⁵⁰

Resentencing outcomes (new sentences)

3.38.

The 154 new sentences handed down during this period resulted in a range of outcomes, from immediate release (indeed, this was the case for the majority) to the imposition of a sentence of life imprisonment (in just one case). New sentences resulted in immediate release in 112 cases. This was either because the court gave an order for immediate release, or it imposed a determinate sentence that, allowing for time served since the date of arrest, resulted in immediate release. Determinate sentences requiring further time in prison were imposed in 41 cases. At the time of writing, approximately half of that cohort had completed their sentences and been released. Where periods of determinate imprisonment were imposed, including those resulting in the prisoner’s immediate release, most of the sentences were in the region of 20 years, with the most serious cases attracting sentences in the region of 30 years. The shortest sentences were

⁴⁷ For a comprehensive study of discretionary capital sentencing in Malawi and in several other jurisdictions around the world, including in the context of sentence rehearings following the abolition of the mandatory death penalty, see *Sentencing in capital cases*, Note 12.

⁴⁸ See for example *Republic v White*, Criminal Case No. 74 of 2008; *State v Charles Fred & Anr*, Criminal Case No. 163 of 2012; *Republic v Makolija*, Sentence Rehearing Cause No. 12 of 2015.

⁴⁹ Sentence Rehearing Cause No. 12 of 2015.

⁵⁰ *Republic v Makolija*, Sentence Rehearing Cause No. 12 of 2015. See also, *Sentencing in Capital Cases*, Note 12 at p. 54. While a minority of cases held that resentencing courts should not take post-conviction conduct into account, see for example *State v Njoloma* Sentence Rehearing Cause No. 22 of 2015, p.4, the majority recognised the obligation, explicitly acknowledged in *Republic v Payenda*, Sentence Rehearing Cause No. 18 of 2015, paragraph 62, to consider the personal circumstances of the offender, including their capacity for rehabilitation, at the time of the offence and at the time of sentencing. For further information and a compendium of selected jurisprudence from the resentencing hearing, see Cornell University Law School and Malawi Human Rights Centre, *Malawi Capital Resentencing Project: selected jurisprudence* (2017).

⁵¹ The three-year suspended sentences were imposed in a case where the prosecution acknowledged that the prisoners (both minors at the time of the offence and who had suffered a catalogue of constitutional violations) should never have been convicted, but the Court’s hands were tied because it was only dealing with sentence. See *R v James & Ors*, Sentence Rehearing Cause No. 69 of 2015, paras 18–28.

⁵² *R v Maonga*, Sentence Rehearing Cause No. 29 of 2015. The longest composite sentence comprised consecutive sentences of 23 and 25 years, but even in that case time already served, plus the prospect of remission, meant that the offender would be eligible for release in 2024. See *Kbwalala v Republic*, Sentence Rehearing Cause No. 70 of 2015.

suspended sentences of three years' imprisonment⁵¹ and the longest individual sentence was 42 years' imprisonment with hard labour.⁵² In just one case, the prisoner was resented to life imprisonment.

Defence representation and difficulties bringing cases before court

3.39.

Missing and lost case files featured in many of the cases dealt with in the post-*Kafantayeni* resentencing process. Judges in Malawi adopted a consistent and principled approach to the issue, acknowledging as a general principle that cases cannot be left in abeyance (judicial redress must be afforded even if there is no case file),⁵³ that loss of a case file does not mean decisions must take place in a vacuum, as basic information may be obtainable from other sources,⁵⁴ and that loss of a case file militates against re-imposition of death sentence, in part because it renders impossible a sound finding that an offence fell within the 'rarest of the rare' category.⁵⁵ It also means the benefit of any vacuum in the facts must be given to the prisoner.

3.40.

As reported by the Malawi Human Rights Commission (which, in coalition with various NGOs and academic institutions, initiated a project in 2013 to provide defence representation to those entitled to resentencing), defence representation included: prison interviews; mental and physical health evaluations; mitigating investigations; preparation of court briefs and submissions; and advocacy before the resentencing court during the sentence rehearing.⁵⁶

Lessons from Malawi

3.41.

As with other jurisdictions, including Uganda, the resentencing hearing process in Malawi once again demonstrates the time-consuming and resource-intensive nature of providing individualised resentencing hearings for a cohort of individuals whose unlawful mandatory death sentences must be replaced with new sentences. As discussed in greater detail above, processing the 156 individuals required

⁵³ See *Mtambo & Ors v Republic*, MSCA Criminal Appeal No. 1 of 2012, p.6.

⁵⁴ See for example *Republic v James & Ors* Sentence Rehearing Cause No. 69 of 2015, paragraph 2.

⁵⁵ *Republic v John & Aur*, Sentence Rehearing Cause No. 13 of 2015, p.9. For a more detailed discussion of how resentencing courts dealt with the issue of lost case files, *Sentencing in capital cases*, Note 12 at pp. 73-74.

⁵⁶ Malawi Human Rights Commission, 'Presentation on the work of the Malawi Human Rights Commission on the death penalty' (presented at the 6th World International Congress on the Death Penalty) at p. 7, available at congres.abolition.fr/wp-content/uploads/2016/06/NHRI-Presentation-J-Dzonzi_-Malawi-Human-Rights-Commission_230616.pdf. The project also engaged in a community sensitisation process in which it conducted community outreach aimed at explaining the impact of the legal reforms and the need for mitigation evidence, collecting such evidence and preparing communities for prisoners' possible re-entry. See The Paralegal Advisory Service Institute Malawi and The Cornell Center on the Death Penalty Worldwide, *Malawian traditional leaders' perspective on capital punishment: a targeted survey of traditional leaders affected by the Malawi Capital Resentencing Project* (2017).

the participation of 14 judges and 29 members of the defence Bar and 13 attorneys from the office of the Director of Public Prosecutions (not to mention the assistance provided by local and international academic institutions and civil society organisations), and, of course, time: 77 hearing dates and more than two years to complete the hearings alone, not to mention the substantial case preparation and file search time preceding the start of the hearings.

3.42.

The Malawi experience also shows the importance of government oversight and accountability for the process, and the impact of missing and lost case files.

Zimbabwe

3.43.

Following the introduction of Zimbabwe's new Constitution in 2013 and the Criminal Procedure in Amendment Act 2016, which provides for a new, more restrictive application of the death penalty, five prisoners who had been sentenced to death under the old regime brought a claim before the Constitutional Court of Zimbabwe seeking commutation of their death sentences. That matter, *Nyathi v Minister of Justice*⁵⁷, was heard in July 2017 and judgment is pending.

CARIBBEAN

3.44.

In the Caribbean region, it is usually up to the individual prisoner to assert his or her rights and file a constitutional motion to enable a judge to quash an unlawful mandatory death sentence and impose a substitute sentence. This, however, can leave prisoners under sentence of death for inordinately long periods of time, even when it is accepted by all parties that the death sentence is unlawful.

3.45.

Once a constitutional motion is filed, the Court is not bound by the lawful penalties under criminal law in force at the time of the resentencing, but may give a reduced penalty from the one that would otherwise have been deserved in recognition of the breaches of the prisoner's constitutional rights – for example, *Harris v Attorney General of Belize*.⁵⁸

⁵⁷ CCZ No.14 of 2017.

⁵⁸ Claim No. 339 of 2006, 11 December 2006.

⁵⁹ *Spence v The Queen* (Court of Appeal, Criminal Appeal No. 20 of 1998) from St Vincent and the Grenadines; and *Hughes v The Queen* (Court of Appeal, Criminal Appeal No.14 of 1997) from St Lucia (2 April 2001). The decision was upheld by the Privy Council in *R v Hughes* [2002] 2 AC 259.

Antigua

3.46.

The mandatory death penalty was held to be unconstitutional in the Eastern Caribbean region in the judgment of *Spence and Hughes v The Queen*⁵⁹ in April 2001. Thirteen years later, in June 2014, seven individuals remained under sentence of death in Antigua, having been sentenced to death mandatorily before the cases of *Spence* and *Hughes* were decided. The Attorney-General brought a constitutional motion as the claimant, with all the prisoners who had been sentenced to a mandatory death sentence as defendants. The Attorney General sought a declaration that their sentences were unlawful and an order that the prisoners be resentenced by the High Court. On 4 June 2015, the declaration and order was granted. These cases were referred to the Criminal Division of the High Court and were first listed for hearings in September 2016. There were adjournments for reports to be prepared and for the parties to make submissions on the appropriate substituted sentences, with the prisoners finally being resentenced in November 2016. Some of those prisoners were immediately released – for example the defendant in *R v Lorrison Cornwall*.⁶⁰

3.47.

The approach in Antigua shows that one way of ensuring all prisoners are resentenced is for the Attorney General to bring a civil action to quash the sentences on account of their unconstitutionality and to invite the Court to resentence all prisoners concerned, or refer them to the appropriate judge.

Jamaica

3.48.

In the case of *R v Watson* [2005] 1 AC 172, the Privy Council declared the mandatory death penalty in Jamaica to be unconstitutional. After *Watson*, there were 38 individuals unlawfully under sentence of death who were not in the appellate process. In March 2005, Parliament amended the Offences Against the Person Act to substitute a discretionary sentence of death for the former mandatory one. That Act also dealt with these individuals:

‘8(1) ... the provisions of the principal Act as amended by this Act shall have effect in relation to persons who were sentenced to death on or after 14 October 1992, but before the date of commencement of the Offences Against the Person (Amendment) Act 2005... as if the amending Act were in force at the time of the sentence...’

