SUMMARY OF THE RECOMMENDATIONS OF THE TASK FORCE ON THE REVIEW OF THE MANDATORY DEATH PENALTY

3 October 2018

BACKGROUND

In December 2017, in a case called *Francis Muruatetu and others versus the Republic*, the Supreme Court of Kenya said that the mandatory nature of the death penalty violates the right to a fair trial under the Constitution of Kenya 2010. This is because a judge could not consider the facts of the offence and background of the offender that might make the death penalty an unfair sentence in the circumstances. A judge can now consider these circumstances and impose a sentence that is not the death penalty, for example life imprisonment. The court did not get rid of the death penalty entirely. It is still allowed under Article 26(3) of the Constitution, and a judge can still impose a death sentence if the circumstances are serious enough.

The Court then found that all offenders who had been given a mandatory death sentence have the right to a new hearing to determine whether they should still be subject to the death penalty, or should get a different sentence. The Court ordered the Attorney General and others to set up a system to conduct these new hearings. The Court gave the Attorney General one year to set up this system, meaning that sentence re-hearings will not begin until January 2019 at the earliest.

The Court also found that life imprisonment should not necessarily mean that an offender stays in prison until their death, and instead there should be an opportunity for the length of an offender's sentence to be reviewed and the offender released in certain circumstances. The Court then recommended that the Attorney General and Parliament develop a law on the definition of what a life sentence means, which may include a minimum number of years to be served before a prisoner is considered for parole, or for prisoners under specific circumstances to serve whole life sentences.

After this decision was released the Attorney General set up a Task Force to develop recommendations on how to implement the Court's orders. The Task Force includes representatives of the Attorney General and Department of Justice, the Department of Public Prosecutions, the Judiciary, Parliament, the Kenya Law Reform Commission, the Power of Mercy Advisory

Committee, Kenya Prison Service, Probation and Aftercare Services, the National Crime Research Centre, and the Kenya National Commission on Human Rights.

So far the Task Force has conducted research on how other countries around the world have done sentence re-hearings, and how they have set up a system of life imprisonment and parole. The Task Force has also considered what international and regional law says, and what other countries around the world are doing about, the death penalty. The Task Force has researched practices in the following countries: Japan, India, Turkey, Australia, Canada, the United Kingdom, Mexico, Columbia, Honduras, Venezuela, Zimbabwe, South Africa, Tanzania, Uganda, Malawi, Botswana, Liberia, Ethiopia, Namibia, Mauritius and Rwanda.

The Task Force is now at the stage where we want to hear from stakeholders. We greatly value your input, and will take your proposals and feedback into consideration in finalising these draft recommendations.

SOME FACTS ABOUT THE DEATH PENALTY

- The Kenyan *Penal Code* provides for a mandatory death penalty for the crimes of murder, robbery with violence, attempted robbery with violence, administering an oath purported to bind a person to commit a capital offence, and treason. The method of execution is by hanging.
- No executions have been carried out since 1987. Death sentences continue to be handed down by courts however, and there are currently approximately 1000 prisoners on death row in Kenya. The general practice in Kenyan prisons is that offenders on death row do not work as do other offenders. It costs 240 Ksh per day (87,600 Ksh per year) to house one offender on death row.
- In 2003, President Mwai Kibaki commuted 223 death row convicts to life imprisonment. On 8 August 2009, President Kibaki further commuted another 4,000 death row prisoners to life imprisonment. This was the biggest known mass commutation of condemned prisoners anywhere in the world. President Kibaki stated that he made the decision following the advice of a constitutional committee, on the basis that commuting death sentences would alleviate the "undue mental anguish and suffering, psychological trauma and anxiety" that come from "extended stays on death row".
- The most recent commutation occurred on 24 October 2016 when President Uhuru Kenyatta commuted all death sentences to life imprisonment, removing 2,747 convicts from death row,

including 2,655 men and 92 women. This significant move signals commitment from the Kenyan Government towards abolishing the death penalty in line with its international human rights obligations, however a budgetary allocation is made each year for servicing of the gallows on the understanding that for as long as the death sentence remains legal, the means of execution must be available at all times.

