AN ASSESSMENT OF THE EFFECTIVENESS OF THE UN UNIVERSAL PERIODIC REVIEW: TOWARDS THE ABOLITION OF THE DEATH PENALTY IN THE UNITED STATES OF AMERICA

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ABSTRACT

International law plays an important role in regulating the criminal punishments imposed by states, including capital punishment. Although capital punishment is not prohibited by international law, the United Nations' ultimate goal is worldwide abolition of the death penalty.

The United States of America ('the US') retains the death penalty in thirty-one States, the federal government, and in the military. The US has a 'thorny' relationship with international law, which to some extent can be attributed to the theory of 'American exceptionalism'. This theory allows the US to act 'exceptionally' simply by virtue of it being a super-power state. Despite this, the US does engage with international law through the Universal Periodic Review ('UPR'). The General Assembly of the United Nations ('UNGA') created the UPR in 2006 through Resolution 60/251 to be a universal and intergovernmental peer review process, intended to appraise every UN member state's protection and promotion of human rights.

To date, no scholar has examined the effectiveness of the UPR in the context of the abolition of the death penalty in the US. This thesis contributes to filling that gap in the literature by undertaking a qualitative review of the 2010 and 2015 US UPRs, examining the UPR's role in facilitating the abolition of capital punishment in the US. From this analysis, the author has identified three broad themes within the US UPR regarding capital punishment. Namely, one, the right to a fair trial and due process, two, intellectual disabilities and mental health, and, three, the implementation of a death sentence. From this, the author has identified recommendations to strengthen the UPR mechanism, both generally, and specifically in the context of the abolition of the death penalty in the US.

The potential impact of this research is three-fold. First, it will assist in ensuring the US is held to account to its international obligations whilst it retains the death penalty. Second, it will further the Steikers' 'blueprint for abolition', by providing evidence to show the arbitrary application of the death penalty in the US in violation of international and domestic laws. Third, the strengthening of the UPR will benefit the mechanism generally, for the protection and promotion of human rights globally.

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LIST OF TERMS

AA4RR	Africans in America for Repatriation
ABA	American Bar Association
ACHR	American Convention on Human Rights
ACLU	American Civil Liberties Union
AEDPA	Anti-Terrorism and Effective Death Penalty Act
AHR	Advocates for Human Rights
AI	Amnesty International
APA	American Psychiatric Association
CAT	Committee Against Torture
CERD	Committee for the Elimination of Racial Discrimination
CESR	Center for Economic and Social Rights
CoE	Council of Europe
Commission	Commission on Human Rights
Committee	Human Rights Committee
Compilation Report	Compilation of UN Information
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
DPIC	Death Penalty Information Center
DSM-IV	Diagnostic and Statistical Manual of Mental Disorders, Version 4
DSM-V	Diagnostic and Statistical Manual of Mental Disorders, Version 5
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ECOSOC	Economic and Social Council
HRW	Human Rights Watch
IAC	Ineffective Assistance of Council
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

ICJ	International Court of Justice
JS2	Joint Submission 2
JS17	Joint Submission 17
JS29	Joint Submission 29
JS41	Joint Submission 41
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
ODVV	Organization for Defending Victims of Violence
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organisation for Security and Co-operation in Europe
POTUS	President of the United States
Privy Council	The Judicial Committee of the Privy Council
Quinquennial Report	Capital punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty
Restatement	Restatement of the Law (Third) Foreign Relations Law of the United States
RUDs	Reservations, understandings, and declarations
Safeguards	Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty
SCOTUS	Supreme Court of the United States
SFRC	Senate Foreign Relations Committee
SRE	Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions
SRT	Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
Stakeholder Report	Summary of Stakeholders' Information
State	State of the United States of America
state	United Nations' Member State
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations' General Assembly
UNHRC	United Nations' Human Rights Council

UPR	Universal Periodic Review
USHRN	United States Human Rights Network
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation

PART I

This thesis has three specific aims. First, it intends to ensure the US is adhering to international law whilst it retains the death penalty, through the Universal Periodic Review ('UPR'). Second, it seeks to further the eventual abolition of the death penalty in the United States of America ('US'). To do this, it aims to gather evidence to develop the argument that the death penalty in the US is arbitrarily applied and is therefore a violation of the prohibition against cruel and unusual punishment. Third, it aims to improve the UPR mechanism through its suggested recommendations.

Chapter one provides the introduction to this thesis. Chapter two then examines the US' relationship with international law. This will facilitate a better appreciation for the US' engagement with the UPR, as it is a global human rights mechanism that is based upon international law. The UPR is considered in chapter three, which allows for Part II of the thesis to analyse the 2010 and 2015 US UPRs in the context of the death penalty.