- (2) For the purpose of subsection (1), in relation to the case of every person referred to in that subsection, a judge of the Supreme Court shall-
- (a) quash any sentence passed before the date of the commencement of the amending Act; and
 - (b) determine the appropriate sentence having regard to the date of conviction and the provisions of the principal Act as amended by the Amending Act.⁶¹

⁶⁰ Case No. 50 of 1995, 22 November 2016.

⁶¹ Act to Amend the Offences Against the Person Act, No. 1 of 2005.

3.49.

In effect, those individuals were to be brought back before the courts for a full resentencing hearing. The law also provided that in cases where a death sentence was selected by the judge as the appropriate punishment, there was a right of appeal (8(4)).

ASIA

Singapore

3.50.

Parliament reformed the mandatory death penalty for murder in Singapore in 2013, to restrict a mandatory death sentence only to certain categories of murder. At the same time, it enacted transitional provisions to allow for the resentencing of individuals then on death row who had been sentenced under the former regime, including those for whom criminal proceedings had been concluded. The following measures were introduced to enable the category of the prisoner's murder to be determined and, if a mandatory death sentence was no longer applicable, a resentence in accordance with the new law:

(5) Where on the appointed day, the Court of Appeal has dismissed an appeal brought by a person for an offence of murder under section 302 of the Penal Code, the following provisions shall apply:

- (a) either the Public Prosecutor or the person may file a motion for resentencing with the Court of Appeal;
- (b) when a motion for resentencing has been filed, the person or the Public Prosecutor may also apply to the Court of Appeal to hear further arguments or admit further evidence for the purpose only of determining the meaning of murder that the person is guilty of;
- ...
- (d) if no application is made under paragraph (b), the Court of Appeal shall clarify the meaning of murder that the person is guilty of;
- (e) if the Court of Appeal clarifies... that the person is guilty of murder within the meaning of section 300(a) of the Penal Code, it shall affirm the sentence of death imposed on the person;
- (f) if the Court of Appeal clarifies under paragraph (c)(ii) or (d) that the person is guilty of murder within the meaning of section 300(b), (c) or (d) of the Penal Code, it shall remit the case back to the High Court for the person to be resented;
- (g) when the case is remitted back to the High Court under paragraph (f), the High Court shall resentence the person to death or imprisonment for life and the person shall, if he is not resented to death, also be liable to be resented to caning;

(h) the provisions of Division 1 of Part XX of the Criminal Procedure Code relating to appeals shall apply to any appeal against the decision of the High Court under paragraph (g)... ;

...

(6) If —

(a) any judge of the High Court, having heard the trial relating to an offence of murder, is unable for any reason to sentence, affirm the sentence or resentence a person under this section;

...

any other judge of the High Court or any other judge of appeal, respectively, may do so.’

3.51.

It can be seen from the above that either the prisoner or the prosecution could bring an application to the Court of Appeal to determine the category of murder committed by the prisoner. In addition, the Court of Appeal could list the matter of its own motion. The legislation permitted both parties to call evidence on the issue of the category of murder into which the offence fell under the new legislation and to make oral submissions. But as the Court of Appeal is the highest court in Singapore, there could be no appeal against the finding of which category of murder the prisoner stood convicted. For the categories of murder for which a death sentence was no longer mandatory, the legislation provided for a full resentencing hearing in which the judge had the same powers as he or she would have had in a case of an offence committed after the introduction of the amending Act. The prisoner had the same rights as newly convicted offenders to appeal that sentence.

3.52.

In October 2017, Amnesty International reported that it could confirm that at least 11 out of 34 prisoners upon whom a mandatory death sentence had been imposed before the amendment legislation (either for the offence of murder and for drug trafficking offences for which the mandatory death penalty was also restricted in 2012) had been resented. ⁶² However, as statistics are not publicly available, it was unable to ascertain the precise number.

Hong Kong

3.53.

Hong Kong abolished the death penalty in 1993 by legislation. After abolition, all prisoners then under sentence of death but for whom criminal proceedings had been concluded had their sentences commuted by the Governor-General to terms of imprisonment.

⁶² Cooperate or die: Singapore’s flawed reforms to the mandatory death penalty, 11 October 2017, ACT 50/7158/2017 p.20 fn. 64.

PART FOUR

Recommendations on
resentencing

4.1.

This Part provides our recommendations to the Task Force with regard to conducting resentencing hearings in accordance with the *Muruatetu* judgment. We also use this opportunity to comment on some aspects of the legislative proposals and urge the Task Force to reconsider recommending legislative amendments that include provisions allowing the imposition of sentences of life without the eligibility of parole, and to clarify the retention of juridical discretion, even where mandatory minimum sentences or mandatory minimum periods of detention have been recommended.

Recommendations on resentencing procedure

4.2.

Responsive to the requests of the Task Force, these recommendations deal with the procedural aspects of the post-*Muruatetu* resentencing process. For a detailed overview of the legal principles that apply in the capital resentencing context (including considerations that arise when offenders need to be resentedenced under a newly discretionary capital regime and courts' treatment of these considerations), we suggest *Sentencing in Capital Cases*, referred to earlier and at Note 12.

4.3.

Broadly, we recommend that the Task Force considers not providing individual sentence re-hearings for all individuals eligible for resentencing, but instead implement a more streamlined resentencing procedure that is detailed below.

Profile of those eligible for resentencing

4.4.

The Task Force has determined that those who are eligible for resentencing include all offenders without pending appeals⁶³ who have been subject to the mandatory death penalty (the majority having been convicted of armed robbery or murder), including those who have had their sentences commuted to life imprisonment (several thousand prisoners had their death sentences commuted to life in the mass commutations of 2009 and 2016), and any offenders sentenced after the decision in *Muruatetu*, but without compliance with the judgment, who have exhausted all appeal mechanisms. The individuals that make up these groups have been estimated to total between seven and eight thousand.

⁶³ Capital offenders with pending appeals can have their sentences dealt with through the already activated appellate process.

4.5.

Murder. Of those individuals who have been subjected to unlawful mandatory death sentences, including those who are currently on death row and who have had their sentences commuted to life, available data indicates that less than one-fifth have been convicted of murder.

4.6.

Robbery with violence. Of those individuals who have been subjected to unlawful mandatory death sentences, including those who are currently on death row and who have had their sentences commuted to life, available data indicates that upwards of 80 per cent have been convicted of robbery with violence or attempted robbery with violence.

Underpinning values: scalability and effectiveness of remedy

4.7.

In all instances where lawful sentences must be put in place as substitution for a mandatory death sentence, there exists the overarching need to ensure the new sentence affords a remedy for previous breaches of fundamental rights. This requires that the resentencing procedure – and thus the realisation of the remedy – is practically accessible and expeditious. These recommendations are, in part, based on a realistic consideration of how all those individuals who are entitled to redetermination of sentence – a group numbering as many as 8,000 people – can be processed while maintaining access to justice and fairness. The number of individuals eligible to be resentenced under *Muruatetu* dwarfs the cohorts of those affected by the analogous judgments discussed in Part A. The most comparable examples were those resentencing processes in Malawi and Uganda – and still, those cohorts were a fraction of the individuals who must be resentenced in the instant case (representing only about one and two per cent, respectively, of the anticipated Kenyan cohort).

4.8.

To put it in context, should the resentencing hearings in Kenya be conducted at the same rate as in Malawi (roughly adjusting for their differences in population), it would take nearly half a century to complete the hearings for all these prisoners. That this would render justice elusive is particularly clear given that convictions reach back at least into the 1990s and that hundreds of the prisoners are already in their 50s or older. Providing the 156 clients in Malawi sentence re-hearings needed the participation of 43 defence and prosecution attorneys, with the same case load, this would require more than two thousand attorneys in Kenya. There may be other potential causes of delay, such as in instances when the case files are missing or lost.⁶⁴

⁶⁴ It must be emphasised that missing case files does not mean that a resentencing judge must operate in a vacuum, as information on the offender can be obtained from different sources; additionally, the loss of a case file means that the benefit of any doubt on the facts or issues in the case must go to the prisoner, as was illustrated by the sentence re-hearing courts of Malawi, discussed on page 28.

4.9.

Justice requires that substitute sentences provide a remedy for the fact that the offender has been given an unlawful and unconstitutional sentence. (Moreover, some of these individuals may have also suffered protracted detention on death row under these unlawfully imposed sentences.)⁶⁵ Put simply, prisoners should receive a discount in their sentence to reflect the breaches of their rights. Fairness requires that these factors are weighed into the determination of a new sentence, militating in favour of sentencing at the lower end of the scale (and arguably precluding the re-imposition of the death penalty altogether).⁶⁶

4.10.

It is with these goals – scalability and effectiveness of remedy – in mind that we make our recommendations on how to best address the sentence re-hearings.

A potential principled and practical solution: use of camp courts applying default sentences for resentencing

4.11.

In outline, our primary recommendations invite the Task Force to consider a resentencing process using ‘camp courts’. These would dispense streamlined justice in situ at prisons, applying discretionary default sentences for robbery with violence and murder, while according so far as possible with the ordinary principles of justice and criminal procedure. This suggestion is inspired in part by the streamlined processes that were instituted with considerable success (after an initial delay) in Malawi.

4.12.

The following observations outline three elements to the camp court proposal: the procedure, the sentencing parameters, and the regulatory framework.

Procedure for camp courts

4.13.

In terms of procedure, we would envisage three stages to the camp court process: audit; camp court hearing; appeal. The third stage is unlikely to arise in practice.

