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Death Penalty for 'Non-Triggerman'-Homicide Offences

A report prepared for Reprieve covering 10 retentionist common law jurisdictions

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EXECUTIVE SUMMARY

I. INTRODUCTION

1. This is a report prepared by Oxford Pro Bono Publico ('OPBP') for Reprieve, to summarise information on retentionist common law jurisdictions which have provisions that allow for the death penalty for 'non-triggermen', and the usage of these provisions in recent case law.

2. For the purposes of this report, a 'non-triggerman' is a person who has not committed an act which directly leads to the death of another.

3. Reprieve has been involved in an *amicus curiae* in support of the reversal of a death sentence in 2012 for a man (Anthony Farina) who had committed a robbery in the U.S. together with his brother (Jeffrey Farina). During the robbery, Jeffrey killed a young woman. Anthony did not take part in the killing and had not intended to kill. He was convicted and sentenced to death for the offence of felony murder, a legal construct which allows for a conviction of murder where the defendant had no intent to kill or injure, and did not kill or injure anyone, by imputing intent to commit murder from the defendant's intent to commit a felony.

4. Reprieve is interested in comparing legal provisions similar to the 'felony murder' rule in the US to other retentionist common-law jurisdictions, and potential limits on the imposition of the death penalty in these cases.

II. NATURE OF THE RESEARCH

5. To create a conclusive database for 'non-triggerman' provisions and case law in retentionist common law jurisdictions, OPBP has undertaken a detailed research regarding 'non-triggerman'-homicide offences in 10 retentionist countries which have carried out the death penalty in the last decade.

6. The report draws on the following jurisdictions:

   i. India
   ii. Pakistan
   iii. Singapore
   iv. Malaysia
   v. Bangladesh
   vi. USA
   vii. Gambia
   viii. Botswana
   ix. Nigeria
   x. Saint Kitts and Nevis

7. Our research addresses two questions in respect of each of the jurisdictions covered:

I. ***Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?***

II. Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

8. As stated above, the questions only concern non-triggerman-homicide offences. Other offences, which do not involve the killing of a person but which can nevertheless be punished with the death penalty (non-homicide cases), will not be covered in this report. Furthermore, this report will focus on felony murder, common purpose, abetment and conspiracy, but does not include innocent agency cases.

9. It shall further be noted that the availability of case law has been very limited in various jurisdictions. This applies especially to Malaysia, Nigeria, Saint Kitts and Nevis, and the Gambia. However, the researchers have summed up the case law found; it is not claimed that this list is exhaustive.

III. SUMMARY CONCLUSIONS

10. This section is a summary of our findings for the two questions considered. By identifying broad trends across jurisdictions, we hope that our research will enrich an understanding of 'non-triggerman'-homicide offences which are punishable by the death penalty.

Question 1:

Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?

11. The statutory provisions dealing with the question at hand are similar for the most part in India, Pakistan, Bangladesh, Singapore and Malaysia. This is because the Indian Penal Code forms the basis of the criminal codes in Pakistan, Malaysia, Singapore and Bangladesh. After the partition of the British Empire, the Indian Penal Code ('IPC') was inherited by its successor states, the Dominion of India and the Dominion of Pakistan, which was further divided into Pakistan and Bangladesh. Furthermore, the Indian Penal Code was adopted by the British colonial authorities in Singapore and the Straits Settlements, now part of Malaysia.

12. The legal tests which are related to 'non-triggerman' liability in these countries are 'common intention', 'common object or purpose of an unlawful assembly', 'dacoity with murder' (called 'gang-robbery with murder' in Malaysia and Singapore), 'abetment' and 'conspiracy'.

13. Due to the fact that the statutory provisions are nearly the same in these jurisdictions, and the case law differs slightly in some instances, only a detailed introduction of India will follow. A detailed description of the other jurisdictions can be found in the main part of this report.

    - **Common intention:** Section 34 of the IPC provides that where a criminal act is done by several persons, in furtherance of the common intention of all, then each person is liable for that act in the same manner as if it were done by that person alone. Two conditions must be fulfilled: (a) there must be a common intention to commit an offence, and (b) all the accused must participate in doing such act or acts constituting that offence, in furtherance of that common intention.

- **Common object or purpose of an unlawful assembly:** Section 149 of the IPC provides that where an offence is committed by any member of an unlawful assembly in furtherance of the common object of that assembly, or an offence which the members of the assembly knew would be likely to be committed in furtherance of that object, then every person who is a member of the assembly is guilty of that offence. As opposed to Section 34, although the object of the members of an unlawful assembly must be common, the intentions of the several members may differ. Also, the element of participation in action, which is the leading feature of Section 34, is replaced in Section 149 by membership of the unlawful assembly.

- **Dacoity with murder:** Section 396 of the IPC prescribes the death penalty as a possible form of punishment for all persons who are held guilty of committing dacoity (called gang robbery in Malaysia and Singapore), if any one or more persons commit murder while committing dacoity. The offence of dacoity involves five (two in Malaysia) or more persons conjointly committing, or attempting to commit a robbery. Unlike Section 34 of the IPC, there is no requirement to show 'common intention' to commit murder to sentence persons under Section 396.

- **Abetment:** Sections 107-120 of the IPC contain the law relating to abetment. Abetment can be committed through instigating the commission of an offence, engaging in a conspiracy to commit an offence, or by intentionally aiding the commission of an offence.

- **Conspiracy:** A criminal conspiracy is committed when two or more persons agree to do, or cause to be done (i) an illegal act, or (ii) an act which is not illegal by illegal means.

14. Note: In Singapore and Malaysia, the only available case law deals with the concept of 'common intent' (article 34 of the Penal Codes).

15. In the US, there are substantial variations in each of the 30 States retaining the death penalty, in how the defence of murder is defined and what categories are subjected to the death penalty. There are no common set of rules that are used across jurisdictions. An overview of the relevant provisions in the different states is enclosed as an appendix to this report. The concepts of 'intentionally directing/ordering murder' and 'felony murder' are applied across jurisdictions:

    - Most non-triggerman cases in the US arise in the context of felony murder, involving situations where the triggerman and non-triggerman were present together 'at the scene' participating in a felony, in the course of which the triggerman caused death.

    - Across jurisdictions, a defendant may be convicted of the highest degree of murder and sentenced to the death penalty, even where they did not themselves carry out the physical act of murder, if they intentionally procured or caused murder. However, jurisdictions differ in how exactly they classify the liability of someone who is involved in organizing an intentional killing without actually carrying out the physical act themselves.

16. In the Gambia, the Criminal Code uses a concept which is very similar to that of 'felony murder' in the US.

    - Pursuant to Article 190 (c) of the Gambian Criminal Code, a person shall be sentenced to death if death is caused and when the "person us[es] violent measures in the commission of, or attempt at, a felony" (Article 190(c)).

- With regard to terrorism offences, the Anti-Terrorism Act 2002 provides for a very specific regulation. Section 66(1) criminalises a range of accessorial conduct in relation to terrorist offences, which can, but do not need to, cause death, to be punishable by death.

- The relevant legal tests regarding terrorism offences are conspiracy or attempt, aiding, abetment, counsel or procurement as well as incitement, urging or encouragement.

17. In Botswana, legal concepts dealing with 'non-triggerman' offences are 'aiding and abetting' and 'common purpose'.

    - Section 21 of the Penal Code of Botswana defines who is deemed to be 'principal offender' of an act. This includes:
        - The person who commits the act or the omission constituting an offence;
        - the person who commits or omits any act for the purpose of enabling or aiding another to commit an offence;
        - the person who aids or abets another person in committing the offence.
    - Section 22 of the Penal Code defines the doctrine of 'common purpose': When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

18. In Nigeria, the tests for non-triggerman homicide offences include 'common purpose/intention', 'procurement', 'counselling' and 'conspiracy'. 'Abetment' is an offence only in Northern States.

    - **Common purpose/intention**: Section 8 of the Criminal Code Act 1990 ('CCA') uses the same definition as Section 22 of the Botswana Penal Code.

    - **Abetment:** Pursuant to Section 83 Penal Code Act 1960 ('PCA'), applicable only in the Northern States, abetment can be committed through instigating the commission of an offence, engaging in a conspiracy to commit an offence or by intentionally aiding the commission of an offence. As to the *mens rea*, it is sufficient if the act done was a probable consequence of the abetment (Section 87 PCA); however, Section 89 PCA places a limitation on the application of abetment by imposing a 'reasonable foreseeability' test on the abettor.

    - **Procurement:** Even though persons can be held criminally liable/treated as the principal offender if they have procured (Section 7(d) CCA) another to do or omit an act or counselled (Section 9 CCA) another to do so, it is not clear from the legislation whether the death penalty would in fact be used for procurement or counselling that results in homicide.

    - **Counselling:** Under Section 9 CCA, when a person counsels another to commit an offence, and an offence is actually committed after such counsel, he can be found guilty of the offence committed by those counselled.

    - **Conspiracy:** Under Sections 96-97 PCA (therefore only in Northern Nigeria), conspiracy is treated in law as abetment to the offence, and any such resultant punishments.

19. In Saint Kitts and Nevis, the only relevant legal test concerning 'non-triggerman' homicide offences is joint enterprise/common design.

- For the legal test of 'joint enterprise', three necessary elements have been set out through case law: (1) a common unlawful joint enterprise, (2) that what was done by the person who carried out the killing was within the scope of that common joint enterprise, and (3) that the action must have been seen as a possible result of that unlawful joint enterprise.
- In a more recent case, it has even been held that the requisite mental element of an offence for accessories has to match that required of the principal offender when an act has been committed under joint enterprise.

Question 2

Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

20. In India, the mandatory death penalty has been held to be unconstitutional, and it is therefore an issue of sentencing discretion. In *Bachan Singh*, Supreme Court held that the death penalty may be imposed only in the 'rarest of the rare' instances, understood as 'the gravest cases of extreme culpability', after considering all aggravating and mitigating circumstances. The mitigating circumstances must be given a 'liberal and expansive construction', and the possibility of reformation of the prisoner must be 'unquestionably foreclosed' for the imposition of the death penalty. The fact that the person did not kill can be considered a mitigating circumstance. The application of the 'rarest of rare' framework has raised serious concerns of arbitrariness and judicial inconsistency. Therefore, in 2015, the Law Commission of India recommended the abolition of the death penalty for all offences except those relating to terrorism.

21. In Pakistan, courts consider mitigating circumstances, such as lack of motive or youthful tendency toward excitement and impulsiveness, to limit the imposition of the death penalty. For example, where a person has participated in the commission of an offence and his participation is duly established but his intention, guilty mind or motive to commit the same is not proven or is not alleged by the prosecution, the court adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict.

22. In Bangladesh, the mandatory death penalty has been held to be unconstitutional and is therefore an issue of sentencing discretion. Moreover, there are certain circumstances that the judiciary, in its discretion, might find extenuating in deciding whether to impose the death penalty.

23. In Singapore Section 300 of the Penal Code, containing the definition of murder, has faced a major revision in 2012 with the stated intention of giving more specificity to homicidal offences and also to give more discretion to the courts. Among other changes, existing murder cases will also be re-considered for clemency.

24. On October 10, 2018, Malaysia announced its decision to abolish the death penalty. Media reports suggest that the death penalty will be rescinded by the end of the year. For Prisoners on death row, their pending executions have been put to halt.

25. In the US, 20 of 50 States, as well as the District of Columbia have abolished the death penalty. Furthermore, the Supreme Court has ruled that the Federal Constitution prohibits the mandatory imposition of the death penalty in all first-degree murder cases. States allowing the death penalty must therefore channel the sentencer's discretion in order to 'genuinely narrow the class of persons eligible for the death penalty and […]

reasonably justify the impositions of a more severe sentence on the defendant compared to others guilty of murder.' States also must take into account the specific circumstances and the defendant's character. Thus, many States require the finding of an 'aggravating factor' to impose the death penalty.

26. In Gambia, there is no room for judicial discretion when administering the death penalty in respect of 'malice aforethought' felony murder. As far as terrorism offences are concerned, there are several limitations on the imposition of the death penalty under the 2002 Act, such as the reveal of the conspiracy to the police or the court by the defendant. In February 2018, President Adama Barrow announced an official moratorium of the death penalty in the country.

27. In Botswana, the most commonly used mechanism to put restrictions on the imposition of the death penalty is the doctrine of extenuating circumstances, contained in Section 203 of the Penal Code. Pursuant to Section 203 of the Penal Code a court is obligated to take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs, in deciding whether there are any extenuating circumstances. In this regard, the subjective state of mind of the offender is greatly important. Furthermore, no factor (e.g. immaturity, intoxication or provocation) can be ruled out if it bears on the accused's moral blameworthiness.

28. In Nigeria, there are no significant restrictions on the imposition of the death penalty other than commonly known defences under criminal law, such as under Section 222 (1) of the PCA, where culpable homicide is not punishable with death if the offender was deprived if the power of self-control by grave and sudden provocation of the victim, or the death was caused by mistake or accident.

29. In Saint Kitts and Nevis, the use of the death penalty for felony murder has been narrowed to only being available in the 'most exceptional and extreme cases of murder'. Furthermore, the mandatory nature of the death penalty in cases of murder was removed with Section 2 of the OAPA to now be read as 'whosoever is convicted of murder may suffer death as a felon.' Furthermore, there are exceptions to the 'common design/joint enterprise'-concept, such as the possibility for the offender to withdraw from the common design.

IV. TABLE SUMMARY

30. The following table is a summary of the findings from our research in respect of the ten jurisdictions covered.

JURISDICTION	**QUESTION 1** *Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?*	**QUESTION 2** *Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?*
India (Regarding Question 1, also Pakistan, Bangladesh, Singapore	The Indian Penal Code is the basis of the criminal codes in Pakistan, Bangladesh, Singapore and Malaysia because of historic reasons. The provisions in the different Penal Codes are mostly the same as in India, although sometimes slightly different.	In India, the mandatory death penalty has been held unconstitutional and it is therefore a matter of sentencing discretion. Courts apply the 'rarest of the rare' standard for the imposition of the death

Malaysia)	The relevant tests regarding 'non-triggerman'-homicides in all these jurisdictions are 'common intention', 'common object or purpose of an unlawful assembly', 'dacoity with murder' (or 'gang robbery with murder' in Singapore and Malaysia), 'abetment' and 'conspiracy'. The only relevant case-law in Singapore and Malaysia can be found regarding 'common intention'.	penalty. The death penalty may be imposed only 'in the gravest cases of extreme culpability', after the mitigating circumstances having been given a 'liberal and expansive construction', and where the possibility of reformation of the prisoner is 'unquestionably foreclosed'. The fact that the person did not kill could be considered a mitigating circumstance.
Pakistan		In Pakistan, courts have adopted a number of common law rules which limit the imposition of the death penalty, such as the consideration of mitigating circumstances.
Bangladesh		In Bangladesh, like in India, the mandatory death penalty has been held to be unconstitutional, and the death penalty is therefore a matter of sentencing discretion. Furthermore, there exists the possibility of non-triggermen not being subject to capital punishment, due to certain circumstances that the judiciary, in its discretion, might find extenuating.
Singapore		The definition of murder in Section 300 of the Penal Code has faced a major revision in 2012, with the stated intention of giving more specificity to homicidal offences, and to give more discretion to the courts.
Malaysia		On 10 October 2018, Malaysia announced its decision to abolish the death penalty.
USA	In the US, there is no single common set of rules which are applied across jurisdictions. An overview of the relevant provisions in the different states is enclosed as an appendix to this report. The legal tests of 'intentionally directing/ordering murder' and the concept of 'felony murder' can be found in almost all states, with partly different designs. 'Felony murder', involves situations where the triggerman and non-triggerman were present together 'at the scene', participating in a felony in the course of which the triggerman caused death.	In the US, 20 of 50 States and the District of Columbia have abolished the death penalty. Furthermore, the Supreme Court has ruled that the Federal Constitution prohibits the mandatory imposition of the death penalty in all first-degree murder cases. States allowing the death penalty must channel the sentencer's discretion in order to narrow the class of persons eligible for the death penalty and take into account the specific circumstances and the defendant's character.
Gambia	In Gambia, the Criminal Code uses a concept which is very similar to that of 'felony murder' in the US. Art. 190(c) states that a person shall be sentenced to death if death is caused and when the "person uses violent measures in the commission of, or attempt at, a felony". Furthermore, the Anti-terrorism Act 2002	In Gambia, there is no room for judicial discretion when administering the death penalty in respect of 'malice aforethought' felony murder. In February 2018, the Gambian president announced an official moratorium of the

	criminalises a range of accessorial conduct in relation to terrorist offences, e.g. conspiracy or aiding and abetting.	death penalty in the country.
Botswana	The relevant legal tests in the Penal Code of Botswana are 'aiding and abetting' (Section 21) and 'common purpose' (Section 22). Furthermore, Section 204 outlines the requisite intention (malice aforethought) for the offence of murder. Also, the requisite intention for the offence of murder is, *inter alia*, given through an intention by an act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit murder.	In Botswana, restrictions on the imposition of the death penalty are put in place by the concept of 'extenuating circumstances' (Section 203, such as immaturity, intoxication or provocation).
Nigeria	In Nigeria, the Criminal Code Act 1990 ('CCA') specifies relevant legal tests, which are 'common purpose/intention' (Section 8), 'procurement' (Section 7(d)), 'abetment' (Sections 83 ff.), 'counselling' (Section 9) and 'conspiracy' (Sections 96-97). Relevant only in the Northern States of Nigeria (as far as the imposition of the death penalty is concerned), where the Penal Code Act 1960 ('PCA') is in force, are the legal tests of 'abetment' (Sections 83 ff.) and 'conspiracy' (Sections 96-97).	In Nigeria, under Section 222 (1) of the PCA, culpable homicide is not punishable with death if the offender was deprived of the power of self-control by grave and sudden provocation of the victim, or the death was caused by mistake or accident.
Saint Kitts and Nevis	In Saint Kitts and Nevis, the only relevant legal tests concerning 'non-triggerman'-homicide offences are joint enterprise/common design (Section 4 of the Offences Against the Person Act 2002). For the legal test of 'joint enterprise', courts require that the death must have been seen as a possible result of the unlawful joint enterprise.	The use of the death penalty for felony murder has been narrowed to only being available in the "most exceptional and extreme cases of murder". Furthermore, the mandatory nature of the death penalty in cases of murder was removed with Section 2 of the OAPA.

INDIA

I. Overview of the legal System

1. India is a constitutional democracy with a bill of rights enshrined under Part III of the Indian Constitution (titled 'fundamental rights'). Articles 20, 21 and 22 are most relevant in the context of the criminal justice system. Article 20 includes the right against ex post facto criminal laws, right against double jeopardy and the right against self-incrimination. Article 21 is a broadly framed provision which enshrines the right to life and personal liberty. Article 22 contains protections in the context of arrest and detention.[1] Statutes, or parts thereof, can be struck down by the High Courts and Supreme Court of India if found to be violative of provisions of the Constitution, including the fundamental rights.