- The Supreme Court in *Mururatetu* noted that the UN Commission on Human Rights urges States that maintain the death penalty not to impose it except for the 'most serious crimes' that are violent in nature, specifically intentional crimes with lethal or extremely grave consequences. In this respect, Article 6(2) of the *International Covenant on Civil and Political Rights* provides that the sentence of death may be imposed "for the most serious crimes" pursuant to a final judgment rendered by a "competent court". The death penalty may not be imposed on persons under eighteen years of age, or pregnant women. Kenya ratified the *ICCPR* in 1972, and it therefore forms part of the law of Kenya in accordance with Article 2(6) of the Constitution.
- In 2007, the UN General Assembly approved Resolution 62/149, which calls for all retentionist states to establish a moratorium on executions with a view to abolishing the death penalty.
- The African Commission on Human and Peoples' Rights in its 2012 *Study On The Question Of The Death Penalty In Africa* ultimately concluded that abolition of the death penalty is necessary in accordance with the statements and resolutions of the UN. The African Commission's *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* adopted in November 2015 notes that international law requires abolition of the death penalty as a means of realizing the right to life and the right to be free from torture and cruel, inhuman or degrading treatment or punishment, and directs States Parties with moratoria on the death penalty to take steps towards formally abolishing it.
- According to Amnesty International, as of 8 November 2017, 105 countries have abolished the death penalty for all crimes, 8 countries have abolished the death penalty for 'ordinary' crimes, and a further 29 countries (including Kenya) have abolished it in practice. The following nineteen (19) African countries have abolished the death penalty completely: Angola (1992), Benin (2016), Burundi (2009), Cape Verde (1981), Congo (2015), Côte d'Ivoire (2000), Djibouti (1995), Gabon (2010), Guinea-Bissau (1993), Madagascar (2015), Mauritius (1995), Mozambique (1990), Namibia (1990), Rwanda (2007), São Tomé and Príncipe (1990), Senegal (2004), Seychelles (1993), South Africa (1995) and Togo (2009).

TASK FORCE RECOMMENDATIONS ON SENTENCE RE-HEARING

Several African countries have recently gone through the same process that is now happening in Kenya, including South Africa, Uganda and Malawi.

- Uganda - The mandatory nature of the death penalty was subject to a constitutional challenge by a number of death row prisoners, and in June 2005 the Constitutional Court of Uganda held that the death penalty *per se* is not cruel, inhuman or degrading punishment, but that the mandatory nature of the death penalty violates inter alia the right to equality in Article 21 and the right to a fair hearing in Article 28. On appeal, the Supreme Court of Uganda agreed with the Constitutional Court that a delay of more than three years between confirmation of a sentence and execution is inordinate. If, after this time, the President has not either carried out the death sentence or exercised the power of mercy, then the sentence must be deemed commuted to life imprisonment without remission.

  Case preparation for the resentencing 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 prisoners interviews and preparing case summaries; obtaining psychiatric reports (a team of psychiatrists were instructed and mental assessments were carried out on 548 prisoners on death row); and collecting witness statements. Ten judges, ten defence advocates and ten prosecutors were assigned for the special session covering 136 sentence re-hearings. Of the 136 offenders re-sentenced at the November/December 2013 sentence re-hearing session, nine death sentences were confirmed, twenty-two received life sentences, ninety-two were sentenced to determinate periods of imprisonment, four were referred to a psychiatric facility and the remainder were released.
- Malawi - The Constitutional Court of Malawi invalidated the mandatory death penalty in 2007 in *Kafantayeni v. Attorney General*. The Court determined that the lack of individualized sentencing discretion could result in the infliction of capital punishment on a defendant whose crime did not warrant the penalty. Over a roughly two-year period, 156 hearings were set and 154 sentences were ultimately handed down. 155 resentencing hearings were heard by a total of 14 judges. The time taken for decisions to be rendered post hearing ranged from the same day to one year, with the median being 16 days.

The Task Force has closely studied these countries, including obtaining opinions from persons who were involved in the process about how they conducted sentence re-hearings, and has developed the following model that is intended to specifically address the circumstances existing in Kenya.

- All offenders who have been subject to the mandatory death penalty will be entitled to sentence re-hearing as directed by the Court in *Muruatetu*. This includes:

  i. All offenders on death row as at the time of the decision (14 December 2017);

  ii. All capital offenders whose sentence has been commuted to life imprisonment; and

  iii. Any offenders sentenced to death after the decision in *Muruatetu* but without regard to or compliance with the court's declaration (ie. have not taken into account mitigating factors), and who have exhausted all appeal mechanisms.

  Based on known figures, the Task Force estimates that there are approximately 8000 of these offenders eligible for sentence rehearing.

- Resentencing Regulations will be introduced to guide the resentencing process. Generally, the regulations will provide for the composition and functions of the subcommittee responsible for oversight of the resentencing process, the procedure for resentencing, the considerations to be made during resentencing, and specific timelines.