⁶⁵ The data available to DPP indicates that the majority of commuted prisoners probably served protracted terms under sentence of death (i.e. more than three years) before having their sentences commuted to life imprisonment, with some serving 10 years or more on death row before commutation.

⁶⁶ For more information on resentencing to provide a remedy for previous imposition of an unlawful sentence, and/or for breaches of fundamental rights, see *Sentencing in capital cases*, Note 12 at paragraphs 6.1-6.9.

Stage 1: audit

4.14.

The first stage would involve a small team of lawyers or other authorised individuals visiting each prison to conduct a resentencing audit. This process would involve the following tasks.

4.15.

First, the audit team would identify all prisoners eligible for resentencing in that prison.

4.16.

Second, the team would prepare a short resentencing summary for each prisoner. The summary would be based on the prison file and a short interview with each prisoner. It would set out basic details on the prisoner, the offence, and any specific aggravating or mitigating features. This might include a short section for the prison authorities to comment on the extent to which the prisoner has shown signs of remorse or rehabilitation.

4.17.

The people performing these functions would require some training, but not much. The key point is that, by keeping this process streamlined, the auditors would be able to process a significant number of prisoners in a relatively short time.

Stage 2: camp court hearings

4.18.

Once the audit has been completed, each prison would be visited by a team comprising a judge, prosecutor and defence lawyer. Prisoners would be entitled to appoint their own defence lawyer if they wished, or to represent themselves, but the majority would no doubt opt to be represented by the appointed camp court defence lawyer.

4.19.

The judge would then process the resentencing hearings at prison, in the presence of the prisoner, prosecutor and defence lawyer. Using the short summaries prepared by the audit team, and applying the suggested default sentences outlined below, the camp court hearings might process dozens of sentence rehearings in a single working day. Clearing the resentencing caseload would be manageable and not consume vast State resources.

Stage 3: option to appeal

4.20.

We suggest that prisoners in camp court hearings should not be deprived of their right of appeal. But for reasons explored below, it is very unlikely that prisoners would exercise that right, because they would rarely have any incentive to appeal. Many would become eligible for immediate release or for parole. So this stage of the process, although available in principle, should rarely arise in practice, and would not impose any significant burdens on the criminal justice system. (By way of comparison, there have been few, if any, appeals in the Malawi resentencing process.)

Sentencing parameters for camp courts

4.21.

In Malawi, there were sentencing guidelines for the post-*Kafantayeni* sentence rehearings, but, otherwise, the sentencing parameters were not formally prescribed. In particular, there were no explicit minimum sentences for that resentencing process. As our survey in Part A reveals, however, most of the replacement sentences were determinate sentences in the region of 20 years (see pages 19-20 above), with many such sentences resulting in the immediate release of prisoners who had already served long sentences. These were all replacement sentences for murder, the offence for which the affected prisoners had been originally sentenced to death (whether subsequently commuted to life imprisonment or not).

4.22.

If more formal parameters are preferred in Kenya, our suggestion is that the camp courts sentence on the basis of discretionary default sentences for murder, robbery with violence and attempted robbery with violence. We would suggest that the default sentence for each should be the minimum sentence for the corresponding offence under the Penal Code as amended in line with the Task Force's recommendations. For prisoners who were convicted of robbery with violence, this would be a 14-year determinate sentence, being the proposed minimum for the new offence of aggravated robbery. A default sentence would also be prescribed for attempted robbery with violence, reflecting the corresponding minimum sentence under the amended Penal Code. The proposed sentence for the least serious kinds of murder would also be the default sentence for murder in the camp courts, whether that be a determinate sentence or life without eligibility for parole for a specified period of years.

4.23.

The default sentences would probably be imposed in the vast majority of resentencing hearings, but – in exceptional cases – the judge would have discretion to depart from the default sentence (see below).

4.24.

Other default sentences would be needed for offences other than murder, robbery with violence and attempted robbery with violence. But, as we understand it, this involves a very small cohort of prisoners.

Principles supporting the suggested camp court resentencing parameters

4.25.

There are various considerations of principle that support our approach to the sentencing parameters for the suggested camp courts.

4.26

First, and most importantly, the relative simplicity of this approach offers the prospect of a resentencing regime that can cope with the very large numbers of prisoners who will fall for resentencing. This accords with the basic principle that justice must be effective, not merely declaratory, and not delayed for many years.

4.27.

Second, this approach reflects the fact that all the affected prisoners would have been the subject of unconstitutionally imposed mandatory death sentences and, for at least a period of time, would have been held on death row and liable to execution by virtue of an unconstitutionally imposed sentence. Our proposal reflects the important principle, noted earlier, that anyone who has suffered the consequences of unconstitutional acts by the State should be afforded a new sentence that incorporates an element of redress.⁶⁷ By identifying the minimum corresponding sentence under the amended Penal Code as the default replacement sentence, this proposal helps to ensure that the new sentence is consistent with that principle and provides a degree of redress. For individuals whose offences under the new sentencing proposals would have attracted the minimum sentence in any event, the residual judicial discretion to vary the default sentence can ensure that they are adequately compensated.

4.28.

Third, this approach is compatible with the sentencing aims of retribution and public protection. In exceptionally serious cases, the resentencing judge would have discretion to impose longer sentences. Furthermore, as these sentences would operate in tandem with the new parole regime, the ability to refuse parole in cases where this is warranted ensures public protection.

⁶⁷ This principle is addressed in more detail in paragraphs 6.1-6.9 of *Sentencing in capital cases*, at Note 12.

4.29.

Fourth, although prisoners would retain a right of appeal under the suggested camp court regime, it is very unlikely that the right of appeal would be exercised. This is because the default substitute sentences would be at the bottom of the usual sentencing range, so – in most cases – the prisoner would have no basis for arguing that the new sentence was unduly punitive. The position might be different if, in the exercise of a limited sentencing discretion, the sentencing judge departed from the default sentence (see below). But such cases would be few and far between.

The discretion to depart from default sentences

4.30.

In our view, any exceptional sentencing approach should depart as little as possible from ordinary constitutional and judicial principles, including the principle of judicial independence when imposing individual sentences. With this in mind, we would suggest that judges at camp courts retain a limited discretion to depart downwards or upwards from the default replacement sentences. The resentencing regulatory regime, whether legislative and/or judicial (see below), should make it clear that judges may depart from default sentences in exceptional cases, but must give written reasons for doing so. Again, prisoners affected by such cases would have a right of appeal.

The resentencing regulatory regime for camp courts

4.31.

In other comparable jurisdictions, the resentencing regime has been regulated by legislation (for instance, in South Africa) or judicial rulings and guidelines (for instance, in Malawi). In Kenya, the task might be achieved by a combination of both, relying on the resentencing regulation contemplated by the Task Force and judicial guidelines. The latter might be created by practice directions, sentencing guidelines adopted by the Chief Justice or the higher courts, sentencing guidelines in individual cases (such as were given by the Supreme Court in the *Muruatetu* case), or a combination of such guidance and the relevant procedures and sentencing principles.

Secondary proposal: default sentencing and streamlining cases where there can be no practical effect of a full hearing

4.32.

On 3 October 2018, the Task Force published *Summary of Recommendations of the Task Force on the Review of the Mandatory Death Penalty* for stakeholder consultation. In brief, the summary makes clear that the Task Force is considering full resentencing hearings for all prisoners entitled to one and not a resentencing scheme that provides streamlining. Accordingly, our secondary suggestion, outlined below,

makes the case for a streamlined sentencing process for at least a portion of the *Muruatetu* cohort: the portion for whom we believe a resentencing hearing would be addressing a moot issue.

4.33.

As a matter of principle, the sentencing process laid out in the *Summary of Recommendations* is admirable in the robust procedural safeguards it provides to protect the rights of those who have been sentenced unlawfully to death. However – particularly in light of our experience in other jurisdictions – we remain concerned by the logistical implications and expense of a plan that envisages individualised resentencing hearings for all prisoners as detailed in the summary recommendations. We wonder whether, in reality, this exercise would be necessary in practical terms as one of the goals must be to ensure that a remedy is provided for all of the *Muruatetu* cohort without undue delay.

4.34.

Using the legislative amendments proposed in the current draft of the Task Force report,⁶⁸ there will be a category of people who, for example, were convicted of robbery with violence under current section 296(2) of the Penal Code, but who – under the proposed revised legislation – would be convicted of just felony robbery (liable to 14 years' imprisonment). For these individuals who, at the time of resentencing, have served 14 or more years, the outcome of any sentencing hearing would be immediate release. An example would be an individual who, in the course of committing a robbery, committed a simple assault, such as striking the victim. Under the existing Penal Code provisions, this person would have been convicted of robbery with violence and mandatorily sentenced to death.⁶⁹ Under the proposed revised law, however, this conduct would amount to felony robbery, liable to 14 years' imprisonment.⁷⁰ Such an individual – who would be identifiable from trial records alone – could not be sentenced to a further period of incarceration given the duration of imprisonment that he or she has already served. A full sentencing hearing would only delay their release and the processing of other resentencing hearings. Such cases could be dealt with sufficiently on the papers.

⁶⁸We are assuming that the final legislative amendments proposed by the Task Force will be similar and, in any event, the point made will still be applicable.

⁶⁹Under existing provisions in the Penal Code, felony robbery is defined as '[a]ny person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained'. s. 295. When this offence is committed (or attempted) while 'armed with any dangerous or offensive weapon or instrument, or [in] company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person' this amounts to robbery with violence and brings the mandatory death penalty. s. 292(2).