2. India is a retentionist country, and 59 sections in 18 central legislations provide for the death sentence as a possible punishment, including 12 sections of the Indian Penal Code 1860 (hereafter 'IPC').[2] A mandatory death sentence has been held to be unconstitutional by the Supreme Court of India.[3] The constitutionality of the death penalty for murder has been challenged twice before the Supreme Court, and was upheld both times.[4]

II. Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?

3. There are several provisions under the IPC that enable a person who has not committed an act which directly leads to the death of another to be convicted of murder and sentenced to death on the basis of 'joint liability' or 'constructive liability'.[5] These include Section 34 of the IPC, relating to 'acts done by several persons in furtherance of common intention', and Section 149 of the IPC, relating to 'offences committed in prosecution of common object of unlawful assembly'. Section 396 of the IPC provides the death penalty for the crime of 'dacoity with murder', which allows for the death sentence to be imposed on all those who participate in a dacoity when any one of them commits murder. In addition, provisions under Chapter V of the IPC, dealing with abetment of offences, and Sections 120A and 120B dealing with conspiracy, also enable a person who has not committed an act which directly leads to the death of another, to be sentenced to the death penalty.

1) Common Intention

4. Sections 34-38 of the IPC dealing with 'general explanations' state the conditions under which a person may be held constructively liable for the acts committed by other members of a group. Section 34 lays down the principle of joint criminal liability, holding all persons

[1] See Constitution of India 1950, Articles 20, 21 and 22, available at <https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf> accessed 29 November 2018.

[2] Anup Surendranath *Death Penalty India Report* (National Law University, Delhi Press 2016) volume 1, 34. In India, the Parliament as well as state legislative assemblies can legislate on criminal laws (See Constitution of India 1950, Article 246 available at < https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf> accessed 29 November 2018; Constitution of India 1950, Seventh Schedule, List III, entry 1, available at <https://www.india.gov.in/sites/upload_files/npi/files/coi-eng-schedules_1-12.pdf> accessed 29 November 2018). However, a consolidated list of state legislations providing for the death penalty is not available.

[3] *Mithu v State of Punjab* (1983) 2 SCC 277 [23]; *State of Punjab v Dalbir Singh* (2012) 3 SCC 346 [91].

[4] *Jagmohan Singh v State of Uttar Pradesh* (1973) 1 SCC 20; *Bachan Singh v State of Punjab* (1980) 2 SCC 684. In *Bachan Singh,* four judges of the five-judge bench hearing the case upheld the constitutional validity of the death penalty, while Justice Bhagwati declared it to be unconstitutional in his dissenting opinion.

[5] KD Gaur *Criminal Law Cases and Materials* (5th ed LexisNexis Butterworths) 220.

equally liable for acts done in furtherance of common intention.[6] Two conditions must be fulfilled for the provision to be applicable:[7]

i. Common intention to commit an offence; and
ii. Participation by all the accused in doing such act or acts constituting that offence in furtherance of that common intention.

Thus, if two or more persons, with a common intention to commit murder, participate in the acts done in furtherance of that common intention, all of them would be guilty of murder.[8]

5. Common intention implies the intention to commit the same offence, and having the intention known to each other. It requires a prior concert, or prior meeting of minds, for example through a pre-arranged plan,[9] formed prior to the commission of the offence.[10] The pre-arranged plan need not be elaborate, nor is a long interval of time required between the formation of a common plan and its execution. It could arise and be formed suddenly, on the spot,[11] so long as all accused consent to it.[12] It is not sufficient if two or more persons have the same or similar intention independent of each other – in such cases, each of them may be individually liable for the offence they commit, but not jointly liable through Section 34, because Section 34 requires a shared common intention.[13]

6. For Section 34 to be applicable, not only must there be this prior meeting of minds with regard to commission of an offence, but the accused must also participate in the execution of the plan.[14] The acts done by each participant may vary, but each of the participants must be motivated by the common intention.[15]

7. In cases where a group of persons have the common intention to commit an offence, but one or more of them commit additional offences, the group cannot be constructively liable under Section 34 of those additional offences. Hence, in several cases, persons have been held constructively liable for simple or grievous hurt where it could be shown that they had a common intention to commit the same and participated in acts that lead to the commission of the offence, but not of the murder that may have been committed by one or more of them.[16]

2) Common object or purpose of an unlawful assembly

8. Chapter VIII of the IPC, dealing with offences against public tranquillity, creates a distinct offence under Section 149. This provides that all members of an unlawful assembly will be guilty of an offence committed by any member in prosecution of the common object of the assembly. The offence must be connected immediately with the common object of the unlawful assembly and must be committed with a view to accomplish the common object.[17]

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[6] *Barendra Kumar Ghosh v King Emperor* AIR 1925 PC 1.
[7] Gaur (n 4) 222.
[8] Gaur (n 4) 222; *Gurdatta Mat v State of Uttar Pradesh* AIR 1965 SC 257.
[9] *Pandurang Tukia and Bhillia v State of Hyderabad* AIR 1955 SC 331; *Khacheru Singh v State of Uttar Pradesh* AIR 1956 SC 546; *Baleshwar Rai v State of Bihar* (1964) CrLJ 564; *Abrahim Sheikh v State of West Bengal* AIR 1964 SC 1263; *Mathulal Sheikh v State of West Bengal* AIR 1965 SC 132.
[10] *Ram Tahal v State of Uttar Pradesh* AIR 1972 SC 354.
[11] *Krishna Govind Patil* AIR 1963 SC 1413.
[12] *Kripal v State of Uttar Pradesh* AIR 1954 SC 514; *Rishi Deo Pande v State of Uttar Pradesh* AIR 1955 SC 331; *Zabar Singh v State of Uttar Pradesh* AIR 1957 SC 465.
[13] *Mahbub Shah v Emperor* AIR 1945 PC 118.
[14] Gaur (n 4) 223.
[15] *Sher Khan v State* AIR 1940 Lah 485; *Barendra Kumar Ghosh v King Emperor* AIR 1925 PC 1; *Rishi Deo v State of Uttar Pradesh* AIR 1955 SC 331.
[16] *Harbans Nonia v State of Bihar* AIR 1992 SC 125; *Yunus v State* 1995 CrLJ 3205 (Delhi); *Dharam Pal v State of Uttar Pradesh* AIR 1995 SC 1988.
[17] *State of Punjab v Sanjiv Kumar* AIR 2007 SC 2430 [10].

Members of an unlawful assembly may also be guilty of those offences committed by any member of the assembly that they knew were likely to be committed in the prosecution of the common object of the assembly. It must be noted that 'common object or purpose' is much broader than common intention, as required under Section 34. Although the object of the members of an unlawful assembly must be common, the intentions of the several members of the unlawful assembly may differ.[18]

9. For Section 149 to be applicable, it must first be shown that the accused formed an unlawful assembly, and therefore the accused must be convicted either under Section 143 (punishment for being a member of an unlawful assembly) or under Section 147 (punishment for rioting).[19] Section 141 defines an unlawful assembly as five or more persons having a common object to commit certain acts specified in the provision.[20] The element of participation in action, which is the leading feature of Section 34, is replaced in Section 149 by membership of the unlawful assembly at the time of committing of the offence.[21]

3) Dacoity with murder

10. Section 396 of the IPC prescribes the death penalty as a possible form of punishment for all persons who are held guilty of committing dacoity, if any one of those five or more persons commits murder while committing dacoity. For the offence of dacoity to be made out, five or more persons should be concerned in the commission of the offence, and they should either commit or attempt to commit a robbery.[22] Unlike Section 34 of the IPC, there is no requirement to show 'common intention' to commit murder to sentence persons under Section 396.

11. According to the Death Penalty India Report, 33 persons were sentenced to death in India under Section 396 of the IPC in the period 2000-2015.[23]

4) Abetment

12. Sections 107-120 in chapter V of the IPC contain the law relating to abetment. Abetment may be committed in three ways:[24]

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[18] *Mohan Singh v State of Punjab* AIR 1963 SC 174; *Mahbub Shah v Emperor* AIR 1945 PC 118; *Krishna Govind Patil v State of Maharashtra* AIR 1963 SC 1413.
[19] Gaur (n 4) 226; *Gajanand v State of Uttar Pradesh* AIR 1954 SC 595; *Mathew KC v State of Travencore-Cochin* AIR 1956 SC 241; *Hukam Singh v State of Uttar Pradesh* AIR 1961 SC 1514.
[20] Unlawful assembly is defined under Section 141 IPC, which reads as follows:
'Section 141. Unlawful assembly
An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-
First: To overawe by criminal force, or show of criminal force, 87[the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or
Second: To resist the execution of any law, or of any legal process; or
Third: To commit any mischief or criminal trespass, or other offence; or
Fourth: By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
Fifth: By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what lie is legally entitled to do.
Explanation- An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.'
[21] *Nanak Chand v State of Punjab* AIR 1955 SC 274.
[22] Indian Penal Code 1860, s 391; *Shyam Behari v State of Uttar Pradesh* AIR 1957 SC 320.
[23] See Table 4 in Surendranath (n 1) volume 2, 159.
[24] Gaur (n 4) 246.

i. By instigating the commission of an offence, or
ii. By engaging in a conspiracy to commit an offence, or
iii. By intentionally aiding the commission of an offence.[25]

13. Instigation to commit an offence requires inciting, urging, or prompting someone to commit an offence. The abettor must play an active role, and silence or acquiesce cannot amount to instigation.[26] Instigation may also take place by wilful misrepresentation or by wilful concealment of a material fact that a person is bound to disclose.[27]

14. Abetment by conspiracy requires an agreement to do a legal act by illegal means, or to do an illegal act, and some act must be done in pursuance thereof.[28] It must be noted that with the introduction of a specific offence of conspiracy under Section 120A of the IPC, it is rare for prosecutors to charge persons for abetment by conspiracy, and more common to pursue cases under Sections 120A and 120B (see below for a more detailed discussion).[29] Abetment by aid occurs when a person renders assistance or aid in the commission of an offence, through active conduct, either through commission or an act of illegal omission.[30]

15. If the offence is committed in consequence of abetment, the abettor is to be sentenced to the punishment provided for the offence.[31] A person who is guilty of abetting murder, and when murder is committed in consequence of the abetment, is liable to the punishment for murder – the death penalty or imprisonment for life.[32]

5) Conspiracy

16. Chapter VA of the IPC, inserted in 1913 through an amendment, makes criminal conspiracy a distinct offence. Conspiracy is an inchoate offence, a preliminary or incomplete crime, and is punishable because it may lead to the commission of an offence. It involves an agreement to do an illegal act, or a legal act by illegal means. No overt act or consummation of the crime is required to be guilty of the offence of conspiracy.

17. Section 120A of the IPC provides that a criminal conspiracy is committed when two or more persons agree to do, or cause to be done:
    i. An illegal act, or
    ii. An act which is not illegal by illegal means.[33]

18. The offence under Section 120A differs from abetment by conspiracy because one may be liable without any act/illegal omission being performed in pursuance of the conspiracy. Abetment by conspiracy usually requires some acts/illegal omissions to follow. However, the distinction is not all that neat. To prove a criminal conspiracy under Section 120A, the prosecution would need to show some acts/illegal omissions, which would bring it within the purview of abetment by conspiracy as well. However, because of (a) the increased punishment possible for conspiracy under Section 120B and (b) evidentiary relaxations

[25] *Faguna Kant Nath v State of Assam* AIR 1959 SC 673.
[26] Gaur (n 4) 247.
[27] Indian Penal Code 1860, s 170 explanation 1.
[28] Gaur (n 4) 248.
[29] Abhinav Sekhri 'The IPC and Conspiracy' <http://theproofofguilt.blogspot.com/2016/02/the-ipc-and-conspiracy.html> accessed 29 November 2018.
[30] Gaur (n 4) 248.
[31] Indian Penal Code 1860, s 109.
[32] Indian Penal Code 1860, s 109 illustration c; s 115 illustration.
[33] Indian Penal Code, 1860, s 120A.

under Section 10 of the Evidence Act 1872[34], it is easier to bring prosecutions for conspiracy than for abetment by conspiracy.[35]

19. Most recently, Yakub Abdul Razak Memon was executed on 30 July 2015 in Mumbai, India; after the courts held him guilty for conspiring to commit the terror attacks that took place in Bombay in March 1993. He was convicted for conspiracy under Sections 120A and 120B of the IPC in relation to several offences under the Terrorist and Disruptive Activities (Prevention) Act 1987 and the IPC including Section 302 IPC (punishment for murder), and sentenced to death for the same.[36] Prior to that, Kehar Singh and Satwant Singh were executed on 6 January 1989 for the offence of conspiring to murder Prime Minister Indira Gandhi under Sections 120B read with Section 302 of the IPC.[37]

III. ***Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?***

20. If the legal thresholds under the provisions that allow for the imposition of the death penalty on those who do not kill are met, then a person may be sentenced to death. However, in India the mandatory death penalty has been held to be unconstitutional, and it is therefore an issue of sentencing discretion.

21. In *Bachan Singh,* a majority of the bench of the Supreme Court held that the death penalty may be imposed only in the 'rarest of rare' instances.[38] The sentencing framework prescribed in the decision involves taking into consideration aggravating and mitigating circumstances, with respect to the crime as well as the offender. The death penalty may be imposed only 'in the gravest cases of extreme culpability', after the mitigating circumstances having been given a 'liberal and expansive construction', and where the possibility of reformation of the prisoner and hence the alternative of imposing life imprisonment is 'unquestionably foreclosed'.[39] The fact that the person did not kill could be considered a mitigating circumstance.

22. However, the application of the 'rarest of rare' framework by judges over the three decades since *Bachan Singh* have raised serious concerns of arbitrariness and judicial inconsistency.[40] These concerns have been extensively analysed,[41] and the Supreme Court itself has acknowledged a long line of cases which have misinterpreted and incorrectly applied the 'rarest of rare' doctrine.[42] Acknowledging this reality, the Law Commission of India

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[34] Indian Evidence Act 1872, s 10, available at: <https://indiacode.nic.in/acts/5.%20Indian%20Evidence%20Act,%201872.pdf> accessed 29 November 2018.

[35] Abhinav Sekhri 'The IPC and Conspiracy' <http://theproofofguilt.blogspot.com/2016/02/the-ipc-and-conspiracy.html> accessed 29 November 2018.

[36] See *Yakub Abdul Razak Memon v State of Maharashtra* (2013) 13 SCC 1 [4].

[37] See *Kehar Singh & Others v State* [1]; <https://www.indiatoday.in/magazine/indiascope/story/19890131-indira-gandhi-assassination-trial-satwant-singh-and-kehar-singh-hanged-815690-1989-01-31> accessed 29 November 2018.

[38] *Bachan Singh* [194]-[209].

[39] ibid [207].

[40] Anup Surendranath *Death Penalty India Report* (National Law University, Delhi Press 2016) volume 1, 34

[41] Amnesty International India and PUCL Tamil Nadu *Lethal Lottery: The Death Penalty in India – A study of Supreme Court judgments in death penalty cases 1950-2006,* available at <https://www.amnesty.org/en/documents/ASA20/007/2008/en/> accessed 29 November 2018.

[42] Anup Surendranath *Death Penalty India Report* (National Law University, Delhi Press 2016) volume 1, 34; *Santosh Kumar Bariyar v State of Maharashtra* (2009) 6 SCC 498 [63]; *Sangeet v State of Haryana* (2013) 2 SCC 452 [34]-[41]; *Shankar Kisanrao Khade v State of Maharashtra* (2013) 5 SCC 546 [124].

recommended abolition of the death penalty for all offences except those relating to terrorism in its 262nd Report.[43]

23. Additionally, individuals sentenced to death can approach the Governor of a state or the President of India for clemency under Articles 161 and 72 of the Constitution of India, who have the power to 'grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute sentences'.

[43] Law Commission of India 262nd Report on the Death Penalty August 2015 available at <http://lawcommissionofindia.nic.in/reports/report262.pdf> accessed 8 June 2018.

PAKISTAN

I. *Overview of the legal system*

24. Pakistan is a federal republic with a written constitution. Chapter 1, Part II of Pakistan's constitution lays down fundamental rights. The most salient of these in the context of criminal justice are Articles 10, 10A, 12 and 13. Article 10 extensively provides safeguards against arrest and detention; it governs executive action in criminal cases. Article 10A provides rights to a fair trial and due process in determination of criminal charges as well as civil rights and obligations. Article 13 provides protection against double jeopardy and self-incrimination. Article 14 governs searches, seizures and extraction of evidence. It makes 'dignity of man' and 'privacy of home' inviolable.[44] Legislative and executive action are subject to judicial review: they may be struck down if found *ultra vires* by a provincial High Court or the federal Supreme Court.

25. Pakistan is a retentionist country with a number of crimes punishable by death including murder, rape, adultery, apostasy and treason. Many of these offenses, such as rape and treason, do not have to result in another's death for the death penalty to be applicable.[45] In practice, hanging is the only method of execution, although others may be legal.[46] Pakistan's government does not provide official figures of executions. However, data collected by independent organizations shows that since the lifting of a moratorium in 2014, the annual number of executions has been among the top five globally.

II. *Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?*

26. Several sections of the Pakistan Penal Code, 1860 ("PPC") provide for punishment by death of a person who has not directly committed an act that results in death of another but has common intention, common objective or abets. These include 34 of the PPC that relates to 'acts done by several persons in furtherance of common intention', Section 149 that relates to acts committed by 'members of an unlawful assembly in prosecution of the common object of the assembly', and Section 396 that punishes with death penalty all those who conjointly commit dacoity and one of them commits murder in the process. Chapter V of the PPC extensively describes and provides the punishment for the offence of abetment, while Chapter V-A does the same for the offence of criminal conspiracy.

1) Common Intention

27. Section 34 of the PPC provides that where a criminal act is done by several persons, in furtherance of the common intention of all, then each person is liable for that act in[47] the same manner as if it were done by that each person alone.[48] It embodies the principle that if two or more persons commit an act intentionally, it is as if each of them had done it

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[44] See Constitution of Pakistan, 1973, Articles 10, 10A, 12 and 13, available at <http://www.pakistani.org/pakistan/constitution/part2.ch1.html> accessed 29 November 2018.

[45] See Cornell Center on the Death Penalty Worldwide, 'Death Penalty Database: Pakistan', available at <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Pakistan#f3-1> accessed 29 November 2018.

[46] ibid.

[47] *Khurram Shahbaz v The State* 2017.

[48] Pakistan Penal Code 1860, s 34.

individually.[49] Two persons have the common intention to commit a crime if they both intended to commit the crime actually committed. Each person then would be convicted of the crime only if he had participated in it with the common intention.[50]

28. The test for common intention requires proving that persons committed an act constituting an offence in concert in pursuance of a pre-arranged plan. It can be proved either conduct or from circumstances or from incriminating facts.