CHAPTER ONE

INTRODUCTION

1.1 The Death Penalty in the United States

Since the death penalty was reinstated in 1976 by the Supreme Court of the United States ('SCOTUS'),[1] it has provoked significant controversy in the US criminal justice system. Almost 1,500 people have been executed since 1976 across the US, and, currently in 2018, thirty-one US states retain the death penalty along with the federal government and the military.[2]

The rate of executions has been steadily declining since 1999, which saw a record high of ninety-eight. This is due to a number of factors considered later in this thesis.[3] However, 2017 bucked the trend and twenty-three people were executed, three more than in 2016.[4] At the time of writing, sixteen people have been executed in 2018.[5]

The US Constitution regulates the application of the death penalty. The Constitution was signed in 1787 and, along with its Amendments, is the supreme law in the US and all State and federal laws must be compatible with it.[6] The Constitution also established the three branches of government – executive, legislative, and judicial. Article I of the Constitution outlines the legislative branch of government, the Congress, which is made up of the Senate and the House of Representatives.[7] Article II provides for the executive power, which is the President of the United States ('POTUS') and the Vice President.[8] Article III provides for the power of SCOTUS, as the head of the judicial branch of government, to adjudicate upon the interpretation of the Constitution.[9] As the US has a federal system of government, each US State also has three branches of government, and the States are considered to be 'laboratories of democracy' within the federal system.[10]

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[1] *Gregg v Georgia* 428 US 153 (1976).
[2] Death Penalty Information Center, 'Number of Executions by State and Region Since 1976' (2018) <https://deathpenaltyinfo.org/number-executions-state-and-region-1976> accessed 24 August 2018; Death Penalty Information Center, 'Facts About the Death Penalty' (18 July 2018) <https://deathpenaltyinfo.org/documents/FactSheet.pdf> accessed 24 August 2018. Correct as at 24 August 2018.
[3] *See*, chapters 4, 5, and 6.
[4] Death Penalty Information Center, 'Executions by Year' (28 June 2018) <https://deathpenaltyinfo.org/executions-year> accessed 24 August 2018.
[5] Ibid. Correct as at 24 August 2018.
[6] American Law Institute, *Restatement of the Law (Third) Foreign Relations Law of the United States* (American Law Institute Publishers 1987) §111 Comment (a) 43 [hereinafter referred to as 'Restatement']; The United States Constitution, Article VI, Clause 2 [hereinafter referred to as 'US Constitution'].
[7] The United States Constitution, Article I.
[8] Ibid Article II.
[9] Ibid Article III.
[10] *New State Ice Co v Liebmann* 285 US 262, 311 (1932).

The use of capital punishment is expressly acknowledged in the Constitution. The Fifth Amendment makes reference to capital crimes and deprivation of life,[11] which applies to the federal government, and is made applicable to the States through the Fourteenth Amendment.[12] In terms of the regulation of the death penalty, the Fifth and Fourteenth Amendments also require due process of law,[13] the Sixth Amendment requires competent counsel in all cases including capital cases,[14] and the Eighth Amendment prohibits cruel and unusual punishment.[15]

The interpretation of the Constitution has developed over time. Particularly relevant for the death penalty is the changing understanding of the Eighth Amendment. In 1910, SCOTUS held in *Weems v. United States* that the Eighth Amendment is 'progressive' and 'may acquire meaning as public opinion becomes enlightened by a humane justice'.[16] Furthermore, in 1958, in *Trop v. Dulles,* SCOTUS held that the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'.[17]

In following this progressive interpretation of the Eighth Amendment, in 1972, SCOTUS placed a moratorium on the death penalty across the US, because of its cruel and unusual application, through the case of *Furman v. Georgia*.[18] However, this was all the five plurality Justices agreed upon. The decision was fractured, with each Justice providing their own opinion on why the death penalty should be struck down, and no Justices joining another's opinion. Justices Brennan and Marshall found that the death penalty *per se* was cruel and unusual punishment,[19] whereas Justices Douglas, Stewart, and White found that it was the current administration of the death penalty that violated the Eighth Amendment, not the punishment in and of itself.[20]

This created the precarious position that, as a principle of constitutional law, the death penalty was only suspended rather than abolished, and it was no real surprise when the moratorium was lifted four years later in the case of *Gregg v. Georgia*.[21] Following the decision in *Furman*, the States had rallied and amended their capital statutes. As such, SCOTUS ruled in a 7-2 decision in *Gregg*, that the death penalty does not automatically violate the Eighth and Fourteenth Amendments.[22] The Court held that in order for a punishment, in this instance a

[11] The United States Constitution, Amendment V.
[12] Ibid Amendment XIV.
[13] Ibid Amendments V, XIV.
[14] Ibid Amendment VI.
[15] Ibid Amendment VIII.
[16] *Weems v United States* 217 US 349, 378 (1910).
[17] *Trop v Dulles* 356 US 86, 101 (1958).
[18] *Furman v Georgia* 408 US 238, 239-40 (1972).
[19] Ibid 305-06, 371.
[20] Ibid 240, 306, 310-11.
[21] *Gregg* (n 1).
[22] Ibid 168.

death sentence, to conform with the Eighth Amendment, it must comport with the evolving standards of decency,[23] and must have a penological justification, in that it must be proportionate to the crime.[24] The majority found that the changes Georgia had made to its death penalty statute were constitutional, and this reinstated the death penalty across the US, insofar as it was consistent with the *Gregg* decision.[25] The modern-day death penalty in the US derives from this reinstatement of capital punishment in 1976.