⁷⁰The proposed new definition of felony robbery is 'any person who steals anything and, at or immediately before or immediately after the time of stealing it, assaults any person or wilfully destroys or damages any property, or threatens to do either of these acts, in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery', where assault is further defined as attempted, threatened or intentional application of force. Felony robbery brings a punishment of 14 years (see revised s. 296(1)), which rises to 25 years only when grievous harm results (revised s. 296(2)(a)) and rises to aggravated robbery only when committed while armed or with others. Revised s. 295(2). Thus a robber who 'struck' a person in the course of the robbery, but did not cause grievous harm, would have been committing robbery with violence under the old law (and mandatorily sentenced to death), but – under the new law – they would be guilty of felony robbery, liable to 14 years' imprisonment.

4.35.

From the prison population data made available to DPP, we can estimate that as many as 30 per cent of commuted prisoners who stand to be resentenced are robbery with violence convicts who have served 12 or more years in prison.⁷¹ A percentage of these people will fall into the category of people described in the above paragraph. In these cases, there is a good principled and practical argument for a more streamlined approach, avoiding a fully resourced resentencing hearing that would delay matters and drain funds, only to produce an identical result.

4.36.

An additional example of cases in this category would be individuals who, under the new legislation, would be sentenced to life imprisonment with a minimum period of detention before they are permitted to be considered for parole. An example is second degree murder as defined on page 10 of the 3 October summary document, where an offender must serve a minimum period of detention of 20 years. In cases where a life sentence would probably be the substituted sentence and the prisoner has already served the minimum period of detention specified, such a case could be referred directly to the Parole Board to consider whether further detention of the prisoner is necessary.⁷² Again, sorting out whether there are offenders who fall into such categories could be a paper task.

The question of entitlement to a full resentencing hearing

4.37.

We understand the Task Force has taken the position that all prisoners who have been mandatorily sentenced to death, or have had their sentence commuted following a mandatory death sentence, are entitled to a resentencing hearing. Nevertheless, given the scale of this undertaking – and despite our proposals, above, which we suggest operate universally – it is important to at least say something about the entitlement to a resentencing hearing, and any principled basis for why a sentencing hearing may not be required for all prisoners.

4.38.

An entitlement to a resentencing hearing is clear in the case of any prisoner sentenced to a mandatory death penalty under section 204 of the Penal Code (murder) because that death sentence has been found to be unlawful in *Muruatetu*⁷³. Although the Supreme Court limited the remedy it provided to the petitioners in that case, the fact that the Supreme Court declared that the mandatory nature of the punishment under section 204 of the Penal Code violated the 2010 Kenyan Constitution means that

⁷¹ Assuming they are resentenced one year from now, and assuming a conservative one-year discount for time spent on remand, those who have served 12 years would almost certainly be eligible for release if resentenced to 14 years.

⁷² As the lawful sentence (the mandatory death sentence being unlawful) at the time the offender committed the offence would have been a fixed term of imprisonment, life imprisonment or death, any minimum period under the new legislative proposals would not be applicable, as it would amount to a retrospective penalty. So the viability of streamlining this category will depend much on the resentencing guidelines that the Task Force intends to produce and any recommended tariffs.

⁷³ Petitions 15 and 16 of 2015, 15 December 2017.

the same entitlement to that remedy applies to anyone else mandatorily sentenced to death under that section. This is true regardless of whether the prisoner was sentenced before or after the introduction of the current Constitution in 2010, because the decision in *Muruatetu* upholds the earlier judgment of *Mutiso*⁷⁴, which also found the mandatory nature of section 204 to be unlawful when measured against the protections contained in the former 1963 Constitution.

4.39.

Whether there is an entitlement to a resentencing hearing is not as straightforward for prisoners who have been sentenced to death for robbery with violence or other offences besides murder that carry a mandatory death sentence. *Mutiso* made no conclusive determination about the compatibility of the mandatory death sentence for other offences with the former 1993 Constitution. The decision of *Mwaura*⁷⁵, which was subsequent to *Mutiso*, upheld the mandatory death sentence for robbery with violence under section 296 of the Penal Code, finding that the mandatory nature of the sentence did not breach the 2010 Constitution. The judgment in *Muruatetu* does not expressly overrule the decision in *Mwaura* and it was only section 204 of the Penal Code that was challenged by the petitioners. However, the Court, in its reasoning, noted that *Mwaura* had, in practical terms, reversed *Mutiso* (at [28]-[30]), before it went on to prefer the *Mutiso* judgment (at [52]). Thus, the Supreme Court made clear that *Mwaura* is not to be followed and it is implicit in the Court's judgment that a mandatory death sentence for an offence under section 296 of the Penal Code would equally violate the Constitution.

4.40.

In respect of those prisoners whose death sentences were confirmed before the 2010 Constitution entered into force on 27 August 2010, the absence of any declaration of incompatibility of section 296 of the Penal Code with the 1963 Constitution means there remains a presumption that a mandatory death sentence imposed for an offence under that section (or for any other offence besides murder carrying a mandatory death sentence) is lawful.

4.41.

The main reason this is worth stating is that it allows for different treatment of those prisoners on whom mandatory death sentences for robbery with violence were imposed (or another offence carrying a mandatory death sentence), who had completed their criminal proceedings before the new Constitution was introduced. They, of course, cannot be executed because their execution would be incompatible with the 2010 Constitution, given the Court has recognised such a punishment is, *inter alia*, cruel and inhuman. But there may be a legal basis for adopting a more practical approach to individual, time-consuming and resource-intensive resentencing hearings for the many prisoners who fall into this category.

⁷⁴ Criminal Appeal 17 of 2008, 30 July 2010.

⁷⁵ Criminal Appeal 5 of 2008, 18 October 2013.

PART FIVE

Legislative proposals

5.1.

We have noted and considered the proposals included in the first draft of the Task Force's proposals at Appendix A, for the replacement sentences for the various offences that currently attract a mandatory death sentence, and make two further proposals, which we hope will be of assistance to the Task Force.

Definition of murder

5.2.

We note the definition of murder in section 203 of the Penal Code is very broadly stated and includes premeditated, intentional and non-intentional killing. If legislative proposals are enacted that specify different sentences for different types of murder, we would recommend, from a practical perspective, that the definition of murder is amended to reflect those changes. For example, under the current sentencing proposals, the definition of murder would be categorised into: 'planned and intentional murder'; 'intentional murder'; and 'non-intentional murder'. If murder is subdivided in this way, prosecutors would then indict an individual, according to the facts of the case, under one or more of the sections that define a type of murder. In turn, the jury would render a verdict for each of these 'types'. This would greatly assist with the sentencing process by defining precisely the type of murder of which the offender stands convicted. The risk of not aligning the definition of murder with the specific sentences is that the judge would have to make a finding post-trial, which is likely to result in another hearing with further evidence being called, and to increase the likelihood of sentencing appeals.

Life without parole

5.3.

The questions posed by the Supreme Court in *Muruatetu* about the practical consequences of a sentence of life imprisonment are challenging. One is an issue that has taxed many domestic and international courts in recent years – namely, the compatibility of 'whole life' sentences, or life imprisonment without any prospect of parole, with fundamental constitutional rights.

5.4.

In 2016, in the unanimous decision of *Obediah Makoni v Commissioner of Prisons and Minister of Justice Legal & Parliamentary Affairs*⁷⁶ the Zimbabwe Constitutional Court declared life sentences without the possibility of parole to be cruel and inhuman punishment and a violation of human dignity. This decision

⁷⁶ Const. Application No CCZ 48/15, Judgment No CCZ 8/16, 13 July 2016 (Constitutional Court of Zimbabwe) [*Makoni*].

added to the increasing number of jurisdictions worldwide in which sentences that are irreducible, such as being passed for natural life or without parole, have been found to offend fundamental human rights.⁷⁷ In *Makoni*, the Court ruled that periodic reviews of detention and rehabilitation programmes with a view to reintegration into society must be provided equally to prisoners serving indefinite terms of imprisonment. Any imprisonment that continued unreasonably – that is, beyond the duration of detention necessary to fulfil the aims of punishment, deterrence and rehabilitation – was liable to be quashed by the courts. Consequently, the Court held that the parole regime must be interpreted as applying to all long-term prisoners, and not just those with fixed-term sentences.

5.5.

The DPP hopes that the Task Force will go the way of Zimbabwe rather than including life-without-parole sentences in its legislative reform proposals. We understand that individuals who may be sentenced to life without the possibility of parole in Kenya under the proposed legislation may retain the ability to seek clemency. However, we do not believe that this saves the sentence from being challenged as cruel and inhuman punishment.

5.6.

Furthermore, we advise against legislating for mandatory minimum terms of imprisonment, or for mandatory minimum periods of detention before a prisoner may be considered for parole. Such sentences have the potential to be arbitrary and disproportionate, and deny an offender proper fair trial rights, and amount to cruel and inhuman punishment.⁷⁸

5.7.

We understand that it is the intention of the Task Force that all non-parole periods proposed in the new legislative scheme may be departed from by the judge in exceptional circumstances.⁷⁹ Such a provision would save these minimum periods of detention from unconstitutionality. However, we suggest that there should be clear legislation to implement this intent, which leaves no room for doubt that a judge may depart even from legislatively proscribed mandatory minimum periods of detention, and not only from the general minimum periods of detention or the norm that applies where no legislative minimum period of detention has been prescribed (for example, the proposal that there be general eligibility for parole after service of two-thirds of a fixed-term sentence and that, for parole purposes, a life sentence is to be calculated as being 25 years).⁸⁰

⁷⁷ See also *State v Tsoieb* (2001) AHRLR 158 (NaSC 1996) (Namibia).