29. An inference of common intention is only proved if it is deductible from the facts and circumstances of the case. It is necessary to have a direct proof of preplanning, premeditation, consultation and instigation.[51] These must lead to the inference of common intention.[52] Mere presence of a person on the time of the occurrence along with other persons accused of the offence is not sufficient to attract the provisions of section 34; there must be some proof of overt act on the part of each accused, done in furtherance of common intention. Strong circumstances must exist manifesting a common intention—material must be available to show some overt act done in furtherance of common intention.[53]

30. In order to constitute an act under Section 34 it is not required that a person should necessarily have performed the act constituting the offence with his own hand. If several persons had the common intention of doing a particular criminal act and if in furtherance of their common intention all of them joined together and aided or abetted each other in the commission of an act then by virtue of his/her presence or by any other act in the commission of the offence, that person would be held to have committed the offence himself/herself within the meaning of section 34.[54]

31. Common intention is a question of fact; it is ascertained from the evidence recorded in the case.[55] The issue of common intention is determined by the trial court after recording evidence.[56]

2) Common Object of an Unlawful Assembly

32. Section 149 of the PPC provides that where an offence is committed by any member of an unlawful assembly in furtherance of the common object of that assembly, or an offence which the members of the assembly knew would be likely to be committed in furtherance of that object then every person who is a member of the assembly is guilty of that offence and can be punished accordingly.[57]

33. Inference of common object has to be drawn from the various factors such as the weapons with which the members were armed, their movements, the acts of violence committed by them and the result.[58] Prosecution must prove the presence and participation of each of the accused in unlawful assembly for conviction under Section 149.[59]

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[49] *Muhammad Ali v The State* PLD 2012 Sindh 272.
[50] *Shaukat Ali v The State* PLD 2007 SC 93/83.
[51] *Irfan Saeed v The State* 2012 PCrLJ 63.
[52] ibid.
[53] *Hakim Zafar v The State* 2017 YLR 232.
[54] *Rab Nawaz v The State* 2015 PcrLJ 1531.
[55] *Habib Khan v Dost Muhammad Khan* 2012 Pesh 1325.
[56] *Shabbiran Bibi v The State* 2018 PCrLJ 788.
[57] Pakistan Penal Code, 1860 s 149.
[58] *Surendra v State of Uttar Pradesh* 2012 SCMR 1422.
[59] *Nallamsetty Yanadaiah v State of Andhra Pradesh* 1994 SCMR 588.

3) Dacoity with Murder

34. The offence of dacoity requires five or more persons conjointly committing or attempting to commit a robbery.[60] Each of the persons is then held to have committed dacoity. Section 396 provides that dacoity with murder occurs when any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity.[61] Every one of such persons is then liable to be punished with death.

35. Authorities diverge on the issue of the extent of a person's involvement necessary to constitute an offence under Section 396. In *Rashid Ali v the State,* it was held that in punishing dacoity with murder, a person's individual role does not matter. Every participant of the crime, regardless of the role, is an accused in equal degree.[62] However, in *Gul Naseeb v the State*, the Shariat Appellate Bench of the Supreme Court held that an accused was jointly liable with other accused persons for dacoity since that offence was committed pursuant to a pre-arranged plan. However, the first accused was not liable for the offence of murder since he was not included in the original plan nor was he aware of the intention of the accused who actually killed another person.[63]

4) Abetment

36. Chapter V of the PPC contains provisions relating to the offence of abetting a crime. A person can abet by doing any of the following:

    i. Instigating any person to do that thing;
    ii. Engaging with one or more other persons, or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that; or
    iii. Intentionally aiding by any act or illegal omission the doing of that thing.[64]

37. Section 108 of the PPC provides that for the offence of abetment, it is not necessary that the person abetted should be capable of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor or any guilty intention of knowledge.[65] The explanation to this section illustrates such a circumstance:

> *A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby, causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.*

38. In this respect, the crime of abetment differs from the crimes of common intention under Section 34 since common intention is required to prove abetment.

39. Pakistan's courts have held that the liability an abettor is limited to the extent of the offence abetted and therefore, cannot be greater than that of the principal accused.[66] Consequently, when the principal accused is acquitted then it is not proper to make the abettor a scapegoat and convict him on the basis of the same evidence.[67]

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[60] Pakistan Penal Code, 1860, s 391.
[61] Pakistan Penal Code, 1860, s 396.
[62] *Rashid Ali v The State* 2013 PCrLJ 297.
[63] *Gul Naseeb v the State* 2008 SCMR 670.
[64] Pakistan Penal Code, 1860, s 107.
[65] Pakistan Penal Code, 1860, s 108.
[66] National Accountability Bureau v Aamir Lodhi PLD 2008 SC 697.
[67] ibid.

5) Criminal Conspiracy

40. Section 120A provides that a criminal conspiracy is committed when two or more persons agree to do, or cause to be done:

    i. An illegal act, or
    ii. An act which is not illegal by illegal means.[68]

41. With regard to death penalty for criminal conspiracy, Section 120B provides that where a party to a criminal conspiracy to commit an offence punishable with death shall (in the absence of an express provision in the PPC) be punished in the same manner as if he/she had abetted such offence.[69]

42. The most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act or a secret and surreptitious act.[70] A conspiracy consists not in the intention of two or more, but in an agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.

III. Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

43. Pakistan's courts have adopted and developed a number of common law rules which prevent imposition of death penalty. For example, where a person has participated in the commission of an offence and his participation is duly established but his intention, guilty mind or motive to commit the same is not proven or is not alleged by the prosecution, the court adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict.[71] Youthful tendency toward excitement and impulsiveness is also treated by the law as mitigating circumstances.[72]

44. Pakistan's constitution gives the President of Pakistan power to pardon death row defendants by accepting mercy petitions.[73] Under Article 45 of the Constitution, the President may pardon, reprieve, respite, remit, suspend or commute any sentence passed by any court, tribunal or other authority.[74]

45. Further, Section 54 of the PPC gives the Federal Government or the Provincial Government within which an offender has been sentenced the power, without consent of the offender, to commute the death penalty. The same power of remission and commutation is also contained in Section 402-C of Pakistan's Code of Criminal Procedure, 1898 (CrPC).[75] The CrPC extends to the President the powers provided by the PPC to the Federal and Provincial Governments. However, it states that that such power may not be exercised without the consent of the victim's heirs. Section 402-C thus introduces confusion regarding the President's constitutional power of pardon.

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[68] Pakistan Penal Code, 1860, s 120-A.
[69] Pakistan Penal Code, 1860, s 120-B.
[70] Qabil v the State 2011 PCrLJ 232.
[71] *Amjad Shah v The State* PLD 2017 AC 152; *Zeeshan Afzal v. The State* 2013 SCMR 1602.
[72] ibid.
[73] Constitution of Pakistan, 1973, Articles 45.
[74] ibid.
[75] Code of Criminal Procedure, 1898, Section 402-C, available at <https://www.oecd.org/site/adboecdanti-corruptioninitiative/39849781.pdf> accessed 29 November 2018.

46. The Supreme Court of Pakistan resolved this controversy in 2006 and laid down that the President's power is unrestrained:[76]

> *Under Article 45 of the Constitution, the President enjoys unfettered powers to grant remissions in respect of offences and no clog stipulated in a piece of subordinate legislation can abridge this power of the President. The exercise of discretion by the President under Art. 45 of the Constitution is to meet at the highest level the requirements of justice and clemency, to afford relief against undue harshness, or serious mistake or miscarriage of the Judicial Process, apart from specific cases where relief is by way of grace alone—where relief or clemency is for the honour of the State."*

47. The above decision thus establishes the President's vast power to pardon. There is, however, a further nuance. The President's power may be limited in cases of *qisas*, i.e. offences punishable by inflicting the same injury as that suffered—death penalty in case of murder. The standard of proof required for murder to be punishable as *qisas* (death penalty) is an exceptionally high one. The accused must make a voluntary and true confession of the commission of the offence before a court or evidence must be provided in accordance with Article 17 of the Qanun-e-Shahadat.[77] In practice, therefore, most death penalty sentences are awarded not by way of *qisas* but as *ta'zir*´-- where the stringent burden of proof is not satisfied and sentence is awarded having regarded to the facts. In such cases, the President retains the power to pardon.

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[76] *Abdul Malik v. The State and Others* PLD 2006 SC 365.

[77] Justice Project Pakistan *'No Mercy: A Report on Clemency for Death Row Prisoners in Pakistan'*, available at <http://www.jpp.org.pk/report/no-mercy-a-report-on-clemency-for-death-row-prisoners-in-pakistan/> accessed 29 November 2018.

BANGLADESH

I. Overview of the legal system

48. The People's Republic of Bangladesh is a constitutional democracy with a bill of rights enshrined under Part III of the 1972 Constitution. (titled 'fundamental rights'). Articles 31, 32, 33 and 35 are most relevant in the context of the criminal justice system. Articles 31 and 32 guarantee the protection of the law and affirm that no person shall be deprived of life or liberty, save in accordance with law. Article 33 contains safeguards with respect to arrest and detention. Article 35 includes the right against ex post facto criminal laws, right against double jeopardy right against self-incrimination, right to a speedy and public trial and the right to not be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.[78]

49. Bangladesh is a retentionist country, and the death sentence is provided as a possible punishment in 15 sections of the Penal Code, 1860. Besides this, there are other central legislations that lay down offences which may attract the death penalty.[79] Mandatory death sentences were held to be unconstitutional by the Appellate Division of the Bangladesh Supreme Court in May 2015.[80]

II. Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?

50. There are several provisions under the Penal Code that enable a person who has not committed an act which directly leads to the death of another, to be convicted of murder and sentenced to the death penalty on the basis of 'joint liability' or 'constructive liability.' These include section 34, relating to 'acts done by several persons in furtherance of common intention', and section 149, relating to offences committed in prosecution of common object by members of an unlawful assembly. Section 396 provides the death penalty for the crime of 'dacoity with murder', which allows the death sentence to be imposed on all persons participating in a dacoity, when any one of them commits murder. In addition, provisions under Chapter V of the Penal Code, dealing with abetment of offences, and sections 120A and 120B dealing with conspiracy, also enable a person who has not committed an act which directly leads to the death of another, to be sentenced to the death penalty.

1) Common intention

51. Section 34 lays down the principle of joint criminal liability, holding all persons equally liable for acts done in furtherance of common intention.[81] The ingredients of this section are

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[78] Constitution of Bangladesh 1972, art. 31, 32, 33 and 35.

[79] Arms Act 1878; Bangladesh Official Secrets Act 1923; Bangladesh Army Act 1952; Bangladesh Air Force Act 1953; Bangladesh Navy Ordinance 1961; Special Powers Act 1974; Intoxicant Control Act 1990; Suppression of Terrorist Offenses Act 1992; Women and Children Repression Prevention Act 2000; Acid Crime Control Act 2002; Anti-Terrorism Ordinance 2008.

[80] *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh* 1 SCOB [2015] AD 1.

[81] *Barendra Kumar Ghosh v King Emperor* AIR 1925 PC 1.

i) Several persons must have a common intention and pre-arranged plan to commit an offence;
ii) The criminal act must be done in furtherance of this;
iii) Each of such persons must actually participate in the commission of the offence in some way or the other at the time the crime is actually being committed.
iv) The participation must be in doing the act, not merely in its planning.

Thus, if two or more persons, with a common intention to commit murder, participate in the acts done in furtherance of that common intention, all of them would be guilty of murder.

52. Criminal sharing, overt or covert by active presence or by distant direction, making out a certain measure of confluence in the commission of the act is the essence of Section 34. There must be general intention shared by all the persons concerned.[82]

53. A common intention presupposes prior concert. But the pre-arranged plan need not precede the commission of the crime by any great length of time. A pre-concert in the sense of distinct previous plan is not also necessary to be proved.[83] The common intention to bring about a particular result may well develop on the spot as between a number of persons.[84] All that is necessary is either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference or the incriminating acts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis. The existence of such pre-concert can be established even by proof of acts performed by individuals after the completion of the main crime.[85]

54. In *Md. Abdur Rahim Mondal v State*,[86] the appellant was convicted of murder, although the victim had been murdered by another party (the Pakistani army). The court held that the circumstances under which the victim was lifted and subsequently murdered as well as the presence of the appellant on both the occasions, was sufficient to show that the appellant had a prior concert with the Army.

2) Common object of an unlawful assembly

55. Chapter VIII of the Penal Code, dealing with offences against public tranquillity, creates a distinct offence under section 149. According to this section, if an offence is committed by any member of an unlawful assembly[87] in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in

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[82] *Mahabub Shah v Emperor* (1945 Law Weekly [Madras] Vol. 58, p. 368
[83] *Md. Abdur Rahim Mondal v State* 1977 (6) CLC (AD) [927].
[84] *Abdur Rahim vs. State* 29 DLR (SC) 246.
[85] *Mahmood v The King Emperor* AIR 1964 PC 45.
[86] 1977, 6 CLC (AD) [927].
[87] Penal Code 1860, s 141 – "An Assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First, to overawe by criminal force, or show of criminal force, or any public servant in the exercise of the lawful power of such public servant; or

Second, to resist the execution of any law, or of any legal process; or

Third, to commit any mischief or criminal trespass, or other offence; or

Fourth, by means of criminal force or show of criminal force, to any person to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth, by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

56. There need not be any prior concert and meeting of minds; it is enough that the number of persons is five or more and that their common object is the commission of an offence.

57. Section 149 is not a substantive penal section. This section deals with constructive liability i.e., liability of one person for an offence not committed by himself but committed by another person. So, this section can be added to the charge of any substantive offence.[88]

58. In *Kapu Mahamud & Others v The State*,[89] the High Court Division made a comparison between section 149 & section 34. It observed that while section 34 required an act, however small, to be done, section 149 merely required membership of the assembly. Section 34 enunciated a mere principle of liability but created no offence. Contrarily, section 149 created a specific offence.

59. While Section 34 is applicable only where the act done is the same act which was intended by way of common intention, Section 149 is wider. It is applicable not only where the act done was the same as was intended but also where it is a different act, provided it is immediately connected with the common object of the assembly or an act which the members of the assembly knew to be likely to be committed in prosecution of that object.[90] Thus, there is difference between the two sections as there is a difference between object and intention.[91]

3) Dacoity with murder

60. Section 396 of the Penal Code prescribes the death penalty as a possible form of punishment for all persons who conjointly commit dacoity,[92] if any one or more of those persons commit murder while committing dacoity. Unlike section 34 of the IPC, there is no requirement to show 'common intention' to commit murder to sentence persons under section 396.

61. Three persons were sentenced to death in July 2018 for committing dacoity.[93]

4) Abetment

62. Sections 107-120 in chapter V of the Penal Code contain the law relating to abetment. Abetment may be committed in three ways:

    i. By instigating the commission of an offence, or
    ii. By engaging in a conspiracy to commit an offence, or
    iii. By intentionally aiding the commission of an offence

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[88] *Abdus Samad v State* 44 DLR (AD) 233.

[89] 2 LG 260.

[90] Md. Saddam Hossen, 'Principles of Joint Liability with Special Reference to Sections 34, 109 and 149 of the Penal Code,1860' (Bangladesh Law Digest, 13 December 2015), available at <http://bdlawdigest.org/principles-of-joint-liability.html#_ftn6> accessed 19 November 2018.

[91] *Ataur Rahman v State* 43 DLR 87.

[92] Penal Code 1860, s 391 – "When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

[93] '3 to die, 19 to suffer life-term for dacoity, killing in Netrakona', available at <http://businessnews24bd.com/3-to-die19-to-suffer-life-term-for-dacoity-killing-in-netrakona> accessed 19 November 2018.

63. Section 109 provides that, whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

64. An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of instigation, or in pursuance of conspiracy, or with the aid which constitutes the abetment.[94]

65. Section 109 may be attracted even if the abettor is not present when the offence abetted is committed. When it is not clear as to who actually committed the offence because there was no eye-witness, then all may be charged with the offence by adding section 109.[95]

66. An abettor[96] is liable only for the acts he abets, and not for any other acts that might have been committed. There are, however, two exceptions to this rule. The abettor will be liable for those acts that are a probable consequence of the act abetted,[97] or for acts done which cause a different effect from that intended by the abettor.[98]

67. A person who is guilty of abetting murder, and when murder is committed in consequence of the abetment, is liable to the punishment for murder – the death penalty or imprisonment for life.[99]

5) Conspiracy

68. Chapter VA of the IPC, inserted in 1913 through an amendment, makes criminal conspiracy a distinct offence. Conspiracy is an inchoate offence, a preliminary or incomplete crime, and is punishable because it may lead to the commission of an offence.

A criminal conspiracy occurs two or more persons agree to do, or cause to be done-

i. an illegal act, or
ii. a legal act by illegal means.[100]

69. Under s. 120B, whoever is a party to a criminal conspiracy to commit an offence punishable with death, shall be punished in the same manner as if he had abetted such offence. It differs from ss. 34 and 109 in that a mere agreement is made an offence even if no step is taken to carry out the agreement.

70. *State v Abul Barek & Others*[101] is a high-profile case, where the death sentence was meted out to twelve persons for conspiring to assassinate the country's founding father - Sheikh

[94] Md. Saddam Hossen, 'Principles of Joint Liability with Special Reference to Sections 34, 109 and 149 of the Penal Code,1860' (Bangladesh Law Digest, 13 December 2015), available at <http://bdlawdigest.org/principles-of-joint-liability.html#_ftn6> accessed 19 November 2018.
[95] Md. Saddam Hossen, 'Principles of Joint Liability with Special Reference to Sections 34, 109 and 149 of the Penal Code,1860' (Bangladesh Law Digest, 13 December 2015), available at <http://bdlawdigest.org/principles-of-joint-liability.html#_ftn6> accessed 19 November 2018.
[96] Penal Code 1860, s 108.
[97] Penal Code 1860, s 111.
[98] Penal Code 1860, s 113.
[99] Penal Code 1860, s 109 illustration c; s 115 illustration.
[100] Penal Code 1860, s 120A.
[101] 54 (2002) Dhaka Law Report 28.

Mujibur Rahman. The conviction was based on section 302 read with sections 34 and 120B of the Penal Code.[102]

71. Most recently, Bangladesh's High Court has confirmed the death penalty for those who participated in the criminal conspiracy preceding the Bangladesh Rifles Revolt. [103]

III. Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

72. If the legal thresholds under the provisions that allow for the imposition of the death penalty on those who do not kill are met, then a person may be sentenced to death. However, in Bangladesh, the mandatory death penalty has been held to be unconstitutional, and it is therefore an issue of sentencing discretion.