1.2 International Law and the Death Penalty

International law describes the agreements made between different sovereign governments,[26] and can be traced back to the Treaty of Westphalia.[27] According to Article 38 Statue of the International Court of Justice, there are four sources of international law. First, treaties or conventions, which are codified laws of a bilateral or multilateral nature, the contents of which are negotiated and agreed upon between states. Second, customary international law, which is not codified, but is agreed upon by tradition. Third, norms of *jus cogens*, which refers to fundamental and non-derogable international laws. Fourth, judicial decisions of the international courts.[28]

International law is particularly important for human rights and capital punishment. Historically, documented rights can be traced all the way back to *Magna Carta* on 15 June 1215. Modern-day human rights began to develop following World War II, including through the Universal Declaration of Human Rights ('UDHR').[29] The UDHR set out thirty fundamental principles that every human being has the right to, such as the right to life,[30] the right to be free from torture and cruel, inhuman and degrading treatment,[31] the right to equal protection,[32] and the right to a fair trial.[33] Article 3 UDHR sets out the right to life, but nowhere in the UDHR does it make reference to the death penalty. The *travaux préparatoires* show that states disagreed about whether the UDHR should call for the abolition of the death penalty or allow it as an exception,

[23] Ibid 172-73.
[24] Ibid 182-83.
[25] Ibid 206-07.
[26] This thesis refers only to 'public international law'.
[27] The Peace of Westphalia (24 October 1648).
[28] Statute of the International Court of Justice 59 Stat 1055 (24 October 1945) Article 38.
[29] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).
[30] Ibid Article 3.
[31] Ibid Article 5.
[32] Ibid Article 7.
[33] Ibid Article 10.

so instead decided it should stay silent on the issue.[34] The right to life is a non-derogable right,[35] although there are limited exceptions, including the death penalty.

1.2.1 The United Nations and the Death Penalty

The United Nations ('UN') was created in 1945 to achieve a number of objectives set out in the Charter of the United Nations ('the Charter').[36] These include to 'maintain international peace and security',[37] 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples',[38] and 'achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.[39] Furthermore, the UN was intended to 'be a centre for harmonizing the actions of nations in the attainment of these common ends'.[40] The UN has six organs: the General Assembly ('UNGA'), the Economic and Social Council ('ECOSOC'), the International Court of Justice ('ICJ'), the UN Secretariat, the Trusteeship Council, and the Security Council.[41]

UNGA is made up of all 193 UN member states and 'is the main deliberative, policymaking and representative organ of the UN'.[42] In 1993, UNGA created the Office of the High Commissioner for Human Rights ('OHCHR'),[43] and the Human Rights Council ('UNHRC') was established in 2006, following the dissolution of the Commission on Human Rights ('the Commission').[44] The UNHRC, through its mechanisms including the treaty bodies, special procedures, and UPR, can be used as vehicles to facilitate the abolition of capital punishment, particularly through the international death penalty framework.

1.2.2 The International Death Penalty Framework

Subsequent to the creation of the UDHR, an international death penalty framework began to take shape. This framework is now comprised of the International Covenant on Civil and

[34] William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 24.
[35] UN Human Rights Committee, 'Draft General Comment 36' on 'Article 6 Right to Life' (2017) para 2 [hereinafter referred to as 'General Comment 36 2017'].
[36] Charter of the United Nations 1945, 1 UNTS XVI.
[37] Ibid Article 1(1).
[38] Ibid Article 1(2).
[39] Ibid Article 1(3).
[40] Ibid Article 1(4).
[41] Ibid Article 3.
[42] Ibid Article 9, 10; United Nations, 'Main Organs' <www.un.org/en/sections/about-un/main-organs/index.html> accessed 24 August 2018.
[43] UNGA Resolution 48/141 (20 December 1993).
[44] UNGA Resolution 60/251 (3 April 2006).

Political Rights ('ICCPR') and its Second Optional Protocol, the ECOSOC Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty ('Safeguards') and the UN Secretary-General's reports, and the UNGA Resolutions on a moratorium on the death penalty. The framework is regulated by the UN, in particular through the UNHRC and OHCHR.[45]

International Covenant on Civil and Political Rights

When the ICCPR was adopted in 1966, Article 6 provided for the right to life, but with the exception of capital punishment for the 'most serious crimes' in Article 6(2).[46] The *travaux préparatoires* of the ICCPR show that it took from 1947 until 1966 for the drafting to be completed, and the right to life provision, with its death penalty exception, took up most of the drafters' time.[47] This was because the drafting states were at odds about whether to include the death penalty as an exception or not.[48] Uruguay and Colombia wanted Article 6 to expressly prohibit the death penalty, but this was disregarded even by other abolitionist states, on the basis that it may discourage ratification of the ICCPR by retentionist states.[49] Therefore, the right to life provision of the ICCPR was adopted with an exception for death sentences for the most serious crimes.[50] Despite this, two provisions of the ICCPR expressly reference 'abolition', with Article 6(6) noting that '[n]othing in this [A]rticle shall be invoked to delay or to prevent the abolition of capital punishment'.[51] Article 6(2) also provides that the exception to the right to life for capital punishment for the 'most serious crimes' was only for 'countries which have not abolished the death penalty'.[52]

Other provisions of the ICCPR are important for capital punishment, including Article 14 which sets out the basics required for a trial to be 'fair'. The 'equality of arms' is a principle referred to by the UN and the European Court of Human Rights ('ECtHR') in considering that both the prosecution and defence should be equal under the right to a fair trial.[53] The equality of arms principle includes the rights under Article 14(3), such as the right to a public trial without undue delay, the right to counsel and to have adequate time to prepare a defence, the right to cross-

[45] OHCHR, 'Death Penalty' <www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx> accessed 24 August 2018.
[46] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [hereinafter referred to as 'ICCPR'].
[47] Schabas (n 34) 46-47.
[48] *See*, ibid chapter 2.
[49] Ibid 64-5.
[50] ICCPR (n 46) Article 6(2).
[51] Ibid Article 6(6).
[52] Ibid Article 6(2).
[53] *See,* UNHRC, 'General Comment No 32' on 'Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial (2007) UN Doc CCPR/C/GC/32; *Khuseynov and Butaev v Tajikistan* Communication No 1263-1264/2004 UN Doc CCPR/C/94/D/1263-1264/2004 (2008); Schabas (n 34) 121.

examination, and the right to an interpreter where necessary.[54] These rights provide vital protections for capital defendants.