⁷⁸ See, for example, *de Boucherville v The State of Mauritius* [2008] UKPC 37, relied upon in *Makoni*; *August v The Queen* [2018] CCJ 7 (AJ) and *R v Smith* [1987] 1 SCR 1045. *The Queen* [2018] CCJ 7 (AJ) and *R v Smith* [1987] 1 SCR 1045.

⁷⁹ See *Summary of Recommendations of the Task Force on the Review of the Mandatory Death Penalty* p.9, bullet 4.

⁸⁰ See p.122 of the Task Force's draft report and note 67 above.

5.8.

This discretion to vary non-eligibility for parole periods, however, does not address the question of mandatory minimum sentences. We refer in particular to mandatory minimum sentences of life imprisonment for all offences of murder – such as the mandatory minimum of life imprisonment without parole for aggravated murder – and other mandatory minimum sentences for other offences that are contemplated.

5.9.

The DPP notes that section 26(2) of the Penal Code states that where an offender is ‘liable to’ a legislatively proscribed penalty, that penalty is a maximum penalty and not a fixed one. However, mandatory sentences are expressly excluded from this section. A simple reading of this section is likely to be understood to mean that, if the words ‘shall be sentenced’ are used in the statute prescribing punishment – or if it is stated that the offender must serve ‘not less than’ a prescribed period of detention before eligibility for parole – this is a penalty prescribed by law and, therefore, outside of the discretion in s.26(2). If, indeed, it is intended that there no longer be any mandatory sentences⁸¹ under the Penal Code, and a judge always retains a discretion not to impose the prescribed minimum sentence in an exceptional case, then we would suggest the Task Force ensures that section 26(2) is amended to reflect this.

5.10.

The DPP hopes that these observations assist the Task Force in its reporting to the Attorney General and in fulfilling the other terms of its important mandate. We remain available and ready to assist the Task Force further in any way we can.

⁸¹ It should be noted that mandatory sentences can include an ‘automatic’ sentence or fixed sentence, which is the only sentence available for that offence, but mandatory sentences also include mandatory minimum sentences, where a judge has no discretion but to impose a sentence of a certain prescribed severity, no matter the individual circumstances of the offence and whether that sentence would be a disproportionate outcome.

ANNEX

Deterrence and the Death Penalty, Internationally and in Kenya

Jeffrey Fagan

Professor Jeffrey Fagan is Isidor and Seville Sulzbacher Professor of Law at Columbia Law School and Professor of Epidemiology at the Mailman School of Public Health at Columbia University. He is also a senior research scholar at Yale Law School. His research examines capital punishment and deterrence, alongside topics of policing, criminal law, and juvenile crime and punishment. He has been an expert witness on capital punishment to the UN Office of the High Commissioner for Human Rights. He served for six years on the Committee on Law & Justice of the US National Research Council. He is a fellow of the American Society of Criminology, and served on its executive board for three years. He is also a former editor of the Journal of Research in Crime and Delinquency, and serves on the editorial boards of several journals in criminology and law.¹

Many states that retain the death penalty do so in the belief that executions deter the targeted crimes. While some states execute solely on the basis of retribution or a belief in a moral imperative based on the harm of the act or crime, many others cling to the theory that executions prevent further crimes by deterring other people from committing those acts that are eligible for death. Leaders in those states and nations, as well as large segments of their populations, endorse this view. Deterrence is not just a justification for capital punishment in many of the retentionist countries – execution is critical to state legitimacy in such places.²

However, rarely do those states or their citizens reflect on the evidence that supports those beliefs or the theory that animates those beliefs. Were they to do so by tapping into a deep body of empirical evidence, as well as challenging the core elements of the theory itself, their beliefs in deterrence might well be shaken, and that foundation of support for the death penalty would be removed.

What do we mean by deterrence?

The core ambition of deterrence is to make threats credible. In the case of capital punishment, retentionist states wish to signal to those contemplating murder, or any other offence eligible for execution, that there are substantial risks of having the state end their lives should they commit the crime and be sentenced to death. The premise is that a would-be offender, knowing about the threat of execution, would forego the act because the costs – in this case, death – are unacceptably high and well in excess of any presumed marginal benefits from the crime itself. It assumes a rational actor whose risk-reward calculus would lead to the avoidance of a capital crime, and one whose perceptions of risk are well calibrated to likelihood of execution. It also assumes that risks are substantial and observable.

This proposition leaves open many practical and empirical questions. How would we know about murders or other death-eligible crimes that are contemplated but abandoned because of the threat of death? How many averted murders are there, and what is the threshold to assume there is a deterrent effect? If we avert one murder, is that sufficient to claim deterrence? Are executions the reason for the abandonment of a capital crime? What about other punishment threats, such as death in prison through an irreversible life

¹This report was produced for the Kenya Task Force on Review of Mandatory Death Sentence under Section 204 of the Penal Code Act at the request of The Death Penalty Project (DPP). DPP, which intervened as *amicus curiae* in *Francis Karioko Muruatetu & Anr v Republic of Kenya*, has, in turn, provided technical expert assistance to the Task Force upon its request and pursuant to s.2(b) of its Mode of Operation.

²Roger Hood and Carolyn Hoyle, *The death penalty in worldwide perspective* (Oxford, UK: Oxford University Press, 2015). Countries such as Japan argue that popular support for capital punishment, including cultural beliefs in its deterrent value, is reciprocally tied to the legitimacy of the government itself. See, for example, Mai Sato, *The death penalty in Japan: will the public tolerate abolition?* (Weisbaden, GDR: Springer Publishing, 2014).

sentence? What ratio of executions to capital crimes would present evidence of ‘deterrence’? How many executions are needed to signal a credible deterrent threat?

What if the evidence of deterrence is weak, speculative, and otherwise inconclusive and uncertain? Then this logic is turned on its head. States that execute in the face of uncertainty about its deterrent effects are implicated in taking lives without a measurable return beyond vengeance or retribution. Executions of the innocent, or of those lacking the requisite culpability for execution, are also moral hazards of execution. The costs to state legitimacy are potentially severe, with the risk of spillover effects of degrading respect for law. Much rides, then, on this evidence.

The evidence: deterrence, executions and murder

Five decades of research have shown that, whether the offence is murder, a drug offence or an act of terrorism, the scientific evidence supporting the belief in deterrence is unreliable – and, in many instances, simply wrong. This conclusion is based on the convergence of evidence from studies over decades, conducted under a wide range of scientific strategies. While there are no experiments on execution, nor can there be for obvious moral and ethical reasons, some of the studies have examined the effects of moratoria in places that have suspended capital punishments. Other studies compare places that practice capital punishment with carefully matched places that have abolished or suspended executions, and have found no differences in murder rates, regardless of the number of executions in the retentionist places.

From 1972–76, there was a moratorium on executions in the US. One of the reasons for the moratorium was growing doubts during the pre-moratorium decade about the deterrent effects of capital punishment on murder.³ Executions resumed after publication of research claiming that the death penalty did, in fact, deter homicides. The claims were quite strong: each execution deterred as many as eight future homicides. But that evidence was strongly contested, and a 1983 panel of the National Academy of Sciences found little evidence that claims of deterrence were accurate.

Still, belief in deterrence remained politically and culturally popular, even if scientific evidence didn’t support the claim. These beliefs persisted throughout the 1980s and 1990s, despite the fact that murder rates rose dramatically just as executions were increasing.

Two factors undermined those beliefs. First, new statistical evidence showed the empirical reality of declining executions and declining homicides. One was the fact that the murder rate began declining sharply in the second half of the 1990s, at the same time that executions rose sharply. Starting in 2000, as death sentences and executions began to decline, the murder still continued its decline.

The second factor was the emergence of a large body of statistical evidence showing that the claims of deterrence were fatally flawed. My own research showed that the decline in murders was no greater in states that continued to sentence and execute murderers than in states that didn’t. This included states with actual moratoria and states with ‘de facto’ moratoria – states, such as California, Michigan and Illinois, with very large numbers of condemned prisoners but no executions. In those places, despite the absence of executions, murder rates declined sharply.

³ *Furman v Georgia*, 408 U.S. 238, 315 (1972) (Marshall, Concurring).

The most recent and intensive review of the evidence on deterrence comes from the National Academy of Science in the US. Its Committee on Deterrence and the Death Penalty concluded that there was no reliable evidence of the deterrent effects of the death penalty on homicides, once we compare its deterrent effects to the deterrent effects of the next most severe punishment: life in prison without the possibility of parole.⁴ In addition to the committee report, papers commissioned by the panel reached much the same conclusion.⁵ The panel and these companion analyses carefully noted that there was no credible evidence of deterrence, because of the failures – if not the impossibility – of establishing the necessary conditions for making sufficiently strong conclusions. Other research specifically repudiated nearly all the studies claiming to show evidence of deterrence from capital punishment, including re-analyses of the original evidence claiming deterrence.⁶

Despite the absence of experimental evidence on deterrence, as called for by the National Academy of Science, national trends in the US confirm the absence of plausible evidence of deterrent effect of executions. In the US, murders have been declining in retentionist, moratorium, and abolition states.⁷ Figures 1 and 2, below, show that, since 1999, death sentences and executions have both been declining at the same time and at the same pace for more than 18 years. Death sentences, in part a reflection of that peak in the mid-1990s, reached a peak rate in 1998, and have declined since. Executions reached a peak in 1999, and have also been declining since.