- Specifically, the Task Force proposes that the National Council on the Administration of Justice (NCAJ) be responsible for overseeing the resentencing process through a subcommittee specifically established for this purpose and comprised of representatives from:

  i. Judiciary
  ii. Parliament
  iii. Office of the Attorney General and the Department of Justice
  iv. Office of the Director of Public Prosecution
  v. Kenya National Commission on Human Rights
  vi. National Legal Aid Service
  vii. National Crime Research Centre
  viii. Kenya Law Reform Commission
  ix. Power of Mercy Advisory Committee
  x. Probation and Aftercare Services

xi. Prisons
xii. Victim Protection Board
xiii. Witness Protection Agency

- The subcommittee will be responsible for collecting all available data that will assist in the proper identification of capital offenders, including those whose sentences have been commuted, before commencement of the resentencing process.

- The subcommittee will also coordinate and oversee mitigation investigations before resentencing commences for all eligible offenders to establish:

  i. the circumstances or facts of the offence and degree of involvement of the offender;
  ii. the age of the offender at the time of commission of the offence;
  iii. the character and record of the offender, including being a first offender;
  iv. whether the offender pleaded guilty, and the point at which the guilty plea was made;
  v. any attempt by the offender to make reparation for the offence;
  vi. the possibility of reform and social re-adaptation of the offender;
  vii. any other mitigating circumstances of the offender such as social or economic circumstances at the time the offence was committed, including whether commission of the offence was in response to gender-based violence; and
  viii. the views of the victim, or where the victim is deceased or incapacitated, the victim's representative, on the psychological, emotional, physical, economic or social impact of the offence committed.

- Investigations will entail interviewing and obtaining sworn statements from offenders, their family members, friends, village authorities, victims or their representatives and any witnesses, and producing a mitigation report for each offender.

- The Task Force also proposes the introduction of a victim outreach and community sensitisation program to take place in conjunction with the mitigation investigation.

- During victim outreach, the subcommittee will obtain sworn statements on the victim's and community's feelings about the potential release and return of the offender.

- Community sensitisation will involve meetings with traditional authorities, local leaders and the public to inform them about the *Muruatetu* judgement and the process of resentencing, and to answer questions about the process.

- Upon identification of all capital offenders eligible for sentence rehearing, the subcommittee shall categorise each prisoner for the purposes of resentencing in terms of the following priority:
    i. Longest serving (20 years and longer);
    ii. Vulnerable (elderly ie. offenders over 60 years of age, offenders with disabilities, offenders who are terminally ill, women);
    iii. Murder
    iv. Robbery With Violence
- The subcommittee will then facilitate the resentencing process by giving notice to these offenders through a designated officer in each prison, who will ensure that each offender fills an application for resentencing which they will thereafter submit to the subcommittee, who will then coordinate with the Judiciary for purposes of scheduling each sentence rehearing.
- Every offender will be notified well in advance of the hearing, and will be requested to indicate whether they will have their own counsel or choose to be represented by *pro bono* counsel. The subcommittee will coordinate with the National Legal Aid Service for provision of *pro bono* counsel for the purpose of sentencing rehearings.
- The Task Force proposes a resentencing hearing model in which the judiciary will designate a specified number of judges who will be responsible for presiding over the resentencing hearings, which will take place in or as close as possible to each prison where eligible offenders are held over the course of a number of consecutive days, with a view to conducting as many hearings as possible in the timeframe.
- The subcommittee will oversee coordination of hearings in each prison, including setting the daily resentencing hearing schedule and ensuring that all files are as complete as possible (including, at a minimum, the mitigation report) and provided to the presiding judicial officer, prosecutor and defence counsel no less than one week in advance of the hearing.
- At the hearing, the presiding judicial officer will receive submissions on the mitigation report and on the recommended new sentence and eligibility for parole. The court may receive *viva voce* evidence from witnesses if deemed necessary to supplement or clarify the sworn statements contained in the mitigation report. The court will then proceed to pass a new sentence,

including giving reasons for any departure from the guideline period of ineligibility for parole as explained below.

- Finally, the Task Force proposes that the existing *Sentencing Policy Guidelines*, as revised by the Court in paragraph 71 of the *Mururatetu* decision, will be converted into Sentencing Regulations so as to make them binding and ensure that the sentencing process is transparent and accountable for all new cases going forward.