In 1989 the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty ('Second Optional Protocol'), was enacted.[55] There are currently eighty-five state parties to the Second Optional Protocol, with two signatories, and 110 countries have taken no action on it, including the US.[56] All state parties to the Second Optional Protocol agree not to execute any person within its jurisdiction,[57] and to take measures to abolish the death penalty.[58]

ECOSOC Safeguards

In 1984, ECOSOC adopted its Safeguards.[59] They are considered to be the minimum standard for states retaining the death penalty, and the UN Secretary-General has noted that '[s]tates that have not ratified or acceded to the relevant treaties are nevertheless bound by international standards, notably those set out in the [S]afeguards'.[60] Two further Resolutions were passed by ECOSOC in 1989 and 1996, strengthening the initial Safeguards and providing further minimum protections.[61]

Every five years, the UN Secretary-General provides a report on 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty' ('quinquennial report'), drawing upon the UN member states' administration of the death penalty and implementation of the Safeguards. The Secretary-General also provides a yearly supplement to the quinquennial report to the UNHRC, also referred to as the report on the question of the death penalty, which will focus on a specific aspect of the death penalty. For example, in 2017, the yearly supplement focused on equality and non-discrimination within capital punishment.[62]

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[54] ICCPR (n 46) Article 14.
[55] Second Optional Protocol to the International Covenant on Civil and Political Rights (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414 [hereinafter referred to as 'Second Optional Protocol'].
[56] OHCHR, 'Status of Ratification Interactive Dashboard' <http://indicators.ohchr.org> accessed 24 August 2018.
[57] Second Optional Protocol (n 55) Article 1(1).
[58] Ibid Article 1(2).
[59] ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1984/50 (25 May 1984) [hereinafter referred to as 'Safeguards 1984'].
[60] ECOSOC 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General' UN Doc E/2015/49 para 61 (13 April 2015) [hereinafter referred to as 'Report of the Secretary-General 2015'].
[61] ECOSOC 'Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1989/64 (24 May 1989) [hereinafter referred to as 'Safeguards 1989']; ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1996/15 (23 July 1996) [hereinafter referred to as 'Safeguards 1996'].
[62] UNHRC, 'Yearly Supplement of the Secretary-General to his Quinquennial Report on Capital Punishment' (22 August 2017) UN Doc A/HRC/36/26. *See,* chapter 4.3 for an analysis of racial discrimination and the death penalty in the US within the UPR.

General Assembly Resolutions

The UNGA periodically votes on Resolutions on a global moratorium on the death penalty. The sixth and most recent vote took place in December 2016 and saw 117 votes in favour, forty against, and thirty-one abstentions, showing a clear majority in favour of abolishing the death penalty worldwide.[63] The US voted against the Resolution, on the basis that the abolition of the death penalty must be decided upon domestically by each member state.[64] The US provided detailed remarks on why it had voted against the moratorium in 2016 but, following the Trump Administration's election into office, access to these comments on the State Department website has been restricted from the public.[65]

1.2.3 Other Sources of International Law

Other international and regional agreements are also relevant to the US and the death penalty. These include the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the European Convention on Human Rights, and the African Charter on Human and Peoples' Rights.

The American Declaration of the Rights and Duties of Man ('American Declaration') pre-dates the UDHR by seven months, as it was adopted in May 1948.[66] Article 1 provides that '[e]very human being has the right to life, liberty and the security of his person', and provides no exception for capital punishment.[67]

The American Convention on Human Rights ('ACHR') came into force in 1969, and the US has signed but not ratified it. The ACHR also provides for the right to life in Article 4(1),[68] although there is an exception to the right to life of the death penalty for the most serious crimes in Article 4(2).[69] Chapters VI and VII of the ACHR established the Inter-American Commission on Human Rights ('IACHR'), which oversees the protection of human rights and adherence with the ACHR.[70] This has included hearing petitions from those on death row in the US.[71]

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[63] UNGA Res 71/187 (19 December 2016).
[64] US Mission to the UN, 'Explanation of Vote at the 71st UN General Assembly Third Committee on "Moratorium on the Use of the Death Penalty"' (17 November 2016) <https://usun.state.gov/remarks/7632> accessed 24 August 2018.
[65] Ibid.
[66] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L V/II.82 Doc 6 Rev 1, 17 (1992).
[67] Ibid Article I.
[68] American Convention on Human Rights, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969) Article 4(1).
[69] Ibid Article 4(2).
[70] Ibid Chapter VI and VII
[71] Francoise Hampson, Claudia Martin, & Frans Viljoen, 'Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa' (2018) I Con, Vol. 16 No. 1, 161–186, 169.