73. In *BLAST v Bangladesh*,[104] the Supreme Court held that any mandatory provision which removed the judiciary's discretion to come to a decision based on all the facts and circumstances surrounding any offence or the offender, including the offender's age and other mitigating circumstances or alternative sanctions, was prohibited by the Constitution. As the court observed – "A provision of law which deprives the court to use its beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence cannot but be regarded as harsh, unfair and oppressive."[105]

74. Thus, there exists the possibility of non-triggerman not being subject to capital punishment, due to certain circumstances that the judiciary, in its discretion, might find extenuating.

75. The President of Bangladesh has the prerogative of mercy, contained under Article 49 of the Constitution. The President may 'grant pardons, reprieves and respites and remit, suspend or commute any sentence passed by any court'.

[102] International Federation for Human Rights, 'Bangladesh. Criminal justice through the prism of capital punishment and the fight against terrorism', October 2010 N°548a, available at <https://www.fidh.org/IMG/pdf/Report_eng.pdf> accessed 19 November 2018.

[103] Sahidul Hasan Khokon, 'Bangladesh: High Court upholds death penalty of 139 convicts in 'BDR carnage' case', 28/11/2017, available at <https://www.indiatoday.in/world/story/bangladesh-rifle-carnage-death-penalty-upheld-1095588-2017-11-28> accessed 19 November 2018.

[104] *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh* 1 SCOB [2015] AD 1, available at <https://www.crin.org/en/library/legal-database/bangladesh-legal-aid-and-services-trust-blast-and-another-v-bangladesh> accessed 19 November 2018.

[105] ibid.

SINGAPORE

I. *Overview of the legal system*

76. Being a very small country, with a correspondingly low amount of homicide offences occurring, Singapore has not had cases fitting the description of cases that feature a non-triggerman (with the exception of the cases being raised as examples). This is either because the penalties involved were less than capital, or because there was only one main defendant (who was the triggerman) accused of the crime.

77. In 2017, Amnesty International estimated that at least 40 people were facing a death sentence.[106] On average there are about 5-7 criminal homicides in Singapore per year that fit the description for murder (on average, the rate is about 0.3).

II. *Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?*

78. Like in India, the Singapore Penal Code ('SPC') provides for various 'non-triggerman'-provisions, including Section 34 of the SPC, relating to 'acts done by several persons in furtherance of common intention', and Section 149 of the SPC, relating to 'offences committed in prosecution of common object of unlawful assembly'. Section 396 of the SPC provides the death penalty for the crime of 'gang-robbery with murder'. In addition, provisions under Chapter V of the SPC, dealing with abetment of offences, and Sections 120A and 120B dealing with conspiracy, also enable a person who has not committed an act which directly leads to the death of another, to be sentenced to the death penalty.

79. In contrast to India, the amount of available case law in Singapore is very limited. The only relevant case law deals with the legal test of 'common intent'. Therefore, the following paragraphs will exclusively deal with this matter.

80. Of the small amount of homicides, there are 2 cases that are most relevant to discussions about common intent - *Lee Cheez Kee v PP,*[107] and *Daniel Vijay s/o Katherasan v PP.*[108] Both cases were appealed to higher courts and featured judgements which have specified the definitions which apply to the broad language of Section 34.

1) Lee Cheez Kee v. Public Prosecutor

81. In *Lee Cheez Kee v PP*[109], Lee, along with defendants Too and Ng, conspired and carried out the robbery of D. During the events of the robbery, D was murdered by Too; Ng was off the premises and Lee was outside of the room, entering only to find D being smothered by Too. In the initial trial, Lee was found guilty of the murder of D. The trial judge agreed that there had been clear indication of a common intent (the robbery), and that the murder had happened in the course of the robbery; and because the conditions set in Section 34 were met there was no need to conclusively establish the identity of the person that actually murdered D. The trial judge also focused on events after the robbery; finding that all parties

[106] Amnesty International, *Death Sentences and Executions in 2017* (2018 Amnesty International) 18.
[107] (2008) 3 SLR 447.
[108] (2008) SGHC 120.
[109] Siyuan Chen, 'The Final Twist in Common Intention? Daniel Vijay s/o Katherasan v. Public Prosecutor' (2011) Singapore Journal of Legal Studies 237-249.

shared and spent the spoils of the robbery through the use of D's payment card and that all felt secure in not being easily identified since D was dead.

82. *Lee* was appealed on the grounds of prejudicial evidence being submitted, and the use of the criminal procedure code in obtaining confessional statements, especially from co-defendants. While the appeal was dismissed, the appellate court applied a reinterpretation and re-specification of Section 34, requiring four elements for liability for common intent under Section 34.

83. The four elements are: [110]

    i. a criminal act (this can refer to the pursuit of both the primary and secondary crimes as part of an 'enterprise'),
    ii. participation in that act,
    iii. some form of a pre-arranged plan and
    iv. the secondary offender's knowledge that "one in his party may likely commit the offence in furtherance of the common intention of carrying out the primary offence".

84. In addition, when using S34, there was no need[111] (give the inclusion of the phrase "in furtherance" in S34) for the parties to have common intent on committing the collateral offence, only the primary one.

2) Daniel Vijay v. Public Prosecutor

85. In *Daniel Vijay v PP*[112], the Court of Appeal further defined the *mens rea* requirements for defendants to be guilty of the collateral offense when in pursuit of the primary offense.

86. In *Daniel Vijay*, 2 people created a plan to rob transported cargo, and recruited Nakamuthu Balakrishnan ("Bala") to carry out the robbery. "Bala" in turn recruited the appellant Daniel Vijay ("Daniel") and one other person, "Christopher", to aid in the crime. During the robbery, the trio successfully stopped the lorry the cargo was on, and "Bala" repeatedly assaulted the lorry driver with a bat without intervention from the other two. The driver passed away due to his injuries some time later.

87. In High Court, all three were jointly charged for murder in furtherance of common intention and were found guilty. Relying on the 4 elements required and created in *Lee,* the court found the trio guilty as all 4 elements were met. Despite not having committed the actual murder, the court found both "Daniel" and "Christopher" guilty as they were both aware that "Bala" would have turned to violence in the commission of the robbery.

88. On appeal, the court focused on Daniel and Christopher's convictions on two issues. Firstly, whether "Bala's" assault on the victim was in furtherance of the appellants' common intention to commit robbery, and secondly, if the requirement raised in *Lee* about the knowledge of the secondary offender in relation to the likelihood of a collateral offence happening was actually satisfied.

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[110] *Lee Chez Kee* (n 107) [162-218].

[111] That is, the criminal act was done pursuant to a pre-arranged plan, although it is possible to form a common intention just before the offence is committed. The circumstances that can lead to an inference of a common intention cover both the antecedent and subsequent conduct of the parties: ibid [161].

[112] Eunice Chua, 'Raising the Bar for the Mens Rea Requirement in Common Intention Cases: Daniel Vijay s/o Katherasan v PP' (2011) 29 Singapore Law Review 21-33; Stanley Yeo, 'Common Intention in the Indian Penal Code: Insights from Singapore' (2010) The Indian Law Institute.

89. On the first issue, the court found that both "Daniel" and "Christopher" could only be shown to have a common intention with "Bala" of robbing the victim—and of using violence, but not murder, in the commission of the primary offence. This was also shown through the actions of the initial planners (who were not present at the physical event) of the robbery who did not intend or plan for a murder to happen. The court moved away from standards set in *Lee* by showing that knowledge did not equate to intention; and that in order to be guilty under Section 34, secondary defendants had to be shown to have intention for the secondary offense to have had happened and not merely to have known about it.

90. More significantly, the court specified the level of subjective knowledge required to have the defendants possess a *mens rea* of the secondary crime. The court ruled that the knowledge required had to be specific enough to the Section of Section 300 (the section addressing homicide on the Singapore Penal Code) that was being prosecuted. In the case above, the defendants would have only known that the victim would have been hurt, maybe even seriously, but could not have known that the victim would have been killed with certainty. The charge of murder was downgraded to being guilty of robbery with hurt for both "Daniel" and "Christopher".

91. Both cases are significant developments in Singapore's use of Section 34 in defining common intention in 'twin crime'. However, after both cases, the Court of Appeal undertook further study as to whether Section 34 had been correctly interpreted; concluding that 'common intention' as meant under Section 34[113] had to have an even more exacting requirement than it was set out in *Lee*. Knowledge that the primary offender *may* carry out the secondary offense is not enough, for guilt to be established under Section 34 a co-defendant has to have actual intent regarding the secondary offense, as well.

92. Based on findings in *Lee* and *Daniel Vijay*, at present, for an offender to be found guilty of a murder without having committed the act itself, the offender has to have a high level of knowledge and certainty that the murder (specifically and not as a 'possible result' out of many other outcomes) would have had been committed in the commission of the crime.

93. In *Lee Cheez Kee v. PP,* the court referenced the Malaysian Court of Appeal case of *Sabarudin bin Non v PP,*[114] which found that presence is not necessary for Section 34 to apply.

94. The legal tests that are relevant are the standards brought about in *Lee* and clarified in *Daniel Vijay*; involving proving the level of knowledge of the accused: for the accused to be guilty of the collateral offense, the prosecution has to prove beyond a doubt that the accused was present and contributing to the execution of the secondary offense or that the accused knew with certainty about the specific outcome of the secondary offense.

III. Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

95. Singapore has had broad changes to its Penal and Criminal procedure codes, making capital punishment more unlikely to be handed down for homicide offences.

96. Singapore has a strict definition of murder under Section 300 of the penal code., which has faced a major revision (the Penal Code (Amendment) Bill 2012 and the Criminal Procedure Code (Amendment) Bill 2012) with the stated intention of giving more specificity to

[113] Broadly speaking, this can also fulfil the definition of 'abetting' under S111 of the Penal code, but here the missing element linking the co-defendant to the collateral offense is the lack of a coherent and proven *mens rea*; the link between an abettor and the actual offender is the lack of a coherent *actus reus.*

[114] [2005] 4 MLJ 37 at [31].

homicidal offences, and also to give more discretion to the courts as part of a general effort at modernizing the judiciary. However, Singapore still retains the death penalty for homicide offences that satisfy the (now narrower) criteria.

97. Section 300 of the Penal Code provides that culpable homicide amounts to murder when it is done with[115]:

    i. the intention to kill;
    ii. the intention to cause injury, coupled with the knowledge that such injury is likely to cause death;
    iii. the intention to cause injury (with the intended injury being objectively sufficient in the ordinary cause of nature to cause death); and
    iv. the knowledge that the relevant act is so imminently dangerous that death is virtually certain or likely as a result.

98. Currently, the mandatory death penalty will be imposed in all four scenarios. The law will be amended to provide that, in cases of murder where killing is not intentional (that is, murder falling within the meaning of Section 300(b), (c) or (d)), the Court will have the discretion to sentence the accused to death or life imprisonment. The Court may also order caning in cases where life imprisonment is ordered.

99. As announced in Parliament on 9 July 2012, all existing cases, if eligible, will be considered for re-sentencing under the new law. Accused persons sentenced to death for murder may apply to adduce further evidence to show that their cases fall under Section 300(b), (c) or (d). Existing cases that are determined to fall under Section 300(a) would have their death sentence affirmed; for existing murder cases that fall under Section 300(b), (c) or (d), the accused persons will be re-sentenced.

100. Further, existing murder cases will also be re-considered for clemency.

[115] The four mental states are paraphrased for simplicity. Section 300 provides that culpable homicide is murder where: (*a*) if the act by which the death is caused is done with the intention of causing death; (*b*) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (*c*) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or (*d*) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

MALAYSIA

I. Overview of the Legal System:

101. Malaysia is a country of 32 million just north of Singapore. In 2017, Amnesty International estimated that at least 800 people were facing a death sentence.[116]

102. On October 10, 2018 – the World Day Against the Death Penalty – Malaysia announced its decision to abolish the death penalty. Media reports suggest that the death penalty will be rescinded by the end of the year. For prisoners on death row, their pending executions have been put to a halt.

II. Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?

103. Like in India, the Malaysia Penal Code ('MPC') provides for various 'non-triggerman'-provisions, including Section 34 of the SPC, relating to 'acts done by several persons in furtherance of common intention', and Section 149 of the MPC, relating to 'offences committed in prosecution of common object of unlawful assembly'. Section 396 of the MPC provides the death penalty for the crime of 'gang-robbery with murder'. In addition, provisions under Chapter V of the MPC, dealing with abetment of offences, and Sections 120A and 120B dealing with conspiracy, also enable a person who has not committed an act which directly leads to the death of another, to be sentenced to the death penalty.

104. In contrast to India, the amount of available case law in Malaysia is very limited. The only relevant case law deals with the legal test of 'common intent'. Therefore, the following paragraphs will exclusively deal with this matter.

105. The most recent case to feature the application of Section 34 is *Veeriah v PP* which was heard together with *Sangaralingam v PP* [henceforth both are referred to concurrently as *Veeriah*]. Unlike Singapore, Malaysia does not seem to have had much development in reinterpreting, specifying, or otherwise setting out relevant tests in deciding the applicability of Section 34.

106. In *Veeriah*[117], the appellant was part of a group that jointly assaulted the victim with machetes and various other weapons such as a helmet. Even the Veeriah's action did not kill the victim, he was found guilty of murder at both trial and appeal.

107. Although more straightforward, the Malaysia approach is not dissimilar from the Singapore Court's use of the 4 factors[118] as decided in *Lee.*

108. The appellate judges ruled that:

    i. a crime had indeed been committed,
    ii. that the appellant was a major participant,

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[116] Amnesty International, Death Sentences and Executions in 2017, p. 18, Oct. 29, 2018.
[117] Criminal Appeal No. P-05(M)-184-05/2016 & 186-05/2016; Date of Judgment: 13 November 2017; Name of Court: Court of Appeal; Source: Federal Court Registry.
[118] They are: a) a criminal act (this can refer to the pursuit of both the primary and secondary crimes as part of an 'enterprise'), b) participation in that act, c) some form of a pre-arranged plan and d) the secondary offender's knowledge that "one in his party may likely commit the offence in furtherance of the common intention of carrying out the primary offence".

iii. the fact that the offenders all jointly intended for the victim to die as in section (302(a)), and 4) with the intention of causing injury that would most likely lead to the victim's eventual death (section 302(b)).

109. The judges rejected the defence's argument that the identity of *who* landed the 'killing blow' was significant; surmising instead that even though there were separate fights between the victim and each of the offenders, each offender knew about the joint attacks and that each attack was likely to contribute significantly to the probability of the victim's death; and that this was done with each offender individually intending for the victim to die (thus fulfilling Section 34's requirement of an *act done in furtherance of the common intention of all*).

110. Whether the assault was one 'act' or divided into several 'acts' taken individually is also of no consequence. The judges went even further as to conclude that once Section 34 has been invoked, there is no legal requirement for the prosecution to conclusively prove the identity of the actual 'doer'. The judges also used the strength of physical evidence significantly; basing their conclusion on the fact that *Veeriah* arrived with the other offenders at the same time at the same place armed similarly to the others (with a machete), removing any circumstantial doubt as to his intentions toward the victim.

111. Under Malaysia law, Section 34 is used more broadly than in Singapore, but the basic 4 factors as initially defined in *Lee* in Singapore are similar. That is, the accused must be actively participating in a ruled crime. However, the other two categories are used more broadly. A pre-arranged plan can be used broadly to refer to having prior contact, however brief; and common actions (such as arriving together etc.), while the requirement that the secondary offender have "subjective knowledge" about possible actions done in furtherance of a common intent can be taken broadly to mean wishing for the same general outcomes (the death of the victim in the case of *Veeriah*).

112. In the Malaysian context, intent is not used as strictly as in the Singaporean context. Merely understanding that that undertaking events that may lead to the victim's death is enough to prove *mens rea* for charge of murder, it is not necessary to prove motive as part of intent.

III. Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

113. On October 10, 2018 – the World Day Against the Death Penalty – Malaysia announced its decision to abolish the death penalty. Media reports suggest that the death penalty will be rescinded by the end of the year. For prisoners on death row, their pending executions have been put to a halt.

USA

I. Overview of the legal System

114. States' ability to legislate for the death penalty is circumscribed by Eighth Amendment to the Federal Constitution, which prohibits the imposition of 'cruel and unusual punishment'. The Supreme Court has held that the requirements of the Eighth Amendment must be interpreted according to the 'evolving standards of decency that mark the progress of a maturing society'.[119] To comply with the Eighth Amendment, the imposition of the death penalty must be proportionate to its 'two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.'[120]

115. The Court has held that the death penalty is not proportionate to crimes that do not result in death, including rape[121] and child rape.[122] The only crime which the Supreme Court has accepted that the death penalty can be constitutionally imposed is murder. (The court has however left open the question of the constitutionality of the death penalty for 'offenses against the State', as opposed to 'crimes against individual persons', not causing death, including 'treason, espionage, terrorism and drug kingpin activity').[123] Furthermore, the Court's case law establishes that the death penalty must be limited to those murders where some kind of aggravating circumstance has been proved, rather than applying to all murders.[124]

116. Within this framework, the court has considered the more specific question of when the death penalty can be imposed on a 'non-triggerman' for involvement in a felony murder. Felony murder rules, established in most US jurisdictions, impose liability for murder on those who cause death in the commission or attempt of certain felonies (generally including robbery, rape, arson, kidnapping and escape from custody).[125] In *Enmund v Florida*,[126] the Court considered whether the execution of a felony-murder accomplice would violate the Eighth Amendment. In that case, the get-away driver in an armed robbery attempt which had resulted in a fatal shooting had been convicted of murder on the basis of felony-murder provisions and had been sentenced to death. The Supreme Court held that this sentence was unconstitutional, because imposing the death penalty on defendants who 'did not kill, attempt to kill, and…did not intend to kill…is disproportionate…'.[127] The case thus suggested that the imposition of the death penalty on a non-triggerman would only be permitted if it was proved that the non-triggerman had *intent* to kill, requiring the finding of a specific *mens rea*.

117. However, the Supreme Court significantly qualified this decision in the later case of *Tison v Arizona.*[128] This case involved brothers who had helped their father escape from prison. In the course of the escape the Tisons flagged down a passing car and the father shot and killed the passengers in cold blood. The brothers were convicted of felony-murder and sentenced to death and appealed on an Eighth Amendment basis to the Supreme Court.

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[119] Trop v Dulles, 356 U.S. 86 (1958) at 101.
[120] Gregg v Georgia, 428 U.S. 153 (1976) at 183.
[121] Coker v Georgia 433 U.S. 584 (1977).
[122] Kennedy v Louisiana 554 U.S. 407 (2008).
[123] ibid.
[124] Zant v Stephens, 462 U.S. 862, 877 (1983); Roberts v Louisiana, 428 U.S 325 (1976) (plurality opinion); Woodson v North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion); see G Binder, B Fissell and R Weisberg, 'Capital Punishment of Unintentional Felony Murder' (2017) 92 Notre Dame LR 1141, 1145.
[125] Binder, Fissell and Weisberg (n 6) 1145.
[126] 458 US 782 (1982).
[127] ibid.
[128] 481 U.S. 137 (1987).