TASK FORCE RECOMMENDATIONS ON THE PARAMETERS OF LIFE IMPRISONMENT AND PAROLE

Background

In 1990 the United Nations General Assembly adopted the *United Nations Standard Minimum Rules for Non-custodial Measures* (*The Tokyo Rules*) which provide that states must develop non-custodial measures with the aim of reducing the use of imprisonment, taking into account human rights, social justice and rehabilitation of offenders. In making a decision on sentencing after a conviction, a judicial authority should consider the rehabilitative needs of the offender, the protection of society, and the interests of the victim who should be consulted.

Up to 6982 (as of 25 April 2018) of offenders in Kenya are currently serving a life sentence out of the total number of convicted offenders. A majority of these 'lifers' are young adults in the range of 20-40 years. Without disturbing most of the current laws there are approximately seventy (70) offences that attract the punishment of a life sentence, either as a mandatory sentence or as maximum in a range of possible sentences.

The Task Force researched the practices in regard to life imprisonment and parole in the following countries: Botswana, Liberia, Malawi, Zimbabwe, Rwanda, Tanzania, Uganda, Namibia, Ethiopia, Mauritius, South Africa, India, Australia, United Kingdom, Japan, Turkey, Canada, United States, Mexico, Columbia, Honduras and Venezuela. The comparative analysis undertaken by the Task Force revealed that in most jurisdictions a life sentence is tempered with the possibility of parole. Parole refers to the period of a sentence during which an offender is released from prison and serves the remainder of their sentence being supervised by a parole officer in the community.

Decades of research have supported a shift in penal policy from retributive to rehabilitative, and parole is one such rehabilitative measure. The main purpose of parole is to increase chances of rehabilitation of offenders within the community while still maintaining public safety. Where parole is institutionalised it is applied as a period of eligibility (i.e. it is not automatic) dependent on a number of factors including the type of offence, circumstances of the offence, personal circumstances of the offender, and a risk assessment, among other factors. When an offender becomes eligible for parole, a decision on whether parole will be granted is based on the good behaviour of the offender while incarcerated and assurance of safety measures in the community.

Eligibility for Parole

- The Task Force proposes retaining the current provision of remission for offenders serving a term of imprisonment that is less than three years, and introducing a new system of parole (replacing remission) for offenders serving a sentence of three years or more, including a life sentence.

- 'Parole' means the early release from imprisonment before the expiry of an offender's sentence, with authority to serve the remainder of the sentence at large, subject to any conditions that may be imposed by law. It is not a pardon.

- Parole will not be automatic. Eligibility to apply for parole after serving a minimum period of incarceration will be determined by the sentencing court in accordance with established parameters. The period of ineligibility (ie. the minimum time to be served before applying for parole) shall include any period of pre-sentence custody.

- A court imposing a sentence on an offender may increase or decrease the period of ineligibility for parole if the court is satisfied, having regard to the circumstances of the offence and the character and circumstances of the offender, that the objectives of deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denunciation may be met by any other period of ineligibility. A judicial officer who departs from the established parameters must give reasons in writing for doing so.

- For offenders serving a sentence other than life imprisonment, 'normal eligibility' to apply for parole will be on the day after which the offender has served two thirds of the prescribed sentence.

- With regard to the parameters of life imprisonment, the Task Force proposes amending the *Penal Code* and the *Kenya Defence Forces Act* to categorize offences which attract the death penalty or life imprisonment with defined periods of ineligibility for parole. For example, the Task Force proposes that murder will be categorized in the following manner:

    a. **Aggravated Murder** will be the first category which will involve the 'rarest of the rare' offences that are intentional, premeditated and aggravated in one or more of the following ways:
        - vulnerable victim (child, elderly, person with disability, pregnant woman, or a person with whom the offender was in a fiduciary relationship or over whom the offender exercised some degree of control)
        - victim is law enforcement officer or a public officer killed during the performance of official duties
        - the crime was a hate crime (ie. the victim was targeted on the basis of religion, perceived sexual orientation or gender identity, race or ethnicity)
        - murder committed after the victim has been raped or tortured
        - victim is a person who has given or was likely to give material evidence in court proceedings
        - multiple victims (includes genocide, acts of terrorism causing death, and grave breach of *Geneva Convention* involving wilful killing)

    There will be **no eligibility for parole** for those convicted of aggravated murder.

    b. **First Degree Murder** will be the second category where the murder is planned and intentional but not aggravated. **Eligibility for parole after 25yrs**
    c. **Second Degree Murder** which is intentional but not premeditated will be the third category, which includes FGM which results in death and torture which results in death. **Eligibility for parole after 20yrs**

d. **Manslaughter** which is unintentional and not premeditated killing will be the fourth category. **Eligibility for parole after serving two thirds of the sentence (this will be the normal eligibility for parole)**

- For the purpose of calculating 'normal eligibility' for parole in respect of a life sentence, such sentence shall be deemed to be twenty-five years, meaning that offenders serving a life sentence who are given 'normal eligibility' for parole will be entitled to apply for parole after serving sixteen and a half (16.5) years.