The European Convention on Human Rights ('ECHR') came into force in 1950, and Article 2 provides for the right to life, with an exception for the death penalty.[72] However, as society has progressed, and the Council of Europe ('CoE') has developed, amendments have been made to the ECHR, including to the exceptions to the right to life. Protocol 6 to the ECHR was passed in 1983, prohibiting the use of the death penalty for all state parties to the ECHR except in times of war.[73] Furthermore, in 2002, reflecting the abolitionist views of the CoE membership, Protocol 13 to the ECHR was enacted, prohibiting the death penalty in all circumstances[74] and prohibiting any derogation from this.[75]

The African Charter on Human Rights and Peoples ('African Charter') came into force in 1981.[76] Article 4 provides that '[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.[77]

The landmark death penalty case of *S v. Makwanyane* in 1994, wherein South Africa abolished the death penalty, compared the South African Constitution to Article 4 ACHR, Article 2 ECHR, and Article 4 African Charter.[78] This was on the basis that they all provided exceptions to the right to life from the death penalty, compared with the South African Constitution which did not.[79] This was also an important decision as it marked the point where there were more abolitionist states than retentionist across the world. Furthermore, when Representative Henry B. Gonzalez called for an amendment to the US Constitution abolishing the death penalty in 1995, he cited the decision in *Makwanyane*.[80]

As evidenced by both international and regional laws, the global community is working towards worldwide abolition of the death penalty. Although the right to life has an exception in capital punishment, that exception is being relied upon less and less. Whilst the US does not always actively engage with these international and regional agreements, they create a corpus of case law and principles that inform legal reasoning in the context of the death penalty.

[72] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 2.
[73] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Protocol 6 1983.
[74] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 2003, Article 1.
[75] Ibid Article 2.
[76] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).
[77] Ibid Article 4.
[78] *S v Makwanyane and Another* (CCT3/94) (1995) ZACC 3 para 36.
[79] Ibid.
[80] Extension of Remarks, 141 Cong Rec E1386-87 (Daily edn 30 June 1995).

1.2.4 The Universal Periodic Review and the Death Penalty

The UPR was created in 2006 by UNGA Resolution 60/251 to be a universal and intergovernmental peer review process intended to appraise every UN member states' protection and promotion of human rights.[81] Resolution 5/1 clarifies that the UPR is based upon the Charter, the UDHR, the human rights treaties to which the state is a party to, voluntary commitments and pledges, and international humanitarian law.[82] In terms of the practicalities of the UPR, each state is to be reviewed in cycles; the first cycle took four years to complete, whereas the second cycle was extended to four and a half years.[83] The third cycle is currently underway and is due to complete in 2020. In order for the UPR to function effectively, it encompasses many different stages and requires cooperation from a range of actors.

The death penalty comes under the UPR's remit as a human rights issue. The UPR can be used to further the global abolition agenda of the UN, by raising awareness of problems inherent within capital punishment in a transparent forum at the international level. Therefore, this thesis provides a qualitative review of the UPR's effectiveness through an analysis of the 2010 and 2015 US UPRs in the context of the abolition of the death penalty. From this, the author identifies recommendations to strengthen the UPR mechanism, both generally, and specifically for the facilitation of the abolition of capital punishment in the US.

1.3 Current Gap in the Research

The UPR is a relatively new human rights mechanism, as its first cycle only began in 2008. Although more research is being conducted on the UPR as the cycles progress, most are studies either on one UN state, one specific human rights issue, or one particular aspect of the UPR.[84] Whilst this thesis does not have a dedicated literature review chapter, the literature is reviewed throughout.

What a review of the literature found was that there is a specific gap in the academic discourse regarding an analysis of the effectiveness of the UPR in the context of the death penalty in the US. Therefore, in order to fill a lacuna in the scholarship and the policy approaches to the UN, this thesis has three specific aims. First, it intends to ensure the US is adhering to international law whilst it retains the death penalty, through the UPR. Second, it seeks to further the

[81] UNGA Resolution 60/251 (3 April 2006).
[82] UNGA Resolution 5/1 (18 June 2007) para 1.
[83] UNHRC Resolution 16/21 (25 March 2011) para 3.
[84] *See, e.g.,* James Gomez and Robin Ramcharan (eds) *The Universal Periodic Review of Southeast Asia* (Palgrave Macmillan 2017); Frederick Cowell & Angelina Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (2012) Human Rights Law Review 12:2, 341-352; Gareth Sweeney & Yuri Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council' (2009) Human Rights Law Review 9:2 203-223.

eventual abolition of the death penalty in the US. To do this, it aims to gather evidence to develop the argument that the death penalty in the US is arbitrarily applied and is therefore a violation of the prohibition against cruel and unusual punishment. Third, it aims to improve the UPR mechanism through its suggested recommendations.

1.4 Theoretical Framework

In *Gregg v. Georgia*, the majority opinion identified the two purposes of capital punishment – retribution and deterrence.[85] However, these theories do not align with the US' retention of the death penalty, for example, studies have shown that the death penalty is not a deterrent to violent crime.[86] Therefore, the theory of American exceptionalism is relied upon to explain why the US has not yet abolished the death penalty.