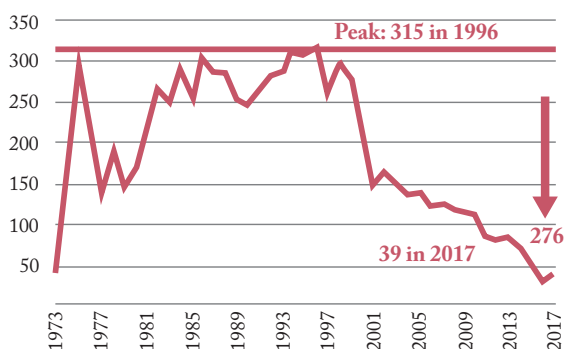


Fig. 1: Death sentences by year

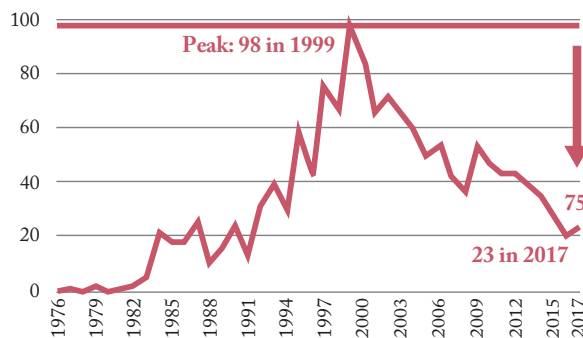


Fig. 2: Executions by year

Source: Death Penalty Information Center, *The Death Penalty in 2017: Year End Report*, at deathpenaltyinfo.org/documents/2017YrEnd.pdf

The homicide rate in the US has been declining since 1996. Figure 3, opposite, shows that the murder rate was unaffected by these changes in execution or death sentence risk, indicating a secular decline in murder unrelated to the risks of executions. The murder rates in the US since 2000 are similar to the murder rates in Kenya, suggesting a basis for comparison.⁸

⁴ Daniel S Nagin and John V Pepper, eds, *Deterrence and the death penalty* (Washington DC: National Academy of Sciences, 2012).

⁵ Aaron, Chalfin, Amelia M. Haviland, and Steven Raphael, What do panel studies tell us about a deterrent effect of capital punishment? A critique of the literature, 29 *Journal of Quantitative Criminology* 5–43 (2013).

⁶ Jeffrey Fagan, Death and deterrence redux: Science, law and causal reasoning on capital punishment, 4 *Ohio St. J. Crim. L.* 255 (2006). John J Donohue III and Justin Wolfers, Uses and abuses of empirical evidence in the death penalty debate, 58 *Stanford Law Review* 791 (2005–2006).

See, also, John J Donohue III and Justin Wolfers, Estimating the impact of the death penalty on murder, 11 *American Law and Economics Review* 249 (2009).

⁷ Death Penalty Information Center, *Murder rates nationally and by state*, deathpenaltyinfo.org/murder-rates-nationally-and-state, last visited 10 October 2018.

⁸ See *The Death Penalty in Kenya*, *infra*.

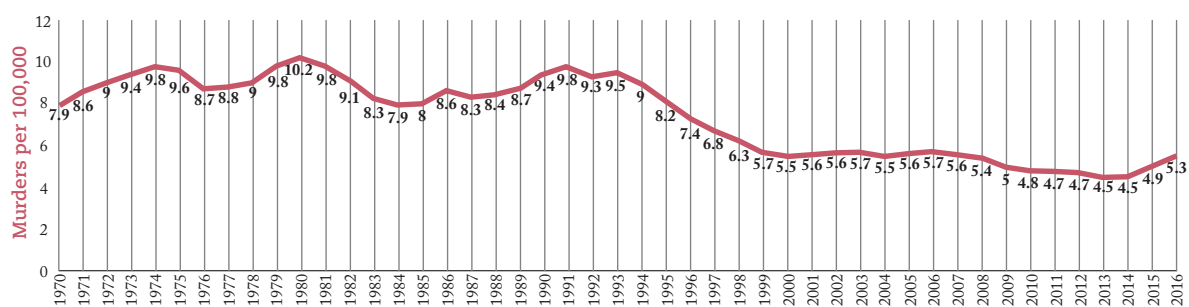


Fig. 3: National murder rate, 1970-2016

Source: Death Penalty Information Center, *Murder rates nationally and by state*, deathpenaltyinfo.org/murder-rates-nationally-and-state, last visited 10 October 2018

Evidence from other countries shows similar secular trends. Since the abolition of capital punishment in Eastern Europe in the early 1990s, homicide rates have been declining.⁹ Figure 4, below, from a study comparing murder rates in Singapore – where executions for murder are common and persistent over time – with Hong Kong, where executions are banned, showed no difference in the murder rates over nearly three decades since the cessation of executions in Hong Kong.¹⁰ The figure shows the Singapore-Hong Kong comparison.

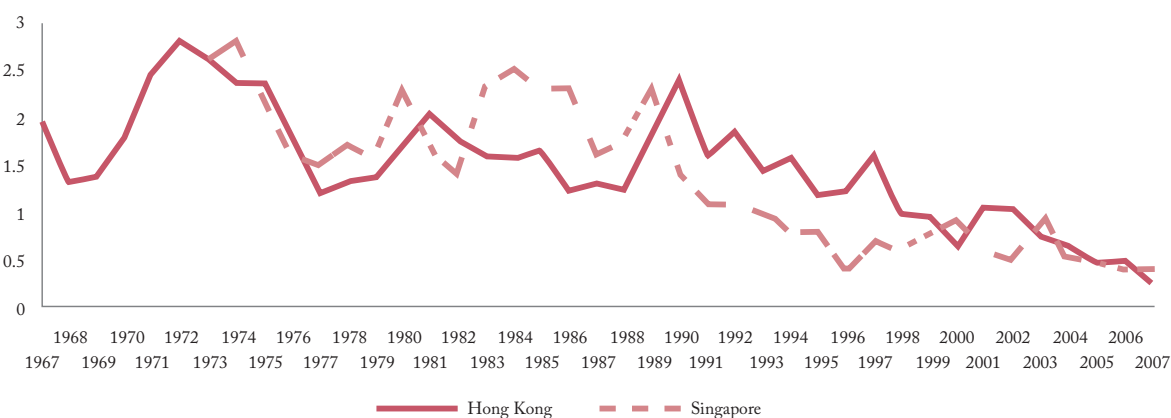


Fig. 4: Homicide rates, Hong Kong and Singapore, 1967-2007

Source: Franklin E Zimring, Jeffrey Fagan, and David T Johnson, 'Executions, deterrence, and homicide: A tale of two cities', *7 Journal of Empirical Legal Studies* 1-29 (2010)

The authors conclude that '[o]ver a span of 50 years, during which these sanctions were being deployed in degrees that varied substantially, neither imprisonment nor death sentences nor executions had any significant relationship to homicides. In the years immediately following an appeals court's determination limiting executions, the murder rate fell.'

⁹ UN Office of Drugs and Crime, *2011 Global study on homicide: trends, contexts and data* (Vienna, Austria: 2011). Homicide declined by 61 per cent from 2000-2008 in Czech Republic, Poland, Moldova, Hungary and Romania. UN Report at 33.

¹⁰ Franklin E Zimring, Jeffrey Fagan, and David T Johnson, *Executions, deterrence, and homicide: a tale of two cities*, *7 Journal of Empirical Legal Studies* 1-29 (2010).

Evidence from a study of capital punishment in Trinidad and Tobago shows much the same. The most comprehensive study showed no change in homicide rates over several decades, despite increases in executions.¹¹ In a multivariate analysis, the same research showed that changes in the rate or number of executions had no deterrent effect on murder over a 50-year period from 1960-2010, once the murder rate is adjusted for imprisonment and socio-economic factors. Figures 5 and 6, below, from that careful regression analyses of Greenberg and Agozino, show that murders were not responsive to changes either in the prison population or in the rate of death sentences.

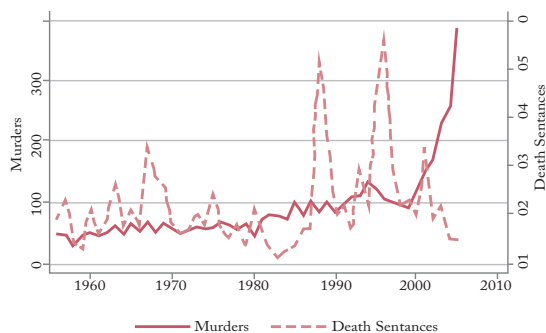


Fig. 5: Murders and death sentences in Trinidad and Tobago



Fig. 6: Murders and prison population

The death penalty in Kenya

Kenya retains the death penalty in its constitution as part of its general sentencing objectives. In cases other than those carrying a mandatory death sentence, courts are required to follow guidelines set forth in law to determine the length and conditions of punishment.¹² In general matters of criminal sentencing, deterrence stands alongside other goals of punishment: retribution, rehabilitation, restorative justice, public security and expressive condemnation.¹³ In cases without a mandatory minimum sentence or a mandatory death sentence, courts consider a sentence within the range of punishment specified by law, and the existence of mitigating and aggravating circumstances that may place the defendant either at the lower or upper boundary of the sentencing range.¹⁴ In cases where a life-imprisonment sentence is permitted, the guidelines state that a court should ‘endeavour to impose a sentence in keeping with the spirit of these guidelines’.¹⁵

Death is based on a different jurisprudence in Kenya. A mandatory death sentence in Kenya forecloses the achievement of each of the stated goals of punishment. Yet there are signs that the jurisprudence underlying the mandatory death penalty may be more elastic than previously thought. Although the Supreme Court of Kenya confirmed the constitutionality of the death penalty in *Muruatetu*, the Court held that a failure to consider mitigating circumstances violates guarantees of a fair trial.¹⁶ This suggests that a more nuanced and complex view of capital punishment may be emerging in Kenya, one where the

¹¹ David Greenberg and Biko Agozino, Executions, imprisonment, and crime in Trinidad and Tobago, 52 *British Journal of Criminology* 113 (2012). See, generally, Roger Hood and Carolyn Hoyle, *The death penalty in worldwide perspective* (Oxford, UK: Oxford University Press, 2015).