Procedure for Granting Parole

- The Task Force recommends that the responsibility to oversee implementation of the parole system will sit with the Power of Mercy Advisory Committee (POMAC) in accordance with its power under Article 133 of the Constitution to recommend remission of part of a punishment.

- The Task Force proposes the formation of a National Parole Board that will be an independent, administrative body established through an Act of Parliament with the authority to grant, deny or revoke parole. POMAC will act as the secretariat for the Parole Board.

- The Parole Board shall consist of members serving terms to be provided in the statute. The Parole Board functions will be devolved so that a three-member Parole Board, selected on an *ad hoc* basis (as necessary in accordance with applications submitted) from among the existing complement of members, will sit at each prison to hear applications from the offender in that prison.

- The Task Force proposes the formation of Case Management Committees in prison facilities. These committees will be responsible for initiating cases for parole consideration once the offender has served the prescribed period of parole ineligibility, including compiling and submitting risk assessment/parole reports to the Parole Board. Risk assessment/parole reports are based on the review of all available information about the offender with the objective of identifying risk factors and available rehabilitative supports, in order to protect society, and will include details on the offender's social history, victim's views and the offender's relationships including family and community ties.

- Case Management Committees will be responsible for coordinating all cases placed before the Parole Board for hearing by ensuring all the necessary documents are in place, and any witnesses required to be in attendance are present during the hearing.

- The Parole Board will consider all relevant information prior to decision making, including the following factors:

    - Circumstances of the offence

    - Criminal record of the offender and other history of previous antisocial behaviour

    - Offender's conduct post-conviction

    - Social issues such as family violence and alcohol or substance abuse

    - Mental status of the offender and potential impact on the ability to re-offend, including whether the offender has received treatment for mental illness (in the form of psychological or psychiatric reports from qualified professionals)

    - The offender's relationships with family, peers and others in the community

    - The offender's employment history or previous economic engagements

    - The offender's perspective and attitude towards the offence

    - The offender's participation in rehabilitation programmes while incarcerated such as skills training or formal education that could aid rehabilitation and reintegration post release

    - Opinions from professionals that have direct contact with or knowledge of the offender such as correctional service staff, police or probation officers, and any other information that could be indicative of the risk that the offenders could pose to the community in the case of release

    - Views of victims and community leaders concerning the proposed release of the offender

- If the Parole Board is satisfied that the offender will not pose undue risk to society and has the potential for rehabilitation, the offender will be released to serve the remainder of the sentence in accordance with any conditions set. Examples of such conditions include:
    - The offender must report to their Parole Officer at specified times and place;
    - The offender must live at a specified location;
    - The offender must avoid taking or abusing alcohol or drugs;
    - The offender must avoid contact with a particular person or persons, for example the victim(s) or former criminal associates;
    - The offender must refrain from committing any criminal offence;
    - The offender must participate in a rehabilitation program or educational activities;
    - The offender must actively seek employment or alternative economic engagement; and
    - If an offender is under the age of twenty-two (22), supervision by a social worker.
- If an offender is serving a sentence for a violent offence (eg. murder, robbery with violence), the Parole Board can refuse to grant parole, but this decision must be reviewed within five years, and within every five years following that, until the offender is granted parole or serves the remainder of the sentence. The Parole Board must give written reasons for a decision not to grant parole to an offender.

- Offenders who are granted parole will be released to the community under the supervision of a Parole Officer who will ensure that the conditions are followed. Officers that specifically focus on supervision of offenders released on parole will be under Probation and After Care Services and will be required to have the same qualifications as probation officers.

- Once granted, parole cannot be appealed, though it may be revoked by the Parole Board if the offender re-offends or violates the conditions of the parole order.
- If an offender's parole is not revoked for the entire time remaining in the sentence, then the offender thereafter will enjoy full freedom, and may apply in writing to POMAC for *pardon* five years after completion of their parole.

THE TASK FORCE WOULD VERY MUCH LIKE TO HEAR YOUR VIEWS

FEEDBACK CAN BE SENT TO reviewmds@ag.go.ke