This thesis explores the utility of the theory of American exceptionalism for the US' retention of the death penalty. Although it discusses the differing interpretations of American exceptionalism and capital punishment in the US,[87] this thesis challenges the reliance upon American exceptionalism as a reason for the continued retention of the death penalty. Instead, it seeks to further the eventual abolition of the death penalty in the US by using the UPR to gather evidence to develop the argument that capital punishment is arbitrarily applied and is therefore a violation of the Eighth Amendment and the ICCPR. This can further be achieved through Carol and Jordan Steikers' blueprint for abolition.[88] The blueprint for abolition of the death penalty in the US utilises the 'proportionality doctrine'.[89] This doctrine is two-fold, involving firstly, 'objective evidence' and, secondly, SCOTUS' 'own judgment' on Eighth Amendment issues.[90]

The US also takes an exceptionalist approach to international law, particularly international human rights. Although this thesis identifies the exceptionalist attitude to international human rights through the US' engagement with the UPR, Part II argues that this mechanism can be used to challenge the US' approach to international law, if the changes suggested in chapter seven are implemented.

[85] *Gregg* (n 1) 183.
[86] *See,* Michael L Radelet & Traci L Lacock, 'Do Executions Lower Homicide Rates?: The Views of Leading Criminologists' (2009) 99 J Crim L & Criminology 489.
[87] *See,* chapter 2.5.
[88] *See,* chapter 2.5.3 for a detailed analysis of the blueprint for abolition.
[89] Carol S Steiker & Jordan M Steiker, *Courting Death: The Supreme Court and Capital Punishment* (HUP 2016) 271, 278.
[90] Ibid 282, 278.

1.5 Methodology

The methodology utilised for this thesis was predominantly a qualitative, textual analysis of the 2010 and 2015 US UPR documents. All reviews are fully recorded on the UN webcast and all documents are freely available on the UPR website.[91] In order to comprehensively collect the UPR data for this research, all of the documents from the 2010 and 2015 US UPRs were read, and all references to the death penalty were collated into a spreadsheet. This data was then analysed and the author identified three broad themes within the death penalty that were critical to the US UPRs: the right to a fair trial, intellectual disabilities and mental illness as a categorical exemption, and the implementation of a death sentence. These three death penalty themes were then researched, considering international law and domestic US law, and other secondary sources. This included, other UN documents, including from the treaty bodies, special procedures, ECOSOC, and UNGA. International case law, particularly from the ICJ, was also assessed, alongside other academic research, and both governmental and non-governmental publications.

This created a basis for the UPR data collected to then be analysed in the context of these three death penalty themes. Through this analysis, it was considered how this data could be used to achieve the three key aims of this thesis (see section 1.3 above). This analysis showed both the strengths and weaknesses of the UPR, which then allowed recommendations to improve the UPR process to be formulated by the author.

Furthermore, due to the nature of the thesis, and the documents relied upon, English and American-English spelling conventions are used interchangeably without note throughout. The content of this thesis is up to date as at 24th August 2018.

1.6 Structure of Thesis

This thesis is comprised of two parts. Part I considers the bilateral and multilateral international relations between the law and its institutions, in the context of the US and the abolition of the death penalty. In order to do this, chapter two considers the US' complex relationship with international law, through its political and adjudicative systems, and the role American exceptionalism plays in the retention of the death penalty. Chapter three then introduces the UPR mechanism, including setting out how it works and the US' engagement with it.

An analysis of the 2010 and 2015 US UPRs on the question of the abolition of the death penalty is the focus of Part II. In order to do this, the death penalty is analysed under three

[91] UNHRC, 'Universal Periodic Review' <www.ohchr.org/en/hrbodies/upr/pages/UPRMain.aspx> accessed 24 August 2018.

headings: the right to a fair trial, intellectual disabilities and mental illness, and the implementation of a death sentence. These three areas were identified by the author for two reasons: first, it tracks the evolution of the death penalty from trial to execution, and, second, these were themes that emerged from the analysis of the 2010 and 2015 US UPRs.

Chapter four considers the right to a fair trial within the US death penalty and how the UPR approaches this. Under this heading, the right to counsel, racial discrimination, wrongful convictions, and foreign nationals' rights are examined. Chapter five analyses the US UPRs through mental illness and the death penalty, both through the current categorical exemption for those suffering with intellectual disabilities, and the potential categorical exemption for those with all serious mental illnesses. Chapter six analyses the implementation of a death sentence within the US UPRs. To do this, it starts with the harsh conditions on death row, including the use of solitary confinement and the death row phenomenon. The second part of the chapter then considers the method of execution, including how US courts and international law has dealt with the botched lethal injection executions.

From the analysis in chapters four, five, and six, chapter seven provides suggested recommendations as to how the UPR mechanism can be improved. These suggested improvements would increase the effectiveness of the UPR in facilitating the abolition of the death penalty in the US, and also benefit the mechanism generally, for the protection and promotion of human rights globally. The reforms argued for in this chapter fill a gap in the current research and policy approach to the UPR.

CHAPTER TWO

THE UNITED STATES AND INTERNATIONAL LAW

2.1 The Status of International Law in the US

The UPR mechanism is based upon international law. Therefore, before an analysis of the US' engagement with the UPR on the death penalty can take place, the US' relationship with international law must firstly be examined. The US has a thorny relationship with international law and, unlike other countries around the world, it can neither be neatly categorised as a 'monist'[1] nor 'dualist'[2] state. The American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States ('Restatement') defines international law to include customary law, international agreements, and 'general principles common to the major legal systems of the world'.[3] A key source of international law engaged with in this thesis is 'international agreements', often referred to as treaties, which are codified bilateral or multilateral agreements between states.[4]