¹² Republic of Kenya, Judiciary, Sentencing Policy Guidelines (launched 25 January 2016) at 3 [*Guidelines*].

¹³ *Id.* at 15.

¹⁴ *Id.* at 50.

¹⁵ *Id.* at 51.

¹⁶ [2017] eKLR, Petition No. 15 of 2015 (as consolidated with Petition No 16 of 2015) [*Muruatetu*].

proceduralisation of the death penalty can lead to a more contextualised determination of deathworthiness and movement away from its strict and formalistic underpinnings.

Although Kenya retains the death penalty in its constitution, it is an abolitionist nation in practice, with a moratorium on executions in place since 1987, and two moratoria on new death sentences since 2009. Table 1 (p60) shows that Kenya's murder rate of 4.9 per 100,000 population in 2016 ranks 22nd among 57 African nations. On 3 August 2009, the death sentences of all 4,000 death row inmates were commuted to life imprisonment. While Kenya has not formally abolished capital punishment, current practice suggests that an unofficial moratorium on executions is in place, as none have been carried out since 1987.

Despite the moratorium – and in contradiction of the advice of a constitutional committee to abolish the death penalty¹⁷ – death sentences continued to be handed down by courts after the 2009 moratorium, and there were 2,747 prisoners on death row in Kenya as of 2016.¹⁸ A second moratorium was declared in 2016, after President Uhuru Kenyatta commuted the death sentences of all people under sentence of death at the end of 2016.¹⁹ As of 2018, the number of new death sentences since the mass commutation in 2016 was 838.²⁰

These changes in death sentencing have had little effect on homicide rates in Kenya. Figure 7 (p61) shows that the homicide rate rose after the 2009 moratorium, but there has been little change in the homicide rate after that.²¹ Over the past five years, the number of homicides dropped from 2,878 in 2013 to 2,774 in 2017, a decline of 3.6 per cent.²² Overall, the year-to-year percentage changes in the homicide rates were narrow, ranging from a drop of 10.5 per cent to an increase of about 11 per cent.²³ The narrow fluctuation in the homicide rates since 2009 follow the pattern of what statisticians refer to as a 'random walk'²⁴ with episodes of volatility that are typical of a random pattern over time and not indicative of longer-term increases.²⁵

¹⁷ President Kibaki stated in 2009 that the decision to commute the death sentences of 4,000 prisoners was based on the advice of a constitutional committee that noted the 'undue mental anguish and suffering, psychological trauma and anxiety' that comes from 'extended stays on death row'. See, Nick Wadhams, Kenya's death row inmates get life instead, *Time*, 5 August 2009, www.time.com/time/world/article/0,8599,1914708,00.html (last visited 7 February 2012). During this time, courts have noted the suffering of prisoners as a 'death row syndrome'. *Mutiso v Republic*, Criminal Appeal No. 17 of 2008, para. 16.

¹⁸ See, Death Penalty Information Center, President commutes all death sentences in Kenya, deathpenaltyinfo.org/node/6590, last visited 23 October 2018.

¹⁹ *Id.*

²⁰ Figure provided to The Death Penalty Project via email on 30 October 2018 by the Kenya Task Force on Review of the Mandatory Death Sentence as reported to them by the Kenya Prisons Service.

²¹ Such a 'phase shift' in the level of homicides is unusual outside of wartime experience, and we look to institute data-capture practices as an alternative explanation. For instance, there may have been a change in the rules of how police or others in Kenya captured these statistics, or their ability to capture such information.


























































²² Cyrus Ombati and Jenifer Anyango, Police release latest crime statistics in Kenya, *Standard Digital*, *The Standard Digital*, 30 April 2018, at www.standardmedia.co.ke/article/2001278742/police-releases-latest-crime-statistics-in-kenya

²³ See, Kenyan National Police Service, Annual Crime Report, various years, available at www.nationalpolice.go.ke/crime-statistics.html

²⁴ Brandt, Patrick T, and Tomislav V Kovandzic. Messing up Texas?: a re-analysis of the effects of executions on homicides, 10 *PLoS one* e0138143 (2015) David McDowall, Time series properties of crime rate changes: comments related to David Greenberg's paper, 31 *Justice Quarterly* 189 (2014).

²⁵ Andrew P Wheeler and Tomislav V Kovandzic, Monitoring volatile homicide trends across US cities, 22 *Homicide Studies*, available at doi.org/10.1177/1088767917740171 (2018) (showing that many of the recent increases in homicides in US cities are not out of the norm given historical patterns). The number of murders, a subset of homicides, reported by the Kenyan National Police Service (NPS) follows a similar 'random walk' pattern over a six-year period from 2010 through 2016. See, Kenyan National Police Service, Annual Crime Report, various years, available at www.nationalpolice.go.ke/crime-statistics.html

Table 1. Murder rates in Africa by nation, 2009-2016

| Rank | Country (or dependent territory) | Rate | Count | Year | Source |
|------|--|------|--------|------|---------------|
| 1 |  Saint Helena | 0.0 | 0 | 2009 | NSO |
| 2 |  Burkina Faso | 0.4 | 67 | 2015 | NSO |
| 3 |  Morocco | 1.2 | 431 | 2015 | UNSDC/CTS |
| 4 |  Algeria | 1.4 | 542 | 2015 | CTS |
| 5 |  Ghana | 1.7 | 423 | 2011 | WHO |
| 6 |  Sierra Leone | 1.7 | 124 | 2015 | UNSDC/NP/SDG |
| 7 |  Malawi | 1.7 | 279 | 2012 | NP |
| 8 |  Mauritius | 1.8 | 23 | 2016 | UNSDC/CTS/NSO |
| 9 |  Réunion | 1.8 | 15 | 2009 | NP |
| 10 |  Equatorial Guinea | 2.3 | 27 | 2015 | WHO Estimate |
| 11 |  Libya | 2.5 | 156 | 2015 | WHO Estimate |
| 12 |  Egypt | 2.5 | 2,207 | 2012 | CTS |
| 13 |  Rwanda | 2.5 | 293 | 2015 | NSO |
| 14 |  Tunisia | 3.1 | 332 | 2012 | WHO |
| 15 |  Liberia | 3.2 | 135 | 2012 | UNMIL |
| 16 |  São Tomé and Príncipe | 3.4 | 6 | 2011 | CTS |
| 17 |  Mozambique | 3.4 | 849 | 2011 | WHO/SDG |
| 18 |  Cameroon | 4.2 | 880 | 2012 | NSO/SDG |
| 19 |  Somalia | 4.3 | 599 | 2015 | WHO Estimate |
| 20 |  Niger | 4.4 | 788 | 2012 | WHO |
| 21 |  Angola | 4.9 | 1,217 | 2012 | NSO |
| 22 |  Kenya | 4.9 | 2,363 | 2016 | CTS |
| 23 |  Sudan | 5.2 | 1,702 | 2008 | CTS |
| 24 |  Zambia | 5.3 | 853 | 2015 | UNSDC/WHO/NP |
| 25 |  Mayotte | 5.9 | 12 | 2009 | NP |
| 26 |  Burundi | 6.0 | 635 | 2016 | CTS/SDG |
| 27 |  Benin | 6.2 | 654 | 2015 | WHO Estimate |
| 28 |  Djibouti | 6.5 | 60 | 2015 | WHO Estimate |
| 29 |  Zimbabwe | 6.7 | 981 | 2012 | WHO |
| 30 |  Tanzania | 7.0 | 3,746 | 2015 | INTP/CTS |
| 31 |  Senegal | 7.4 | 1,105 | 2015 | WHO Estimate |
| 32 |  Ethiopia | 7.6 | 7,552 | 2015 | WHO Estimate |
| 33 |  Madagascar | 7.7 | 1,863 | 2015 | WHO Estimate |
| 34 |  Comoros | 7.7 | 60 | 2015 | WHO Estimate |
| 35 |  Eritrea | 8.0 | 390 | 2015 | WHO Estimate |
| 36 |  Gabon | 8.0 | 155 | 2015 | WHO Estimate |
| 37 |  Guinea | 8.8 | 1,067 | 2015 | WHO Estimate |
| 38 |  Togo | 9.0 | 668 | 2015 | WHO Estimate |
| 39 |  Chad | 9.0 | 1,266 | 2015 | WHO Estimate |
| 40 |  Gambia | 9.1 | 181 | 2015 | WHO Estimate |
| 41 |  Congo | 9.3 | 466 | 2015 | WHO Estimate |
| 42 |  Guinea-Bissau | 9.6 | 169 | 2015 | WHO Estimate |
| 43 |  Nigeria | 9.9 | 17,843 | 2015 | WHO Estimate |
| 44 |  Mauritania | 9.9 | 416 | 2015 | WHO Estimate |
| 45 |  Mali | 10.9 | 1,905 | 2015 | WHO Estimate |
| 46 |  Cape Verde | 11.5 | 62 | 2016 | NP/CTS |
| 47 |  Uganda | 11.5 | 4,473 | 2014 | NP/CTS |
| 48 |  Ivory Coast | 11.6 | 2,688 | 2015 | WHO Estimate |
| 49 |  Seychelles | 12.7 | 12 | 2016 | INTP/NSO |
| 50 |  DR Congo | 13.6 | 10,322 | 2015 | WHO Estimate |
| 51 |  South Sudan | 13.9 | 1,504 | 2012 | NP |
| 52 |  Botswana | 15.0 | 303 | 2010 | WHO |
| 53 |  Namibia | 17.1 | 388 | 2012 | NP/INTP |
| 54 |  Swaziland | 17.3 | 208 | 2010 | WHO |
| 55 |  Central African Republic | 19.8 | 913 | 2016 | CTS |
| 56 |  South Africa | 34.0 | 19,016 | 2016 | NP |
| 57 |  Lesotho | 41.3 | 897 | 2015 | CTS/NSO |