The Court held that the sentence of death imposed on the Tison brothers was constitutionally valid, despite the lack of any finding that they had shared their father's intent to kill the passengers.

118. The precedent of *Enmund* was confined to the scenario where there is a 'minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have any culpable mental state.'[129] In contrast, the Tison brothers' participation in the underlying felony was 'major rather than minor' so *Enmund* should be distinguished.[130] The majority opinion held that, where a non-triggerman was a major participant in the underlying felony, they could be constitutionally sentenced to death for felony-murder even if they had not intended to cause death, as long as it could be shown that they had 'a reckless disregard for human life.'[131] The *Tison* court thus lowered the *mens rea* requirement for imposition of the death penalty on 'major' participants in felony-murder.

119. The *Tison* decision has been subjected to significant academic criticism. The lowered *mens rea* requirement of 'reckless disregard for human life' has been described as an 'indefinite' standard that 'rationally can be held to apply to every felony murder accomplice.'[132] It also been questioned whether the methodology underlying the decision is compatible with subsequent developments in the Supreme Court's death penalty case law. *Tison* was one of a trilogy of late 1980s cases in which the Court upheld the constitutionality of contentious instances of the death penalty. The other two cases from this period – allowing the imposition of the death penalty on minors[133] and on the mentally retarded[134] – have since been overturned.[135]

120. It has also been argued that developments in various states since the 1980s abandoning or limiting the use of the death penalty against non-triggermen (which will be outlined below) support the view that 'evolving standards of decency' no longer allow the imposition of the death penalty against non-triggermen without a specific finding of intent.[136] As of 2018 however *Tison* has not been overruled.

II. Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?

121. Within the limits of the constitutional framework laid out above, each of the 50 States within the US (as well as the federal jurisdiction and the District of Columbia) has its own criminal law defining the circumstances, if any, in which the death penalty can be imposed. As of 2018, 19 States, as well as the District of Columbia, have abolished the death penalty.[137] 31 States, as well as the federal jurisdiction, retain the death penalty.

122. It is difficult to provide a succinct overview of the law governing the imposition of the death penalty on non-triggerman in those jurisdictions which retain the death penalty.

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[129] ibid.
[130] ibid.
[131] ibid.
[132] Richard A. Rosen, 'The "Especially Heinous" Aggravating Circumstance in Capital Cases- The Standardless Standard' (1986) 64 N Car LR 941, 943.
[133] *Stanford v Kentucky* 492 US 361 (1989).
[134] *Perry v Lynaugh* 492 US 302 (1989).
[135] *Atkins v Virginia* 536 US 304 (2002); *Roper v Simmons* 543 US 551 (2005).
[136] See Joseph Trigilio and Tracy Casadio, 'Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing' (2011) 48 American Criminal Law Review 1371, 1399–1411.
[137] See Appendix 1.

There are substantial variations in each State in how the defence of murder is defined and what categories of murder are subjected to the death penalty. There is no single common set of tests (such as common purpose, conspiracy to murder, what constitutes 'aiding or abetting' etc) which is used across jurisdictions, making it challenging to structure this section of the report.

1) Intentionally Directing/Ordering Murder

123. One set of cases involves the imposition on a non-triggerman of the death penalty for murder *simpliciter*, rather than felony-murder. These cases suggest that across jurisdictions a defendant may be convicted of the highest degree of murder and sentenced to the death penalty, even where they did not themselves carry out the physical act of murder, where they intentionally procured or caused the murder.[138] Thus, the death penalty can constitutionally be imposed on the procurer of a murder in a 'contract killing' or 'murder for hire' scenario.[139] Premeditated 'murder for hire' occurring across State lines is specifically defined as a capital offence in federal law.[140]

124. Jurisdictions differ in how exactly they classify the liability of someone who is involved in organizing an intentional killing without actually carrying out the physical act themselves. In Virginia, the death penalty can only be imposed on the 'immediate perpetrator' of the crime, not on an aider or abettor.[141] However, this has been interpreted to allow the imposition of the death penalty on a defendant who does not carry out the physical act of killing but who 'directs' or 'orders' the killing.[142] Thus the Supreme Court of Virginia upheld the imposition of the death penalty on John Allan Muhammad, the 'mastermind' of the 2002 Washington area sniper killings, despite the fact that he had not pulled the trigger himself.[143]

125. In many other States a non-triggerman involved in an intentional killing is classified as an 'aider or abettor' rather than a principal perpetrator. However, it has been held by the Supreme Court that 'States have authority to make aiders and abettors equally responsible, as a matter of law, with principals…'[144].

126. For example, California allow the death penalty for 'any person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree,'[145] as long as other statutory aggravating circumstances are present.[146] This seems broader than the Virginia approach restricting the death penalty for murder to the non-triggerman who 'directs' or 'orders' the killing. The California approach potentially allows the death penalty to be imposed on a mere assisting accomplice to murder rather than the active procurer or organizer of the murder. In practice, though, it seems that the death penalty has only been imposed in recent decades for intentional murder (in contrast to cases of felony murder) on a non-

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[138] See for example State of Tennessee v Greenclose 615 S.W.2d 142 (1981); Hopkinson v State of Wyoming 664 P.2d 43 (1983)*;* Haney v State of Alabama 603 So. 2d 368, 386 (1991)*;* Heath v. State 455 So. 2d 898 and 474 U.S. 82 (1985)*;* also Richard W. Garnett, 'Depravity Thrice Removed: Using the Heinous, Cruel, or Depraved Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases' (1994) 103 Yale L.J. 2471, 2489–91.

[139] See Garnett, ibid.

[140] 18 US Code §1958.

[141] Muhammad v. Commonwealth, 269 Va. 451, 483, 619 S.E.2d 16, 34 (2005); Anisa Mohanty, 'Taking Aim at the Virginia Triggerman Rule: A Commentary on House Bill 2358' (2009) 12 Richmond Journal of Law and the Public Interest 385, 386.

[142] ibid.

[143] ibid.

[144] Lockett v Ohio, 438 U.S. 586 (1978).

[145] California Penal Code 190.2(c).

[146] For the list of aggravating factors under the California Penal Code, see Appendix 2.

triggerman where he or she in fact directed or ordered the killing, as the 'mastermind' or as the instigator of a 'murder for hire.'[147]

2) Felony Murder

127. Most non-triggerman cases in the US arise in the context of felony murder, involving situations where the triggerman and non-triggerman were present together 'at the scene' participating in a felony in the course of which the triggerman caused death. As discussed above, *Tison* lays down the minimal constitutional requirements for the imposition of the death penalty on the non-triggerman for felony murder, requiring for this that the non-triggerman have been a 'major participant' in the felony and have acted with 'reckless indifference' to human life. However, the majority of jurisdictions now impose further restrictions on the imposition of the death penalty in this context.[148]

- The first category of jurisdictions are of course the nineteen States, plus the District of Columbia, that have abolished the death penalty altogether.[149]
- The second category is made up of three States that have the death penalty for murder but not for felony murder (Pennsylvania, Washington and Missouri).
- The third category consists of three States that allow the death penalty for felony-murder, but only for the triggerman (Oregon, Georgia and Virginia).
- The fourth category includes eight States that allow the death penalty for a triggerman convicted of felony-murder, but only where there is an affirmative finding that the non-triggerman acted with intent to kill (Alabama, Indiana, Kansas, Louisiana, Mississippi, Montana, Ohio and Wyoming).
- The fifth category consists of nine States that do not clearly require intent to kill, but nonetheless require in addition to the *Tison* requirements an affirmative finding of some further factor for the death penalty to be imposed on a non-triggerman, such as knowledge that lethal force would be used (Arkansas, Nevada, Tennessee, Utah), complicity (Arkansas), or an additional jury finding of an aggravating factor (Nebraska, New Hampshire, North Carolina, Oklahoma).
- The sixth category is made up of eight States (Arizona, California, Colorado, Florida, Idaho, Kentucky, South Carolina, and Texas) as well as the federal jurisdiction, which do impose any restrictions on the imposition of the death penalty for felony-murder beyond the constitutional requirements laid down in *Tison*.

128. It has been observed that the majority of jurisdictions either have abolished the death penalty or only apply it to non-triggermen where an intent to kill has been established, suggesting that *Tison* is no longer in line with the 'evolving standards of decency' of American society.[150] This argument is further supported by the fact that even in States where it is permitted, in practice the death penalty is only rarely imposed on non-triggermen for felony murder. Although there are no comprehensive studies, the Death Penalty Information Centre identifies 10 non-triggermen as having been executed for felony murder since 1985.[151]

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[147] See 'Contract Killings', Death Penalty Information Site, available at <https://deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim> accessed 29 November 2018..
[148] Updated from Trigilio and Casadio (n18) 1400-1402.
[149] See Appendix 1.
[150] Trigilio and Casadio (n30).
[151] 'Felony Murder', available at <https://deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim> accessed 29 November 2018..

129. A full overview of statutory provisions across US jurisdictions relevant to the imposition of the death penalty on non-triggermen, taken from the 2011 article of Trigilio and Casadio and updated to reflect the more recent abolition of the death penalty in a number of States, is provided in Appendix 1.

III. Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

130. The Supreme Court has ruled that the Federal Constitution prohibits the mandatory imposition of the death penalty in all first degree-murder cases.[152] States allowing the death penalty must therefore channel sentencing discretion in order to 'genuinely narrow the class of persons eligible for the death penalty and…reasonably justify the imposition of a more severe sentence on the defendant compared to others guilty of murder.'[153]

131. States must also ensure that the sentencer considers whether there is relevant mitigating evidence counting against the imposition of the death penalty.[154] States must not preclude sentencers from considering 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death'. [155]

132. In order to fulfil the constitutional requirements that the class of murders subject to the death penalty be narrowed, State sentencing schemes generally require the finding of an 'aggravating factor' increasing the seriousness of the crime before the death penalty can be imposed.[156]

133. An example of a statutorily defined list of aggravating factors taken from the California Penal Code is provided in Appendix 2 to this report. The Sixth Amendment to the Constitution, guaranteeing the right to trial by jury, has been interpreted as requiring that a finding of the existence of an 'aggravating factor' must be made by the jury, and not by a judge.[157] In many jurisdictions, the jury is itself the sentencer and directly determines whether the death penalty should be imposed, although that is not constitutionally required.[158] Whether the jury rather than the judge determines whether the death penalty should be imposed, it must be instructed by the judge as to the need to find an aggravating factor and to consider whether there are any mitigating factors.[159]

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[152] Roberts v Louisiana 428 US 325 (1976); Woodson v North Carolina 428 US 280 (1976).

[153] Zant v Stephens, 462 U.S. 862, 877 (1983).

[154] *See* Roper v. Simmons, 543 U.S. 551, 568 (2005) (constitutionality of death sentence requires defendant be afforded "wide latitude" to present mitigating evidence); *see also* Smith v. Spisak, 558 U.S. 139, 144-49 (2010) (jury instructions valid when told to consider any relevant mitigating factors without unanimously finding the factor to exist); Abdul-Kabir v. Quarterman, 550 U.S. 233, 263-64 (2007) (statutory requirement that jury consider only particular kinds of mitigating evidence was unconstitutional); Brewer v. Quarterman, 550 U.S. 286, 289 (2007) (sentencer may not be precluded from "giving meaningful effect to mitigating evidence). List of references taken from 'Sentencing' (2016) Geo LJ Ann Rev Crim Proc787, 918.

[155] Lockett v Ohio 438 U.S. 586, 608 (1978).

[156] Brown v. Sanders, 546 U.S. 212, 216 (2006); *see also* Tuilaepa v. Cal., 512 U.S. 967, 972 (1994).

[157] See Ring v. Ariz., 536 U.S. 584, 609 (2002) (overruling Walton v. Arizona, 497 U.S. 639 (1990), to the extent that it allowed sentencing judge to determine the presence of an aggravating circumstance sufficient to impose the death penalty); see also Hurst v. Fla., 136 S. Ct. 616, 619 (2016) (overruling Hildwin v. Fla., 490 U.S. 638 (1989), and Spaziano v. Fla., 468 U.S. 447 (1984), to the extent they allowed, under Florida law, a judge to find aggravating circumstances necessary for imposition of a death sentence independent of jury's factfinding); 'Sentencing' (n 35) 910.

[158] *See* Spaziano*,* 468 US 447 at 459 (objectives of "measured, consistent application and fairness to the accused" do not require imposition of death penalty by jury (quoting Eddings v. Okla., 455 U.S. 104, 111 (1982))); Sentencing (n 35) 910.

[159] See 'Sentencing' (n 35) 907–08.

134. However, the requirement of the finding of an aggravating factor does not necessarily exclude the imposition of the death penalty on a non-triggerman in a felony murder case. In States in the sixth category referred to in the previous section, that the murder takes place in the course of a violent felony itself constitutes an aggravating factor (see for example California Penal Code 190.2(a)(17)). In these States therefore, the only restrictions for the imposition of the death remain the basic requirements laid down in *Tison*.

135. Despite the Sixth Amendment principles requiring that aggravating factors allowing the imposition of the death penalty must be established by the jury beyond reasonable doubt, lower courts have found that the *Tison* requirements for the imposition of the death penalty on non-triggermen in cases of felony murder ('major participation' in the felony and 'reckless indifference to human life' do not need to be the subject of separate findings by the jury, a body of case law which has been subject to academic criticism.[160]

[160] Arizona v. Ring, 65 P.3d 915, 944 (Ariz. 2003) (en banc); Brown v. State of Oklahoma, 67 P.3d 917, 920 (Okla. Crim. App. 2003); Harlow v. State of Wyoming, 70 P.3d 179, 204 (Wyo. 2003); see Michael Antonio Brockland, See No Evil, Hear No Evil, Speak No Evil: An Argument for a Jury Determination of the Enmund/Tison Culpability Factors in Capital Felony Murder Cases' (2007) 27 St. Louis U. Pub. L. Rev. 235 (criticising these decisions).

GAMBIA

I. Overview of the legal system

136. Gambia, officially the Republic of The Gambia, is a constitutional democracy. Chapter IV of the Constitution of The Gambia guarantees the protection of fundamental rights and freedoms. For present purposes, the most relevant are the right to life (Article 18), the right to personal liberty (Article 19), the protection from inhuman treatment (Article 21) and the provisions to secure the protection of the law and fair play (Article 24).[161]

137. In particular, Article 18(2) provides that 'no court in Gambia shall be competent to impose a sentence of death for any offence unless the sentence is prescribed by law and the offence involves violence, or the administration of any toxic substance, resulting in the death of another person'.[162] Schedule 2 of Part 2 of Chapter XXII provides that, where any law makes provision for a sentence of death outside of the situations that Article 18(2) specifies, that law shall take effect as if life imprisonment were substituted for that sentence.[163]

138. Article 24(5) also provides that 'no penalty shall be imposed for any criminal offence which is more severe in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed'.[164] In spite of this provision, read alongside Article 18(2), the Cornell Center on the Death Penalty Worldwide has found that there have been death sentences, and subsequent executions, for offences that have not resulted in the death of any person (including treason and terrorism offences).[165]

139. The main source of criminal law is the Criminal Code, adopted in 1934.[166] Article 28 provides that the Minister of Justice 'may issue instructions as to the manner in which sentence of death by hanging shall be carried out', so long as the execution is undertaken in 'the most expeditious and human fashion possible'.[167] Nevertheless, there are reports that shooting by firing squad has also been used as a method of execution.[168] At the end of 2017, there were approximately twenty-three prisoners on death row.[169] In February 2018, however, President Adama Barrow announced an official moratorium of the death penalty in the country.[170]

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[161] Constitution of the Republic of The Gambia 1996, arts 18-19, 21 and 24, available at <http://www.wipo.int/wipolex/en/text.jsp?file_id=221243> accessed 27 October 2018.
[162] ibid art 18(2).
[163] ibid sch 2, pt 2, c XXII.
[164] ibid art 24(5).
[165] Cornell Center on the Death Penalty Worldwide, 'Death Penalty Database: Gambia', available at <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Gambia#a13-3>, accessed 27 October 2018.
[166] Criminal Code of the Republic of The Gambia 1934 ('Criminal Code') available at <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=75289> accessed 27 October 2018.
[167] ibid art 28.
[168] Cornell Center on the Death Penalty Worldwide (n 5).
[169] Amnesty International, 'Death Sentences and Executions in 2017' (2018), available at <https://www.amnesty.org/en/latest/news/2018/04/Death-penalty-sentences-and-executions-2017/> accessed 27 October 2018.
[170] See, for example, Agence France Presse, 'Gambia suspends death penalty in step towards abolition' *The Guardian* (London, 19 February 2018), available at <https://www.theguardian.com/world/2018/feb/19/gambia-suspends-death-penalty-abolition> accessed 27 October 2018; Amnesty International, 'Why Gambia's Progress should spur Abolition of the Death Penalty in Africa' (2018), available at <https://www.amnesty.org/en/latest/campaigns/2018/03/why-gambia-progress-should-spur-abolition-of-the-death-penalty-in-africa/> accessed 27 October 2018.

140. Article 188 of the Criminal Code provides for the death penalty in cases of murder.[171] Article 187 provides that murder is committed when a person 'who of malice aforethought causes the death of another person by an unlawful act or omission'.[172]

II. Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?

1) Felony murder

141. As noted above, the Criminal Code uses the concept of 'malice aforethought' as the requisite mental element for murder.[173] However, as Article 190 shows, this concept is broad, covering various types of intention and knowledge. For the purpose of 'non-triggerman' homicide offences, Article 190(c) is most relevant. It defines 'malice aforethought' to mean when a person 'us[es] violent measures in the commission of, or attempt at, a felony'.[174]

142. Where this type of malice aforethought is shown, and the act or omission in question has caused death, the Criminal Code provides that a person shall be sentenced to death.[175]

143. Although the Criminal Code does not use the terminology of 'felony murder', this provision is similar to some formulations found in the United States (e.g. Arizona,[176] Washington[177]) in that it does not require an intention to kill. In addition, the Gambian provision seems not to require any knowledge of probable death or grievous bodily harm, since this is presented as an independent aspect of malice aforethought in Article 190(b). Hence, though the concept of malice aforethought usually relates to some mental elements on the part of offenders such as intention and knowledge, Article 190(c) uses 'malice aforethought' to refer primarily to the conduct of offenders, that is, the use of violence in the commission of, or attempt at, felonies .