The US Constitution is the supreme law in the US and all State and federal laws must be compatible with it.[5] The Supremacy Clause of Article VI, §2 of the Constitution provides that, 'all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land',[6] and the Restatement clarified that this means international agreements have the same status as federal law and, as such, are the supreme law over State laws.[7] Furthermore, the Restatement also noted that '[t]he view, once held, that treaties are not subject to constitutional restraints is now definitely rejected'.[8]

Although, in the present day, the US is generally considered to have a problematic relationship with international law, in cases as early as *The Paquete Habana* in 1900, SCOTUS noted that '[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly

[1] J G Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 Brit YB Intl L 66. Within a monist system, both domestic and international law exist within the states' single legal system. Whereas, in a dualist system, for international law to become part of a states' law, domestic legislation is required.
[2] Ibid.
[3] In its interpretation of international law, the courts in the US and the US Department of State often look to the Restatement. 'International agreements' can be termed in different ways such as treaty, convention, agreement, protocol, covenant, charter, statute, act, declaration, *concordat*, exchange of notes, agreed minute, memorandum or agreement, memorandum of understanding, and *modus vivendi*, *see* American Law Institute, *Restatement of the Law (Third) Foreign Relations Law of the United States* (American Law Institute Publishers 1987) §301 Comment (a) 149 [hereinafter referred to as 'Restatement'].
[4] For a detailed discussion of how treaties are made, *see* Malcolm N Shaw, *International Law* (7th edn, CUP 2014) chapter 16.
[5] Restatement (n 2) §111 Comment (a) 43 (Restatement); The United States Constitution, Article VI, Clause 2.
[6] The United States Constitution, Article VI, Clause 2.
[7] Restatement (n 2) §111(1).
[8] Ibid §302 Comment (b) 153.

presented for their determination'.[9] However, in practice, US engagement with modern-day international law is more complex than the Framers could have envisaged, particularly due to the evolution of international law from its bilateral native to multilateral application and protection of individual rights. Further complexity is added by the federal system in the US, with the federal government retaining some powers,[10] and the individual State governments retaining others,[11] and the extent to which international law can bind the US States as well as the federal government is often disagreed upon.

The US' engagement with international law can broadly be broken down into two categories: the political framework and the adjudicative framework. Part 2.3 of this chapter considers the political framework in the US regarding international law, through an analysis of the US' accession to the ICCPR. This includes an evaluation of the Senate's role in treaty making, the complexities of reservations, understandings, and declarations, and self-executing and non-self-executing treaties. Furthermore, once the US has ratified the treaty, it is then for the courts to interpret the international agreement, which can cause conflict between State and federal jurisdictions. Part 2.4 considers the adjudicative framework, analysing the different approaches to international law and the practices of foreign nations by different SCOTUS Justices when interpreting the US Constitution. Part 2.5 of the chapter engages with the theory of American exceptionalism, with a consideration of how the death penalty may be abolished in the US.

2.2 Key Legal Principles: Comity and Finality

The principles of comity and finality must be established to form the basis of the arguments in this thesis. This is because the UPR mechanism itself is an exercise in international comity through the solidification of human rights, and the death penalty is an issue that raises comity interests on both the international stage and the domestic US level. Furthermore, whilst domestic law seeks to achieve finality in the US, international law seeks to move away from it in terms of the abolition of capital punishment. This section of the chapter will consider these principles in the context of the US' relationship with international human rights and the death penalty.

[9] *The Paquete Habana* 175 US 677, 700 (1900).
[10] The United States Constitution, Article I, Section 8.
[11] The United States Constitution Amendment X.

2.2.1 Comity

The principle of comity originated in international law, and is used 'for maintaining intergovernmental relationships in a reciprocal procedural recognition of national legislation, judicial decisions, and other interests represented within bilateral and multilateral communications'.[12] In practice, comity within the US federal structure is multifaceted and its importance has long been recognised by SCOTUS.[13] This thesis considers the role of comity and international law within the US capital judicial system and, as such, three strands can be identified: first, comity in international law, second, comity in domestic US law, and, third, comity in the US death penalty.

Comity in International Law

Comity within international law describes the states' bilateral and multilateral relationships, such as through treaties and judgments of international courts, including the ICJ. In the context of this thesis, there are two parts to this: first, the US' relationship with international law, and, second, international law ensuring that the US provides protections at the domestic level.

An example of the US' comity relationship with international law can be seen though the US entering into an international agreement, such as the ICCPR discussed in section 2.3. On one hand, the US is limiting its sovereignty by consenting to adhere to the principles in the agreement, but it is also exercising its sovereignty by being protected by the provisions of the treaty.

Essentially, 'international comity allows the [US] to decide for itself how much recognition or restraint to give in deference to foreign government actors'.[14] This is evidenced by the US' comity engagement with the UN. On one hand, the US engages in international comity on the international level each time it ratifies a treaty, cooperates with the special procedures, and takes part in the UPR. However, through its engagement with these mechanisms, the US avoids various death penalty issues. For example, it places reservations against treaties, as demonstrated in section 2.3 below, and notes UPR recommendations, as analysed in Part II of this thesis.

International comity also sees individuals having access to meaningful review throughout capital proceedings due to international law. This is provided for by the protections in Article 14(3) ICCPR,[15] which provide for the minimum guarantees to be afforded to anyone facing a

[12] Jon Yorke, 'Comity, Finality, and Oklahoma's Lethal Injection Protocol' (2017) 69 Okla L Rev 545, 553.
[13] *See, e.g., Hilton v Guyot* 159 US 113 (1895).
[14] William S Dodge, 'International Comity in American Law' (2015) 115 Colum L Rev 2071, 2077.
[15] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 14 [hereinafter referred to as ICCPR].

criminal charge, and the 1984 Safeguards four, five, and six, regarding the protections specifically for those facing a death sentence.[16] These protections are engaged with in chapter four.