Source: UNODC Statistics Online, United Nations Office On Drugs and Crime, at dataunodc.un.org/crime/intentional-homicide-victims. Last visited 11 October 2018

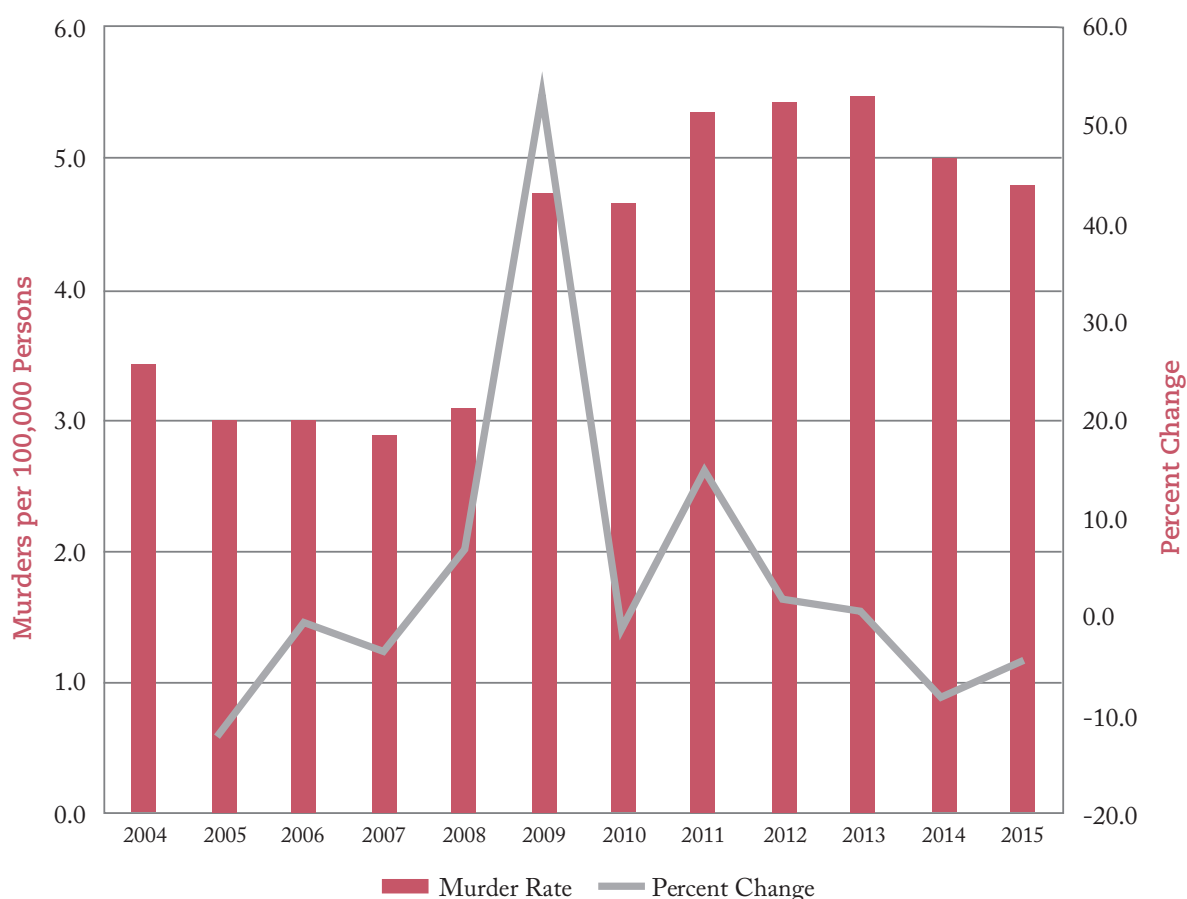


Fig. 7: Homicide rate and percent change, 2004-2016

With respect to the question of deterrence of homicide, it is critical to note that throughout this period, and for more than 30 years, there have been no executions in Kenya. The absence of year-to-year changes in murder rates in the face of two separate mass commutations suggests an absence of deterrence from the presence of a capital punishment regime in Kenya. The finding of no deterrent effect is consistent with the most recent and highly developed empirical evidence and jurisprudential reasoning.

Is the death penalty an effective 'crime control' measure generally?

Finally, it is important to note the deterrence of murder is a special case in the scientific literature on deterrence. There is, indeed, evidence of deterrent effects of enforcement and punishment in other realms of antisocial and illegal behaviour. Deterrence may be an effective crime-control measure for crimes such as tax evasion, minor property crimes, and vehicular offences.²⁶ There is also some evidence that rapid criminal responses to marital violence can be an effective deterrent, but only for some types of offenders.²⁷ In general, however, deterrent effects are weakest among the most serious crimes.²⁸

²⁶ Daniel Nagin, Deterrence in the 21st century: a review of the evidence, 42 *Crime and Justice* 199 (2013).

²⁷ Christopher D Maxwell, Joel H Garner, and Jeffrey A Fagan, The preventive effects of arrest on intimate partner violence: research, policy and theory, 2 *Criminology & Public Policy* 51-80 (2002).

²⁸ Nagin, supra note 11. See also Paul Robinson and John Darley, Does the criminal law deter?, 24 *Oxford Journal of Law* 173 (2004).

From these studies and prestigious study commissions, I conclude that there is no evidence of the deterrent effects of death sentences or executions on homicides.²⁹ I am not alone in reaching this conclusion. A survey of more than 1,000 leading criminologists in the world agreed with this conclusion, based on their reading of the evidence and their own studies.³⁰ In fact, there is conclusive evidence that deterrent effects are a function of the risks of arrest rather than the severity of the sanction, including death.³¹

In sum, there is no evidence that executions have a greater deterrent effect on homicides than other forms of punishment. Accordingly, there is no expectation that executions will deter homicides in the US, in Kenya, or elsewhere.

²⁹ Nagin and Pepper, *supra* note 4. See, also, Tomislav V Kovandzic, Lynne M Vieraitis, and Denise Paquette Boots. Does the death penalty save lives? New evidence from state panel data, 1977 to 2006, 8 *Criminology & Public Policy* 803 (2009). Fagan, *Death and deterrence redux*, *supra* note 6.

³⁰ Michael L Radelet and Traci L. Lacoock, Do executions lower homicide rates: the views of leading criminologists, 99 *Journal of Criminal Law Criminology* 489 (2008).

³¹ Nagin, Id Steven N Durlauf and Daniel S Nagin, Imprisonment and crime: can both be reduced?, 10 *Criminology & Public Policy* 13 (2011).

The Death Penalty Project

The Death Penalty Project is a legal action charity, based in London, working to promote and protect the human rights of those facing the death penalty. We provide free legal representation to death row prisoners around the world to highlight miscarriages of justice and breaches of human rights. We also assist other vulnerable prisoners, including juveniles, those who suffer from mental health issues and prisoners who are serving long-term sentences.

For more than three decades, our work has played a critical role in identifying miscarriages of justice, promoting minimum fair-trial guarantees in capital cases, and in establishing violations of domestic and international law. Through our legal work, the application of the death penalty has been restricted in many countries in line with international human rights standards. To complement our legal activities, we conduct capacity-building activities for members of the judiciary, defence lawyers and prosecutors, as well as mental health professionals, and commission studies on criminal justice and human rights issues relating to the death penalty.

We commission and publish academic research, targeted reports and professional resources to increase knowledge and understanding on the death penalty. Covering thematic issues such as public opinion, conditions of detention and the implementation of human rights law, these resources are developed in close consultation with local partners to respond to specific needs. Our publications are used by NGOs, lawyers and policymakers around the world as tools to effect lasting change in policy and practice.

In December 2017, in *Muruatetu v Republic of Kenya*, the Supreme Court of Kenya found the mandatory death penalty to be unconstitutional. Following the *Muruatetu* judgment, The Death Penalty Project was invited to assist the governmental body tasked with developing a process for implementing the decision and giving relief to the thousands of individuals unlawfully sentenced to death. As part of this work, we submitted this report, drawing on our experiences in other jurisdictions where capital sentencing laws have been struck down or abolished.

As a companion to this report, we direct the reader to our video on Kenya's abolition of the mandatory death penalty, as well as *Sentencing in Capital Cases* (2018), by Joe Middleton and Amanda Clift-Matthews with Edward Fitzgerald QC. These resources, including this report, are available to view and download at www.deathpenaltyproject.org.



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