2) Terrorism offences: accessorial liability

144. Under section 3(1)(a) of the Anti-terrorism Act 2002, a person who commits an act of terrorism (regardless of whether it causes death) is liable to be sentenced to death. An act of terrorism includes acts seriously damaging a country or an international organisation, intending to intimidate a population or seriously destabilise the societal structures of a country, and which involve or cause death, attacks on physical integrity and/or kidnapping.[178] Based on the wording of the statute in relation to the death penalty, there is no requirement that such an act of terrorism be one that caused death.[179]

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[171] Criminal Code (n 6) art 188.
[172] ibid art 187.
[173] ibid.
[174] ibid art 190(c).
[175] ibid arts 187-188, 190.
[176] ARS 13-1105A2.
[177] RCW 9A.32.030.
[178] Anti-terrorism Act 2002, s 2(a)-(c).
[179] ibid s 3(1)(a).

145. Section 66(1) criminalises a range of accessorial conduct in relation to terrorist offences.

a. Conspiracy or attempt

146. A person who conspires to commit, or attempts to engage in, conduct that is an offence under the 2002 Act not only commits an offence, but 'is liable on conviction to the same penalty as would be applicable if the person were convicted of the offence as a principal offender'.[180]

147. To be guilty of conspiracy in this context, a person must have:

i. entered into an agreement with any other person or persons that one or more of them would commit the agreed offence, or
ii. intended, alongside at least one other party to the agreement, that the offence would be committed, and
iii. committed, alongside at least one other party to the agreement, an overt act pursuant to the agreement.[181]

148. A person may be guilty of conspiracy even if the commission of the principal offence was impossible.[182]

149. A person is not guilty of conspiracy if they:

i. withdrew from the agreement,
ii. made a reasonable effort to prevent the commission of the agreed offence, and
iii. as soon as possible after withdrawal, reported the matter to the police.[183]

150. It is important to note that the Anti-terrorism Act 2002 is a specific legislative regime and conspiracy is treated differently from the general provisions on conspiracy to commit felony in Chapter XLI of the Criminal Code.[184]

b. Aiding, abetment, counsel or procurement

151. The elements that constitute aiding, abetting, counselling or procuring in this context are not provided in the 2002 Act. The sole provision is section 66(1)(b), which provides that a person who 'aids, abets, counsels or procures, or is by an act or omission in any way directly or indirectly, knowingly concerned in, or party to' any conduct that is an offence under the Act commits an offence. That person is then liable to the same penalty as a principal offender, reflecting the provision on conspiracy or attempt above.[185]

c. Incitement, urging or encouragement

152. Similarly to the previous section, incitement, urging or encouragement of conduct that constitutes a terrorist offence is itself an offence under section 66(1)(c) the 2002 Act. However, no detail is given beyond these terms.[186] The liability operates in the same way as it does in relation to conspiracy, attempt, aiding, abetment, counsel, and procurement.

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[180] ibid s 66(1).
[181] ibid s 66(2)(a)(i)-(iii).
[182] ibid s 66(2)(c).
[183] ibid s 66(2)(b).
[184] Criminal Code (n 6) arts 368-370.
[185] Anti-terrorism Act 2002 s 66(2).
[186] ibid s66(1)(c).

III. Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

153. All the offences noted are subject to limitations on the death penalty relating to certain categories of offenders, including those below eighteen years old,[187] those who are pregnant,[188] and those who suffer from mental illnesses.[189]

1) Felony murder

154. It seems that there is no room for judicial discretion when administering the death penalty in respect of 'malice aforethought' felony murder. As the Cornell Center notes, the language of the Criminal Code is that offenders 'shall' be punished by death.[190] Moreover, in the case of *Dawda Bojang v The State* (2010), the High Court held that the lower courts had no sentencing discretion and that the death penalty was mandatory.[191]

2) Terrorism offences: accessorial liability

a. Conspiracy or attempt

155. Under the 2002 Act, a person shall be exempted from the penalty, and absolutely discharged, if they:

i. revealed the conspiracy to the police or the court, and
ii. made it possible to prevent the commission of the offence and to identify the other person(s) involved in the conspiracy.[192]

b. All accessorial offences under the 2002 Act (including conspiracy and attempt)

156. There is some scope for judicial discretion under the 2002 Act in the context of all the statutory offences, including the accessorial offences noted above. A penalty that an offender incurs shall be reduced in such manner that the court thinks just where that person has:

i. before any proceedings, made possible or facilitated the identification of any other person involved in the commission of the offence, or
ii. after commencement of proceedings, made possible or facilitated the arrest of any other such person.[193]

[187] Children's Act 2005 ss 204, 218.
[188] Criminal Code (n 6) art 28(3).
[189] Criminal Code (n 6) art 192.
[190] Cornell Center on the Death Penalty Worldwide (n 5).
[191] *Dawda Bojang v The State* (2010).
[192] Anti-terrorism Act 2002 s 65(3).
[193] Anti-terrorism Act 2002 s 65(4).

BOTSWANA

I. Overview of the Legal System

157. Botswana has a dual legal system based on Roman-Dutch and English Common Law principles alongside customary law. The criminal law in Botswana is based mainly on English law, with South African law influencing evidence.

158. Under the law of Botswana, five types of offence are punishable by death; murder[194], treason[195], espionage[196], certain military offences not resulting in death[197], and piracy with intent to murder.[198]

159. According to the Constitution of Botswana, every person is entitled to the right to "life, liberty, security of the person and the protection of the law."[199] However, the Constitution also provides that "No person shall be deprived of his or her life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he or she has been convicted,"[200] thus explicitly suggesting that the death penalty is constitutional.

160. The constitutionality of the death penalty was challenged in the Court of Appeal in *Ntesang v State*, where, while acknowledging that the death penalty was increasingly recognised as "torture, inhuman or degrading punishment or treatment", the Court ultimately held that it had "no power to rewrite the Constitution."[201] The decision was affirmed in *Kobedi v State* where the Court of Appeal, nonetheless, held that the death penalty was not mandatory in Botswana.[202]

II. Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?

161. Under the Penal Code, there are a number of ways in which a person who does not themselves commit an act which directly or immediately leads to the death of another, can nonetheless be convicted of murder and sentenced to the death penalty.

162. Section 21 of the Penal Code outlines who will be deemed a "principal offender," and this includes persons who enable, aid and/or abet another to ultimately commit a crime. Malice Aforethought (requisite intention) of murder is laid out in Section 204 and includes merely the intention to assist a person who has committed murder to escape custody. Finally, Section 22 outlines 'common purpose,' whereby each person with common intention to pursue an unlawful purpose is deemed to have committed the offence (regardless of whether they actually 'pulled the trigger.')

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[194] Penal Code of Botswana, ss. 202, 203(1), 204.
[195] *Ibid*, ss. 34, 35.
[196] Botswana Defence Force Act 1977, s 28.
[197] *Ibid*, ss. 27, 29, 34.
[198] Penal Code of Botswana, sec. 63.
[199] Constitution of Botswana, Art. 3(a).
[200] Ibid, Art 4(1).
[201] *Ntesang v. The State* [1995] B.L.R. 151 (CA).
[202] *Kobedi v. The State* [2005] (2) B.L.R. 76 (CA).

1) Aiding and Abetting

163. Those who are deemed to be 'Principal Offenders' of an act are set out in Section 21 of the Penal Code.[203] The section says that the following people are deemed to have taken part in committing the offence, be guilty of the offence and may be charged with actually committing it;

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence.

164. The Aider- This is someone whose act or omission enables or facilitates the perpetrator to commit the offence, with knowledge and intention of helping commit the crime. Their acts/omissions occur before the commission of the offence. Such acts include, for example, supplying weapons, instructing the principal offender on how to commit the crime, and leaving open premises supposed to be locked.[204] So not only is the aider a 'non-triggerman', they are not even present when the killing takes place, but could still be charged with murder, and therefore vulnerable to the death penalty.

165. The Aider and Abettor- This is someone who actually helps and encourages the perpetrator to commit the crime, and unlike 'the aider' as outlined above, they render their help simultaneously with or at the time of the commission of the crime. This could be, for example, disabling a victim, acting as 'look-out,' or illuminating the scene of crime to allow the perpetrator to see what they're doing.[205] Therefore, Section 21 of the Penal Code allows someone who is playing an arguably minimal role, to nonetheless be charged as a principal offender, and thus exposed to the death penalty.

2) Malice Aforethought

166. Section 204 of the Penal Code outlines the requisite intention (malice aforethought) for the offence of murder.[206] The section states that malice aforethought will be deemed to be established in the following circumstances;

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) knowing that the act or omission causing death is likely to cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused;

(c) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit such an offence.

167. It is (c) which is most worrying for our purposes. There need not be any intention to kill, or even an intention to cause bodily harm. All that is required to make out malice aforethought for murder is an intention to help someone else who has committed murder, to escape custody. That being said, the circumstances in which intent to commit a felony can be sufficient to make out the offence of murder are very limited in Botswana when compared with other jurisdictions, being limited to the circumstance outlined above.

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[203] Penal Code of Botswana, s. 21.

[204] Daniel David Ntanda Nsereko, *Criminal Law in Botswana*, (Kluwer Law International, 2011), p 176.

[205] *Ibid*, pg. 177.

[206] Penal Code of Botswana s 204.

3) Common Purpose

168. Section 22 of the Penal Code outlines the doctrine of 'common purpose.'[207] The section states; "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

169. An example of this can be found in *Leshomo v State*[208] which brings together case law elucidating the requirements of common purpose in the context of murder. In *Lesogoro v The State*, Amissah JA explained that in order for an offence committed by one or more of the parties, to be deemed an offence committed by all of the parties, it must be "a probable, not merely a possible, consequence of the prosecution of their common purpose.'[209]

170. In the case of *Kemoreile v The State*[210] Schreiner JA referred with approval to the South African case of *S v Mgedezi and Others* where Botha JA said in relation to the requirements for conviction on the basis of common purpose:

- "In the first place, he must have been present at the scene where the violence was being committed.
- Secondly, he must have been aware of the assault...
- Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault.
- Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others.
- Fifthly, he must have had the requisite mens rea, so, in respect of the killing of the deceased, he must have intended them, to be killed; he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."[211]

III. Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

171. The mechanism used most frequently by the courts in Botswana to 'soften the rigidity of the death sentence'[212] is the doctrine of extenuating circumstances, contained in Section 203 of the Penal Code. Another method is the President's power of Prerogative of Mercy (clemency), however this has proved less useful in practice.

1) Doctrine of Extenuating Circumstances

172. Under Section 203 of the Penal Code it is stated:

(1) …any person convicted of murder shall be sentenced to death.

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[207] Penal Code of Botswana, s 22.
[208] *Leshomo v State* [2011] (2) B.L.R. 558 (CA).
[209] *Lesogoro v The State* [1986] B.L.R. 311 (CA).
[210] *Kemoreile v The State* [1996] B.L.R. 34 (CA).
[211] *S v Mgedezi and Others* [1989] (1) SA 687 (A).
[212] Andrew Novak, "Guilty of Murder with Extenuating Circumstances: Transparency and the Mandatory Death Penalty", [2009] Boston University International Law Journal, Vol. 27, p 173.

(2) Where a court in convicting a person of murder is of the opinion that there are extenuating circumstances, the court may impose any sentence other than death.
(3) In deciding whether or not there are any extenuating circumstances the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.[213]

173. The Botswana Court of Appeal explicitly rejects the conclusion that the death penalty is mandatory for murder; Botswana courts may "impose any appropriate punishment."[214] Going a step further than that, the courts have held that Section 203(2) imposes an obligation on them, after conviction, to consider all the circumstances and facts of the case and determine whether there were extenuating circumstances.[215]

174. The case of *Mosarwana v The State* is helpful in understanding what constitutes an extenuating circumstance.[216] Maisels P referred to two leading South African cases on the matter. In *R v Fundakubi and Others* it was pointed out that in considering the question of extenuating circumstances, the subjective state of mind of the offender is greatly important, and that no factor (regardless of how remote or indirectly related to the offence) can be ruled out if it bears on the accused's moral blameworthiness.[217] In *S v Letsolo* Holmes JA defined extenuating circumstances as facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard, a trial Court has to consider—

(a) whether there are facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);
(b) whether such facts in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;
(c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.[218]

175. The above South African cases have been cited with approval and followed in the High Court and Court of Appeal in Botswana, many times.[219] In *Mosarwana v The State* it was also held that Section 203 does not cast any onus on an accused person to show that such circumstances existed and that a decision could be reached independently of whether or not the accused gave any evidence in that regard. It is the settled rule of practice in Botswana that once extenuating circumstances have been satisfactorily shown to exist, the sentencing court must impose a sentence other than death.[220]

176. Bojosi has claimed: "It is heart-warming to note that the courts in Botswana have been liberal in the interpretation of Section 203(2) and have held a wide range of circumstances as extenuating circumstances."[221] These circumstances include provocation,[222]

[213] Penal Code of Botswana, s 203.
[214] *Kobedi v. State* [2005] (2) B.L.R. 76 (CA).
[215] K. Bojosi, "A Commentary on Recent Constitutional Challenges to the Death Penalty in Botswana", British Institute of International and Comparative Law, 2004, p 3.
[216] *Mosarwana v The State* [1985] B.L.R. 258 (CA).
[217] *R v Fundakubi and Others* [1948] (3) SA 810 (A).
[218] *S v Letsolo* [1970] (3) SA 476.
[219] *Puso v The State* [1998] B.L.R. 421 (CA).
[220] D.D.N. Nsereko "Extenuating Circumstances in Capital Offences in Botswana" Vol. 2 (2) (1991) Criminal Law Forum, p 246.
[221] K. Bojosi, "A Commentary on Recent Constitutional Challenges to the Death Penalty in Botswana", British Institute of International and Comparative Law, 2004, p 3.
[222] *Mashaba v The State* [1977] B.L.R. 10 (CA).

intoxication,[223] youthfulness and immaturity[224], and absence of actual intention to kill[225]. In practice the courts in Botswana have substituted the death penalty for a custodial sentence of an average of seven years.[226]

177. The above law on extenuating circumstances suggests that a court would be extremely likely to take into consideration the position of a 'non-triggerman' and the inherent reduction in their moral blameworthiness. It is therefore unlikely, given the existence of the doctrine of extenuating circumstances, that a 'non-triggerman' in Botswana would be sentenced to death.

2) President's Power of Prerogative of Mercy

178. Under Section 53 of the Constitution[227] it is stated that the President may;

(a) grant to any person convicted of any offence a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;

(c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; and

(d) the whole or part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Government on account of any offence.

179. In essence this means that the President has discretionary powers to pardon a condemned prisoner and substitute a sentence of death for any other sentence. This means a 'non-triggerman' could appeal to the President and the Committee on the Prerogative of Mercy, as a means to avoid the death penalty.

180. However, unfortunately, the effectiveness of the Presidential Prerogative of Mercy is severely compromised in practice because "the whole procedure is shrouded in secrecy and lack of transparency."[228] There have been occasions where prisoners have been executed without being informed of the decision of the President in relation to their application for clemency.[229]

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223 D.D.N. Nsereko "Extenuating Circumstances in Capital Offences in Botswana" Vol. 2 (2) (1991) Criminal Law Forum, p 257.

224 *Gofhamodimo v The State* [1984] B.L.R. 119 (CA).

225 *State v Manyeke* [1978] B.L.R. 10 (CA).

226 D.D.N. Nsereko 'Extenuating Circumstances in Capital Offences in Botswana' Vol. 2 (2) (1991) Criminal Law Forum, p 244.

227 Constitution of Botswana, art 53.

228 K. Bojosi, "A Commentary on Recent Constitutional Challenges to the Death Penalty in Botswana", British Institute of International and Comparative Law, 2004, p 4.

229 *Bosch v The State* [2001] (1) BLR 71 (CA) - Marriette Bosch was executed while her petition for clemency was pending with the African Commission on Human and Peoples' Rights.

NIGERIA

I. Overview of the legal system

181. Nigeria is a federation of 36 states. The country uses a tripartite system of criminal law: The Criminal Code Act 1990 ('CCA') (based upon English Common Law and legal practice); the Penal Code Act 1960 ('PCA') (based on Maliki Law and Sharia Law); and Customary Law (based on the customs and traditions of the people).[230] The PCA applies only to the Northern States in Nigeria. The modern court system of Nigeria is made up of Magistrates/Sharia and Customary courts, State/Federal High Courts, the Federal High Court of Appeal and the Supreme Court.[231] Each State has its own judicial system, but appeals are dealt with at a federal level.

182. Nigeria is a retentionist State, with a mandatory death sentence for 19 offences, 7 of which are for offences causing a homicide.[232] Section 316 of the CCA states that: *"A person who unlawfully kills another in any of the following circumstances shall be guilty of murder… if death is caused by mean of an act done in the prosecution of an unlawful purpose, where the act is of such a nature as to be likely to endanger human life."*[233] Section 319 of the Criminal Code and Section 221 of the Penal Code prescribe the death penalty as punishment for homicide.

II. Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?

183. Section 7 of the CCA states that where an offence is committed, then each of the following persons will be deemed to have taken part committing the offence and be guilty of it, and may be charged with actually committing it:

(a) Every person who actually does the act or make the omission which constitutes the offence;
(b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
(c) Every person who aids another person in committing the offence
(d) Any person who counsels or procures any other person to commit the offence.

184. These can be summarised as 'common purpose/intention', 'procurement', 'counselling' and 'conspiracy'. 'Abetment' is an offence only in Northern States governed by the PCA. Each shall be dealt with in turn in their application to non-triggermen homicide offences.

1) Common Purpose/Intent

185. Section 8 CCA states that *"when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such*

[230] It should be noted that this legislation is only enforceable in States in the Northern Territories.
[231] The list is set out in order of hierarchy. Olamide, O. (2016, March 21). Hierarchy of courts.jet Lawyer, available at <http://www.djetlawyer.com/hierachy-of-cpourts/> accessed 29 November 2018.
[232] Cornell Center on the Death Penalty Worldwide, 'Death Penalty Database: Nigeria', available at <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Nigeria> accessed 29 November 2018.
[233] Chapter 27, Section 315 read in conjunction with s.316(3) of the Criminal Code.

purpose, each of them is deemed to have committed the offence."[234] Section 308 CCA provides that anyone who causes the death of another person, whether directly or indirectly, is deemed to have killed that person.

186. This is to be read in conjunction with Section 316 CCA which sets out six circumstances where a person will be deemed to have caused the death of another. Most relevant to this discussion (as noted above), is Section 316(3) of the CCA, whereby a person can be found guilty of murder where a person is involved in an act *"that is to be likely to endanger human life."* The section goes on to clarify that it is immaterial that the offender did not intend to hurt any person or that the offender did not intend to cause death or did not know that death was likely to result.

187. Of particular relevance to the discussion of non-triggermen offences is the case of *Benjamin Oyakhire v The State*. Here the court held that:

> *"If, in the course of the accused persons' execution of their unlawful common purpose of armed robbery and while jointly and severally, employing their arms to overcome the victims' resistance to facilitate their own escape, the gunshot of one of them kills any of the victims, each of the accused persons is deemed, in the eyes of the law, to have fired the fatal gunshot and criminally liable for the armed robbery as well as the culpable homicide."*

188. Sections 79-81 of the PCA also contains like provisions. Section 79 states that *"When a criminal act is done by several persons in furtherance of the common intention of all, each of those persons is liable for that act in the same manner as if it were done by him alone."* Section 80 goes one step further to impute the *mens rea* of an offence when an act is only criminal by *"reason of its being done with a criminal intention"*, and is committed by several persons, then each of those who join in the act with that level of knowledge or intention.[235] Section 81 then deals with the *actus reus* by stating that, *'When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing anyone of those acts, either singly or jointly with any other person, commits that offence.'*[236]

189. S.79 needs to be read in conjunction with Section 221(b) for non-triggermen offences, as it states that culpable homicide will be punishable with death *"if the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause."*[237] The terms "probable" and "likely" have been defined within the Act to alleviate any ambiguity.[238] Section 19 provides that an act is said to be "likely" to lead to a consequence if the consequence resulting from that act would not come as a surprise to the reasonable man.[239] However, an event is said to be a "probable" consequence if the consequence would be considered by the reasonable man as the normal or natural result of the act.[240]

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[234] *Ubierho v The State (2005) 2 SCM 193.*
[235] S.80 Penal Code Act 1960.
[236] *Jimoh Micheal v The State (2008) 5-6 (pt II) 203*, "Where two or more persons form a common intention to do an unlawful act, such as armed robbery and in furtherance of that unlawful act, a person is killed, each of them is guilty of killing under section 79 of the Penal Code and none of them can claim that it was not his own act or attack that killed the deceased."
[237] Penal Code 1960.
[238] s 19 PCA.
[239] See *Habibu Usman v The State (2010) LPELR-CA/S/93/C/09*, "that the act or omission of the accused which caused the death of the deceased was intentional with the knowledge that death or GBH was its probable cause", available at <http://www.lawpavilionpersonal.com/lawreportsummary_ca.jsp?suite=olabisi@9thfloor&pk=CA/S/93/C/09&apk=1507> accessed 29 November 2018..
[240] ibid 5.

190. In *Lalluwa Auta v The State (1975),*[241] the Supreme Court clarified the required *mens rea* of Section 79 and Section 80 for the respective parties to the offence. Section 79 use the existence of a common intention between all the parties involved is established then all such parties will be liable for the entire criminal act in furtherance of that common intention. By contrast, s.80 only relates to acts which are an offence only if done with a criminal knowledge or intention. The criterion of liability of each person concerned in doing of such an act depends on his individual knowledge or intention. Therefore, if several persons join in an act, each manifestly having a different intention or knowledge, each is liable according to his own intention or knowledge and no more.[242]

191. In the case of *Bashaya v The State*,[243] the deceased was attacked by a group of men armed with sticks and other weapons, killing him. The person that delivered the fatal blow was considered inconsequential by the court and all were convicted of murder - the hand that did so was no more than the "hand by which the others all strike".[244] However, without evidence of a common an intention between the parties, a co-accused cannot be held guilty of common intention under s.8 where he had by his reaction, expressly dissociated himself from the act of the primary offender.[245]

2) Abetment (Northern States Only)

192. Section 83 of the PCA defines the offence of abetment. A person abets the doing of a thing who:

i. Instigates a person to do that thing; or
ii. Engages with one or more other person or persons in a conspiracy for the doing of that thing; or
iii. Intentionally aids or facilitates by an act or illegal omission the doing of that thing.

193. Section 85 makes it clear that an abettor shall be punished as if they were the principal of the offence, unless that act expressly provides otherwise. Section 87 speaks directly to non-triggermen offences and the *actus reus* by stating that, "*When an act is abetted and a different act is done and the act done was a probable consequence of the abetment and was committed under the influence of the instigation or in pursuance of the conspiracy or with the aid which constituted the abetment, the abettor is liable for the act done in the same manner and to the same extent as if he had directly abetted it.*"

194. The PCA gives a relevant illustration of application for this section: A instigates B and C to break into a house to commit a robbery and provides them both with a firearm. During the course of the robbery, B shoots Z. If that killing was a probable consequence of the abetment, A would be liable for the punishment of culpable homicide – death.

195. Section 89 places some limitations on the application of abetment by imposing a "reasonable foreseeability" test on the abettor for the unexpected consequence of his actions. Therefore, if an abettor intends for X to occur and Y does instead, he will only be liable for that consequence if he knew the act was likely to cause that effect. The abettor

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241 4 SC 92.
242 ibid11.
243 *Bashaya v The State* (1998) 5 NWLR pt 550.
244 *Asimiyu Alarape & Oors v The States* (2001) 3 SCM 1.
245 *Ele v The State All FWLR* [pt.329] 849 C.A.

shall not be sentenced to death under this section, unless he knew that death would be the probable effect of the act abetted. [246]

196. In *Akanni v The Queen*[247] the Court held that the mere presence of the accused at the scene of the crime does not states a case for him having aided or encouraged the commission of the crime. However, in *Buje v The State* (1991),[248] abetment extended to both prior participants as well as non-mere onlookers; thus, the accused who distracted or chased away potential assistance from a scene prior to a murder by assailants was also liable for the murder.

3) Procurement

197. Under Section 7(d) of the CCA any person who procures another to do or omit to do any act which would constitute and offence if committed, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission.[249] It is not clear from the legislation whether the death penalty would in fact be used for procurement that results in homicide.

198. The Act explicitly states that someone who procures someone to commit suicide will be liable to imprisonment for life under Section 326 CCA, therefore you would expect a like provision for dealing with procurement in more conventional homicide cases if the death penalty was not to be used.

4) Counselling

199. Under Section 9 CCA **w**hen a person counsels another to commit an offence, and an offence is actually committed after such counsel, can be found guilty of the offence if committed by those counselled.[250] The section further states that it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

200. As with procurement above, it is not clear whether the death penalty will be imposed on those that counsel and offence that leads to homicide, however the ambiguity in Section 7 CCA allows for the possible imposition of a death sentence by the court as a punishment.

5) Conspiracy

201. Under Sections 96-97 of the PCA, conspirators are treated in law as an abettor to the offence, and any such resultant punishments. Therefore, under Section 85 of the PCA it would be possible for a co-conspirator to be sentenced to death for homicide cases – though this only applies in the Northern Territories of Nigeria. In *John v The State*,[251] the court held that the actual commission of the offence is not a necessary ingredient of the offence of conspiracy.

202. Section 324 CCA makes it clear that conspirators to murder will only be liable to imprisonment for fourteen years.

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[246] *In Okosi v The State (1989) All NLR 170 S.C.* it was held that knowledge of the fact that an accomplice bore a weapon was sufficient to inculpate an accused in an armed robbery and thus considered to have abetted the more serious offence.
[247] F.S.C 295/58, available at <http://judgements.lawnigeria.com/2018/05/09/3plr-akanni-v-vthe-queen> accessed 29 November 2018.
[248] 4 NWLR [pt.139] 1512 C.A.
[249] s 513(1) Criminal Code Act 1990.
[250] When read in conjunction with s.7 CCA.
[251] SC.59/2014.

III. Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

203. Under Section 222(1) of the PCA, culpable homicide is not punishable with death if the offender was deprived of the power of self-control by grave and sudden provocation of the victim, or the death was caused by mistake or accident. The question of whether the provocation was grave and sudden enough to prevent the offence from amounting to culpable homicide punishable with death is a question of fact. [252]

204. A death will only be seen as accidental or mistaken if it is caused in the course of doing a "lawful act by lawful means and with proper care and caution."[253] Further to this, it is up to the accused to show an absence of criminal intention or knowledge.[254]

[252] See notes to s 222(1) PCA.
[253] s 48 PCA 1960.
[254] See *Kwaranga Mubarak Arabi v The State* (2001) 5 NWLR (Pt 706) 256.

SAINT KITTS AND NEVIS

I. Overview of the legal system

205. Saint Kitts and Nevis is an English-speaking, Commonwealth country in the Caribbean. It operates under a common law system and as such its criminal laws are a product of both cases and acts of parliament. As well as having its own Supreme Court, the Judicial Committee of the Privy Council (JCPC) is the highest court of appeal for the country and others within the Commonwealth.[255]

206. The Constitution of Saint Kitts and Nevis explicitly allows for the use of the death penalty only in cases of murder or treason.[256] Section 2 of the Offences Against the Person Act 2002 ("OAPA") imposes mandatory death sentence for those convicted of felony murder.[257] Apart from the Constitution, no other legislation makes reference to treason and the use of the death penalty as punishment. The last known execution in the country occurred in 2008 of Charles Elroy Laplace.[258]

207. Apart from joint enterprise resulting in homicide, other forms of abetment such as conspiracy of solicitation will only be punished with a maximum of 10 years imprisonment. [259] As a result, this report shall limit itself to the legal tests of joint enterprise/ common design.

208. The use of the death penalty for felony murder has been narrowed to only being available in the "most exceptional and extreme cases of murder".[260] Further to this, the mandatory nature of the death penalty in cases of murder was removed by the JCPC in *Fox v Queen*,[261] with Section 2 of the OAPA to now to be read as "whosoever is convicted of murder ***may*** suffer death as a felon."

209. A Draft Criminal Code for the country has been written but has no date of implementation.[262] The Draft Code makes no reference to the death penalty as being an available punishment for any offence in the country, including homicide. This report will not discuss the Code any further as it has not been enacted.

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[255] To bring an appeal to the Judicial Committee of the Privy Council, leave must have been granted by the lower court whose decision is being appealed. In criminal cases, it is unusual for the lower court to have the power to grant leave unless a case raises questions of great and general importance, or there has been some grave violation of the principles of natural justice. See <https://www.jcpc.uk/about/role-of-the-jcpc.html#Commonwealth> accessed 29 November 2018.

[256] Constitution of Saint Christopher and Nevis Jun. 23, 1983, Sec. 4(1) ("A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offense of treason or murder under any law of which he has been convicted").

[257] Offenses Against the Person Act, amended 2002 c. 4.21 § 2, reading "[whosoever is] convicted of murder shall suffer death as a felon".

[258] Cornell Center on the Death Penalty Worldwide, 'Death Penalty Database: Pakistan', available at <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Saint+Kitts+and+Nevis> accessed 29 November 2018.

[259] s 4 Offences Against the Persons Act 2002.

[260] *Director of Public Prosecutions v. Wycliffe Liburd*, paras. 18, 27, Suit No. SKBHCR 2009/0007, Eastern Caribbean Supreme Court, Oct. 22, 2009; *Wilson v. The Queen, Civil Appeal No. 30 of 2004*, para 17, Eastern Caribbean Court of Appeal, Nov 28, 2005.

[261] *Fox v. R,* [2002] UKPC 13, [2002] 2 A.C. 284 [11] (appeal taken from St. Kitts & Nevis) - interpreting section 7 of the St. Kitts & Nevis Constitution to prohibit the mandatory imposition of the death penalty.

[262] Available at <http://www.easterncaribbeanlaw.com/wp-content/uploads/2014/08/Criminal-Code-Draft-1.pdf> accessed 29 November 2018.

II. Under what legal conditions would any individual in the relevant jurisdiction, who has not committed an act which directly leads to the death of another, be convicted of murder and sentenced to the death penalty? Which legal tests apply in these circumstances (e.g. common purpose, conspiracy, felony murder etc.)?

1) General/Parties to an Offence

210. Under Section 69 OAPA every principal in the second degree and accessory before the fact shall be punished in the same manner as the principal offender. The Act does not give further explanation as to what actors will be classified as second-degree offenders, and it therefore falls to prosecutorial and judicial discretion in any given case.

211. This section is to be read in conjunction with Section 4 OAPA when it comes to the specific offence of homicide. Section 4 excludes the following as being treated as principal offenders, "All persons who conspire, confederate, and agree to murder...and whosoever solicits, encourages, persuades, endeavours to persuade, or proposes to any person to murder another person...commits a misdemeanour and shall be liable for a term of imprisonment not exceeding 10 years...".[263]

1) Common Design / Joint Enterprise

212. Saint Kitts and Nevis applies the doctrine of joint enterprise, which is a common law creation. There is no mention of joint enterprise in the statues pertaining to criminal law within the jurisdiction, however *Evanson Mitcham et al v Director of Public Prosecutions 2002* clarifies the legal tests that need be satisfied for secondary offenders to fall under the doctrine. [264]

213. In this case Mitcham and two associates tried to rob a female. During the course of the robbery Mitcham shot and killed a bystander, and his two associates later admitted to knowing he had a gun. All three were tried and convicted under joint enterprise, however only Mitcham was sentenced to death.

214. Justice Baptiste set out the 3 necessary elements that need to be present for Mitcham's associates to be found guilty of murder:

    1. A common unlawful joint enterprise.

    2. That what was done by the person who carried out the killing was within the scope of that common joint enterprise.

    3. That the action must have been seen as a possible result of that unlawful joint enterprise.[265]

    Applying this to the case of *Mitcham*: there was a common design to commit a robbery; Mitcham's associates knew that he was armed; and it was reasonably foreseeable that Mitcham would use that weapon to carry out the robbery.

215. The law of joint enterprise in Saint Kitts and Nevis will have been affected by the recent decision *in R v Jogee and Ruddock*,[266] in which the UK Supreme Court re-wrote the law on

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[263] s 4 Offences Against the Person Act 2002.
[264] Criminal Appeal Nos. 10, 11 and 12 of 2002, available at <https://www.eccourts.org/evanson-mitcham-et-al-v-director-public-prosecutions/> accessed 29 November 2018.
[265] ibid 8 para13.
[266] [2016] UKSC 8 & UKPC 7.

joint enterprise not only in its own jurisdiction, but also for those commonwealth states subject to the jurisdiction of the JCPC.

216. The court held that the requisite mental element of an offence for accessories has to match that required of the principal offender when an act has been committed under joint enterprise – the mere existence of foresight alone will no longer be conclusive of guilt but merely evidence upon with intent may be inferred.[267] If the crime requires a particular level of knowledge or intent, then the accessories must intend to assist or encourage the principal offender to act with such intent.

217. They further held that if an accessory is a party to a violent attack on another, without intent to assist in the causing of death or really serious harm, but the principal offender escalates the violence which results in death, then the accessory will be guilty of manslaughter not murder.[268]

218. This judicial re-statement of the legal test for liability under joint enterprise has direct effect on the Mitcham judgement, and the test that was applied by Justice Baptiste – most notably the mental element found in number 3. It has not been possible to find a decided case in Saint Kitts and Nevis since the Jogee and Ruddock judgement.

III. Are there any provisions (statutory norms/case law) which impose restrictions that would effectively prohibit the imposition of the death penalty for murder on those who do not kill?

219. Saint Kitts and Nevis also has two common law exceptions for liability under joint enterprise. The first was set out by Justice Baptiste in *Mitcham.*[269] It was held that 'Where...two or more persons embark on an unlawful enterprise and goes on to commit something beyond the contemplation or foresight of the others, those other persons are not in law responsible for the act of the person.'[270]

220. It is not clear how the wording of this exception is to be construed in light of Justice Baptiste's earlier test of joint enterprise – in particular the wording of the third element of a "possible result" to be foreseen by the secondary offenders. This level of foresight appears to be somewhat lower than that in the exception, leading to the inference that there would need to be a significant diversion from the original common unlawful design for the exception to be available to secondary offenders. It was not possible to find case law to see how this exception would be applied in practice.

221. The second common law exception is a withdrawal from a common design. Again, this exception was discussed within the Mitcham judgement, however it is in fact and English common law principle as opposed to having been found in the laws of Saint Kitts and Nevis.

222. The law on withdrawal from a common design was set out in *R v Becerra* [1975].[271] Here it was held that if an offender wishes to withdraw from the common plan, then there must be a reasonable and timely communication of the intention to abandon the common purpose made to the other participants in order to escape secondary liability under joint enterprise.

[267] ibid 12, para 90.
[268] ibid 13.
[269] ibid 11.
[270] ibid 8, para 14.
[271] 62 Cr. App. R. 212.

223. It has not been possible to find case law in which these exceptions have been used. Nor is it clear how these two exceptions will be affected by the decision in *R v Jogee and Ruddock*. [272]

[272] ibid 12.

APPENDIX 1

Jurisdictions which have abolished the death penalty (19 States and District of Columbia):

Alaska, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin

Death Penalty Jurisdictions: Overview of Statutory Provisions[273]

Alabama
Category: Intent State
The law defining capital offenses enumerates eighteen capital crimes, all involving murder. ALA. CODE § 13A-5-40(a) (2011). For purposes of the capital offense statute, murder is defined as requiring an intent to kill. *Id.* §§ 13A-5-40(b), 13A-6-2(1). Furthermore, the definition of capital murder specifically excepts felony murder from its definition. *Id.* §§ 13A-5-40(b), 13A-6-2(a)(3) ("[T]he terms 'murder' and 'murder by defendant' as used in this section to define capital offenses mean murder as defined in Section 13A-6-2(a)(1), but not as defined in Section 13A-6-2(a)(2) and (3) [which describes felony murder]"). Although a non-triggerman may be guilty of capital murder, to qualify, he must be found guilty of being an accomplice in the murder. *Id.* § 13A-5-40(c). An accomplice must "procure, induce or cause" another to commit the murder, or "aid or abet" the murder, or have a legal duty to try to prevent the murder, which he fails to do. *Id.* § 13A-2-23. It is a mitigating circumstance that though an accomplice, the defendant's participation was minor. *Id.* § 13A-5-51(2)(4). "No defendant can be found guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony-murder doctrine." *Ex parte Woodall*, 730 So. 2d 652, 657 (Ala. 1998).

Arizona
Category: *Tison* State
Felony murder by a non-triggerman is first-degree murder and subject to the death penalty. ARIZ. REV. STAT. § 13-1105(A)(2), (D) (2011) (". . . and in the course of and in furtherance of the [felony] . . . the person or another person causes the death of any person"). "[N]o specific mental state" is required for first degree felony murder other than required for the underlying offense. *Id.*
§ 13-1105(B). Even though legally accountable for murder, it is a mitigating circumstance where the defendant's participation was minor. *Id.* § 13-751(G)(3).

Arkansas
Category: Complicity
Felony murder by a non-triggerman is first-degree murder and subject to the death penalty. ARK. CODE ANN. § 5-10-101(a)(1), (c)(1) (2011). To support a conviction, the state must prove that the defendant acted with "extreme indifference to human life." *Id.* § 5-10-101(a)(1)(B). However, it is an affirmative defense that the defendant did not commit the act, "or in any way solicit, command, induce, procure, counsel, or aid" in its commission. *Id.* § 5-10-101(b).

California
Category: *Tison* State

[273] Taken from Trigilio and Casadio (n 18) 1412-22 (with adaptations to reflect subsequent abolition of the death penalty in a number of States).

Felony murder is first-degree murder and subject to the death penalty. CAL. PENAL CODE §§ 189, 190.2(a) (West 2011). Non-triggermen are eligible for the death penalty if they acted with intent to kill and aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the murder. *Id.* § 190.2(c). "Notwithstanding" the requirements of subdivision (c), Nontriggermen are also death eligible under subsection (d) if they meet *Tison*'s minimal requirements. *Id.* § 190.2(d). Although the California courts at one time required intent to kill before the special circumstance requisite to a death sentence could be assessed for an accomplice, *People v. Anderson,* 43 Cal.3d 1104, 1138–39 (1987), that requirement was abrogated by Proposition 15 in
1990. *See Tapia v. Superior Court*, 53 Cal.3d 282, 298 & n.16 (1991) (describing the change as one that brought state law into conformity with *Tison*).

Colorado

Category: *Tison* State

Felony murder by a non-triggerman is first-degree murder and subject to the death penalty. COLO. REV. STAT. §§ 18-3-102(1)(b) (2011) (defining first felony murder as "death of a person . . . caused by anyone"), (3), 18-1.3-1201(1)(a). Non-triggermen have a very narrow affirmative defense available if (1) there were other participants in the underlying felony, (2) they did not in any way aid, abet, or assist in the murder, (3) they were unarmed, (4) they had no reasonable ground for believing the other participants were armed or intended to engage in conduct which might result in death, and, (5) as soon as they realized that such circumstances existed, they attempted to disengage from the commission of the underlying felony. *Id.* § 18-3-102(2). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 18-1.3- 1201(4)(d). It is also a mitigating circumstance that the defendant could not have reasonably foreseen that his conduct would cause or risk the death of another. *Id.* § 18-1.3-1201(4)(e).

Florida

Category: *Tison* State

Felony murder is first-degree murder and subject to the death penalty. FLA. STAT. ANN. § 782.04(1)(a)(2), (3) (West 2011). Imposition of the death penalty 1414 AMERICAN CRIMINAL LAW REVIEW [Vol. 48:1371 requires only that the defendant's conduct have been reckless. *Jackson v. State,* 575 So.2d 181 (1991). The felony murder aggravating circumstance does not require greater culpability. FLA. STAT. ANN. § 921.141(5)(d) (West 2011). Non-triggerman are subject to a lesser penalty only if the death was caused by a third-party not involved in the underlying felony. *Id.* § 782.04(1)(3). There is also a lesser penalty for a killing committed without any design to effect death during the commission of a felony not enumerated. *Id.* § 782.04(1)(4). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 921.141(6)(d).

Georgia

Category: Non-triggermen Ineligible

Felony murder is first-degree murder and subject to the death penalty. GA. CODEANN. § 16-5-1(c), (d) (2011). However, to be guilty of felony murder, the defendant must have caused the death. *Hulme v. State,* 544 S.E.2d 138 (2001) ("[U]nder Georgia law, the defendant must directly cause the death of the victim to be convicted of felony murder." (citing *State v. Crane*, 279 S.E.2d 695 (1981)). Accordingly, the death penalty is not authorized for nontriggermen.

Idaho

Category: *Tison* State

Felony murder is first-degree murder and subject to the death penalty. IDAHO CODE ANN. §§ 18-4003(d), 19-2515(1) (2011). The defendant need not have caused the death and the only *mens rea* required is reckless indifference. *Id.* § 19-2515(1). The felony murder aggravating circumstance

does not require greater culpability but additional evidence above that necessary for conviction is required to satisfy the death penalty statute. *Id.* § 19-2515(9)(g); *State v. Wood*, 967 P.2d 702 (1998). Mitigating circumstances are not enumerated. *Id.*

Indiana

Category: Intent State

Every murder in Indiana is subject to the death penalty, including felony murder. IND. CODE §§ 35-42-1-1 & (2), 35-50-2-3(b) (2011) (excepting defendants who were juveniles or suffered mental retardation). However, the felony-murder aggravating circumstance requires that the defendant "committed the murder by intentionally killing the victim." *Id.* § 35-50-2-9(b)(1); *Ajabu v. State*, 693 N.E.2d 921, 935 (Ind. 1998) ("Our cases have repeatedly emphasized that the (b)(1) aggravating factor requires a finding of intentional killing." (citing *Fleenor v. State*, 514 N.E.2d 80 (1987))). Another aggravating circumstance requires only that the victim was also a victim of felony battery,

kidnapping, criminal confinement, or a sex crime, and that the defendant was convicted of the underlying crime, without reference to *mens rea*, however, no cases reflect the use of this aggravator standing alone. *Id.* § 35-50-2-9(b)(13). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 35-50-2-9(c)(4).

Kansas

Category: Intent State

Capital felony murder requires "[i]ntentional and premeditated killing." KAN. STAT. ANN. § 21-3439(a)(1), (4) (2011). There is no felony murder aggravated circumstance. *Id.* § 21-4625. It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 21-4626(4).

Kentucky

Category: *Tison* State

Every murder in Kentucky is subject to the death penalty. KY. REV. STAT. ANN. § 507.020 (West 2011). Murder includes wanton conduct creating a grave risk of death which also results in a death. *Id.* § 507.020(1)(b). The felony murder aggravating circumstance is limited to the underlying crimes of first-degree arson, robbery, burglary, rape and sodomy. *Id.* § 532.025(2)(a)(2). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 532.025(2)(b)(5).

Louisiana

Category: Intent State

First-degree felony murder requires a "specific intent to kill or inflict great bodily harm." LA. REV. STAT. ANN. § 14:30(A)(1) (2011); *State v. Bridgewater*, 823 So.2d 877, 890–91 (La. 2002) (reversing defendant's conviction for capital felony murder when the state failed to prove the defendant, who was not the triggerman, possessed an intent to kill). When intent is lacking, it is second-degree murder with a maximum penalty of life in prison without parole. LA. REV. STAT. ANN. § 14:30.1(A)(2), (B) (2011); *Bridgewater*, 823 So.2d at 890–91 (finding that non-triggerman who lacked intent to kill was properly sentenced for second-degree murder). Mitigating and aggravating factors do not appear to be governed by statute.

Maryland

Category: Non-triggermen Ineligible

Felony murder is murder in the first degree. MD. CODE ANN., CRIM LAW § 2-201(a)(4) (West 2011). However, imposition of the death penalty for felony murder requires that the defendant be a "principal in the first degree." *Id.* §§ 2-202(a)(2)(i), 2-303(g). To be considered a principal in the first degree, the defendant must be the triggerman. *Brooks v. State,* 655 A.2d 1311, 1321 (Md.

Ct. Spec. App. 1995) (noting that "Maryland is among a minority of states that refuse to impose the death penalty on defendants who did not actually kill"). Thus, non-triggermen are not death-penalty eligible.

Mississippi
Category: Intent State
Felony murder is capital murder in Mississippi "with or without any design to effect death." MISS. CODE ANN. § 97-3-19(2)(e) (2011). Before assessing the death penalty, the jury must make a written finding that the defendant at least contemplated the use of lethal force. *Id.* § 99-19-101(7). The Mississippi Supreme Court has construed this language to require that the defendant either killed, attempted to kill, or intended to kill the victim. *Randall v. State*, 806 So.2d 185, 233–34 (Miss. 2001) (overturning a death sentence when the jury did not find that the defendant killed, attempted to kill, or intended a killing take place, even though the defendant was armed with a gun at the time of the crime). Because the finding that the defendant contemplated lethal force is a threshold inquiry, the weighing of aggravators and mitigators does not come into play if no such finding is made. MISS. CODE ANN. § 99-19-101(3) (2011). Nevertheless, it is a mitigating circumstance that the defendant's participation was minor. *Id.* § 99-19-101(6)(d).

Missouri
Category: Felony Murder not Death Eligible
Felony murder is second-degree murder. MO. REV. STAT. § 565.021 (1)(2) (2011) (defining second degree murder). First-degree murder is limited to persons who "knowingly cause[] the death of another person after deliberation upon the matter." *Id.* § 565.020 (defining first-degree murder).

Montana
Category: Intent State
Felony murder is defined as deliberate murder and thus death-penalty eligible. MONT. CODE ANN. § 45-5-102(1)(b),(2) (2011). Felony murder aggravating circumstances require that the underlying felony be either aggravated kidnapping or sex crimes. *Id.* § 46-18-303(1)(a)(vi), (2). However, even in these circumstances, the Supreme Court of Montana has mandated that the state
constitutional standard exceeds *Tison*'s protection, and requires finding intent to kill for non-triggermen. *Vernon Kills on Top v. State*, 928 P.2d 182, 200–07 (Mont. 1996). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 46-18-304(1)(f).

Nebraska
Category: Additional Aggravation Required
Felony murder is murder in the first degree and thus death-penalty eligible. NEB. REV. STAT. § 28-303 (2011). It does not require intent. *Id.* However, felony murder itself does not constitute an aggravating circumstance. *Id.* § 29- 2523(1). Accordingly, some additional aggravation is required, such as the killing of more than one person or a killing for the purpose of covering up a crime. *Id.* It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 29-2523(2)(e).

Nevada
Category: Knowledge of Lethal Force
Felony murder is murder in the first degree and thus death-penalty eligible. NEV. REV. STAT. § 200.030(1)(b), (4)(a) (2011). It does not require intent. *Id.* However, the felony murder aggravating circumstance cannot alone justify the death penalty as construed by the courts because it does not sufficiently narrow the class of crimes eligible. *Id.* § 29-2523(1); *McConnell v. State,* 102 P.3d 606, 620-24 (Nev. 2004). Accordingly, some additional aggravation is required. *Id.*

In addition, it is also necessary to show that the defendant knew that lethal force would be used. NEV. REV. STAT. §§ 200.030(1)(b), (4)(a), 200.033(4) (2011). It is a mitigating circumstance that the defendant's participation was minor. NEV. REV. STAT. § 200.035(4) (2011).

New Hampshire
Category: Additional Aggravation Required
Felony murder is capital murder and thus death-penalty eligible. N.H. REV. STAT. ANN. § 630:1(I)(b), (e), (f) (2011). The definition of capital felony murder is narrow, and may be based only on kidnapping, aggravated felonious assault, and drug offenses. It does require a knowing act, but not intent. *Id.* However, felony murder itself does not constitute an aggravating circumstance. *Id.*
§ 630:5(VII). Accordingly, some additional aggravation is required. *Id.* It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 630:5(VI)(c).

North Carolina
Category: Additional Aggravation Required
Felony murder is murder in the first degree and thus death-penalty eligible. N.C. GEN. STAT. ANN. § 14-17 (West 2011). It does not require intent. *Id.* However, the felony murder aggravating circumstance cannot alone justify the death penalty as construed by the courts. State v. Gregory, 459 S.E.2d 638, 665 (N.C. 1995). Accordingly, some additional aggravation is required. *Id.* It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 15A-2000(f)(4).

Ohio
Category: Intent Required
Felony murder is aggravated murder and thus death-penalty eligible. OHIO REV. CODE ANN. § 2903.01(B) (West 2011). It requires purposeful conduct. *Id.* The felony murder aggravating circumstance requires that the defendant be either the principal offender or have committed the murder with premeditation. *Id.* § 2929.04(A)(7); *State v. Taylor,* 612 N.E.2d 316, 325 (Ohio 1993) (holding that death penalty eligibility requires that a defendant be either a principle or have intent to kill regardless of aider and abettor status). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 2929.04(B)(6).

Oklahoma
Category: Additional Aggravation Required
Felony murder is murder in the first degree and thus death-penalty eligible. OKLA. STAT.ANN. tit. 21, §§ 701.7(B), 701.9(A) (West 2011). It does not require intent. *Id.* However, there is no felony murder aggravating circumstance. *Id.* § 701.12. Accordingly, some additional aggravation is required. *Id.* Mitigating circumstances are not defined by statute.

Oregon
Category: Non-triggermen Ineligible
Felony murder is aggravated murder only if the defendant "personally" committed the murder. OR. REV. STAT. ANN. § 163.115(1)(b) (West 2011), 163.095(2)(d); *State v. Nefstad,* 789 P.2d 1326, 1338–39 (Or. 1990).

Pennsylvania
Category: Felony Murder Ineligible
Felony murder is murder in the second degree whether the perpetrator is a principal or accomplice. PA. CONS. STAT. ANN. § 2502(b) (West 2011).

South Carolina
Category: *Tison* State
In South Carolina, murder is committed with malice aforethought "either express or implied." S.C. CODE ANN. § 16-3-10 (2011). All murder is death penalty eligible. *Id.* §16-3-20(A). The felony murder aggravating circumstance contains no *mens rea* requirement or any requirement that the defendant be the triggerman. *Id.* § 16-3-20(C)(a)(1). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 16-3-20(C)(b)(4).

South Dakota
Category: Additional Aggravation Required
Felony murder is murder in the first degree and thus death-penalty eligible. S.D. CODIFIED LAWS § 22-16-4(2) (2011). It does not require intent. *Id.* However, there is no felony murder aggravating circumstance. *Id.* § 23A- 27A-1. Accordingly, some additional aggravation is required. Mitigating circumstances are not statutorily defined. *Id.*

Tennessee
Category: Knowledge of Lethal Force
Felony murder is murder in the first degree and thus death-penalty eligible. TENN. CODE ANN. § 39-13-202(a)(2), (b), (c)(1) (2011). It does not require intent. *Id.* However, the felony murder aggravating circumstance requires "knowing" conduct, either in commission or in aid of the murder. *Id.* § 39-13- 204(i)(7). Accordingly, some additional aggravation is required under the statute if "knowing" is not shown. Nevertheless, courts have held that non-triggermen can be held vicariously liable for aggravators, undoing the statute's culpability requirement. *Owens v. State,* 135 S.W.3d 742, 762 (Tenn. Crim. App. 1999). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 39-13-204(j)(5).

Texas
Category: *Tison* State
Felony murder is a capital offense in Texas if the defendant "intentionally" commits the murder. TEX. PENAL CODE ANN. § 19.03(a)(2) (West 2011). Although courts have held that non-triggermen can be held vicariously liable so long as the murder was foreseeable under the law of parties statute, *Whitmire v. State,* 183 S.W.3d 522, 526–27 (Tex. App. 2006), they are not eligible for the death penalty absent a finding of deliberateness, which involves either intent, or knowing conduct, Tex. Code Crim. Proc. Ann. art. 37.071(b) ("in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken"); *Green v. State*, 682 S.W.2d 271, 283–287 (Tex. Crim. App. 1985) (affirming a death sentence pursuant to the law of parties statute for a murder committed by one of defendant's co-felons during an armed robbery, reasoning that defendant was a participant in the robbery and should have anticipated that a killing would occur as a result). Mitigating circumstances are not statutorily defined.

Utah
Category: Knowledge of Lethal Force
Felony murder is aggravated murder if the defendant "intentionally or knowingly" commits the murder. UTAH CODE ANN. § 76-5-202(1)(d) (West 2011). The *mens rea* is reduced to the *Tison* requirements in the case of felonies against children. *Id.* § 76-5-202(2).

Virginia
Category: Non-triggermen Ineligible

Felony murder is first-degree murder. VA. CODEANN. § 18.2-32 (2011). Capital felony murder requires that the defendant's conduct was "willful, deliberate and premeditated." *Id.* § 18.2-31(1), (4), (5), (10). Virginia courts have construed this as requiring that only the triggerman is death penalty eligible. *Watkins v. Commonwealth,* 331 S.E.2d 422, 434–35 (Va. 1985).

Washington
Category: Felony Murder Ineligible
Felony murder is first-degree murder. WASH. REV. CODE ANN. § 9A.32.030(c) (West 2011). Aggravated first-degree murder, such as to warrant the death penalty, is limited to premeditated murder with aggravated circumstances. *Id.* §§ 10.95.020, 9A.32.030(a), (c).

Wyoming
Category: Knowledge of Lethal Force
Felony murder is first-degree murder. WYO. STAT. ANN. § 6-2-101(a) (2011). It does not require intent. *Id.* However, the felony murder aggravator requires that the defendant acted with "purpose[] and with premeditated malice." *Id.* § 6-2-102(h)(iv) ("The defendant killed another human being purposely and with premeditated malice and while engaged in, or as an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual assault, arson, burglary, kidnapping or abuse of a child under the age of sixteen (16) years."). It is a mitigating circumstance that the defendant's participation was minor. Id. § 6-2-102(j)(iv). Although Wyoming's Supreme Court relies on *Tison* in conducting proportionality review, *Harlow v. State*, 70 P.3d 179, 203 (Wyo. 2003), it has never construed the felony murder aggravating circumstance to require less than intent for non-triggermen. Moreover, in the single case discussing the felony murder aggravating circumstance, the Wyoming Supreme Court decided that the intent element was constitutionally required in order to adequately narrow death eligibility. *Engberg v. Meyer*, 820 P.2d 70, 87–91 (Wyo. 1991). 2011] EXECUTING THOSEWHO DO NOT KILL 1421

Federal
Category: *Tison* Jurisdiction
Felony murder is first-degree murder in the United States and thus eligible for the death penalty. 18 U.S.C. § 1111(a) (2006). There is no intent requirement. *Id.* A threshold culpability finding requires only that the defendant engaged in violence with reckless disregard. *Id.* § 3591(a)(2)(D). Felony murder is an aggravating circumstance requiring no additional culpability. *Id.* § 3592(c)(1). It is a mitigating circumstance that the defendant's participation was minor. *Id.* § 3592(a)(3).

APPENDIX 2

Aggravating Factors Allowing Imposition of the Death Penalty in California

Section 190.2, California Penal Code

(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:
(1) The murder was intentional and carried out for financial gain.
(2) The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.
(3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.
(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.
(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.
(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.
(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.
(8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.
(9) The victim was a firefighter, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.
(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile

proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.
(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.
(12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.
(13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.
(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.
(15) The defendant intentionally killed the victim by means of lying in wait.
(16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.
(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:
(A) Robbery in violation of Section 211 or 212.5.
(B) Kidnapping in violation of Section 207, 209, or 209.5.
(C) Rape in violation of Section 261.
(D) Sodomy in violation of Section 286.
(E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288.
(F) Oral copulation in violation of Section 288a.
(G) Burglary in the first or second degree in violation of Section 460.
(H) Arson in violation of subdivision (b) of Section 451.
(I) Train wrecking in violation of Section 219.
(J) Mayhem in violation of Section 203.
(K) Rape by instrument in violation of Section 289.
(L) Carjacking, as defined in Section 215.
(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.
(18) The murder was intentional and involved the infliction of torture.
(19) The defendant intentionally killed the victim by the administration of poison.
(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.
(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.
(22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.
(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.
(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.