Comity in Domestic US Law

As the US has a federal system of government, with power being shared between the federal and State governments, domestic comity takes place within the US, through the reciprocal relationship between the federal government and the US States. This has also been recognised by SCOTUS.[17] Article I, Section 8 of the US Constitution sets out the enumerated powers of Congress to make certain laws.[18] All other powers that are not granted to Congress, or prohibited by the Constitution, are given to the States by way of the 10th Amendment to the Constitution.[19] These powers granted to the States include criminal justice issues, including a choice over which punishments to inflict. Whilst the US States generally retain the power to legislate over its criminal justice system, there is still a comity relationship between the States and federal government, in that SCOTUS, and other federal courts, can rule upon the constitutionality of State punishments, including the death penalty.

Comity in the US Death Penalty

William S. Dodge has argued that it is a 'myth of international comity…that the executive branch enjoys a comparative advantage in making comity determinations'.[20] In fact, both federal and State courts also engage in international comity and SCOTUS has done so in key capital decisions.[21] Section 2.4 below engages with the different interpretations of international law by SCOTUS justices in death penalty cases.

Furthermore, US State courts, in their role as laboratories of democracy,[22] also engage in international comity. This is referred to as 'adjudicative comity',[23] which is essentially 'deference to foreign courts' by US courts.[24] Adjudicative comity has been seen in practice in the death penalty context, for example, through the decision of the Oklahoma Court of Criminal

[16] ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1984/50 (25 May 1984) Nos 4-6 [hereinafter referred to as 'Safeguards 1984'].
[17] *See, eg, Austin v New Hampshire* 420 US 656, 660, 666 (1975); *Allen v McCurry* 449 US 90, 96 (1980); *Marrese v American Academy of Orthopaedic Surgeons* 470 US 373, 380 (1985).
[18] The United States Constitution, Article I, Section 8.
[19] The United States Constitution Amendment X.
[20] Dodge (n 15) 2132.
[21] *See, e.g., Atkins v Virginia* 536 US 304, FN21 (2002); *Roper v Simmons* 543 US 551, 575-78 (2005).
[22] *See, New State Ice Co v Liebmann* 285 US 262, 311 (1932).
[23] Dodge (n 15) 2105.
[24] Ibid.

Appeals in *Torres v. Oklahoma*,[25] and the Supreme Court of Nevada in *Gutierrez v. Nevada*,[26] as analysed in chapter 4.5.2.2.

However, comity within the death penalty has been limited by the Anti-Terrorism and Effective Death Penalty Act ('AEDPA').[27] AEDPA was, in part, created to limit the procedural and substantive postconviction avenues for capital appellants to speed up the capital process in order to achieve finality.[28] This has caused friction with comity, in that the review of State and federal decisions, and, indeed, the review of international decisions, is not being carried out correctly and constitutionally, which in turn causes a 'false finality'.[29]

2.2.2 Finality

The modern understanding of finality and its importance in criminal litigation is derived from Paul M. Bator's taxonomy.[30] He detailed four reasons why finality is necessary. First, the need to conserve resources within the legal system by not relitigating the same issue.[31] Second, revisiting the same issue would negatively affect the judiciary.[32] Third, Bator argued that '[a] procedural system which permits endless repetition of inquiry into facts and law' would oppose the deterrent and rehabilitative aims of criminal law.[33] Fourth, if there is no finality to a case, it would have a negative psychological effect upon those involved in it.[34]

International law's exception of capital punishment to the right to life in Article 6(2) ICCPR allows for finality through an execution in domestic law. However, in general, international law seeks to move away from this finality through the abolition of the death penalty. Finality interests are prevalent throughout a capital case, beginning with an arrest with the possibility of a capital charge, and continuing throughout proceedings, until finality is achieved through either execution or release from death row.[35] Three main strands of finality can be identified within the US capital judicial system: first, finality and capital crimes, second, finality of process in the death penalty, and, third, finality and methods of execution. These three strands are briefly explained below. This section does not provide a detailed analysis on the particular issues raised regarding the death penalty, as this analysis is carried out in Part II of the thesis.

[25] *Torres v State* 120 P 3d 1184, 1186 (Okla 2005).
[26] *Gutierrez v Nevada* No 53506 2012 WL 4355518 (2012).
[27] The Anti-Terrorism and Effective Death Penalty Act 1996, 28 USC § 2244.
[28] Ibid. *See* Lee Kovarsky, 'AEDPA's Wrecks: Comity, Finality, and Federalism' (2007) 82 Tul L Rev 443, 447.
[29] *See,* Yorke (n 13) 565.
[30] Paul M Bator, 'Finality in Criminal Law and Federal Habeas Corpus for State Prisoners' (1963) 76 Harv L Rev 441.
[31] Ibid 451.
[32] Ibid.
[33] Ibid 451-52.
[34] Ibid 452-53.
[35] *See,* Yorke (n 13) 565.

Finality and Capital Crimes

Finality begins within the capital system when a person is arrested, charged, and sentenced to death. To legitimately achieve this finality, international and domestic standards must be followed. For example, Article 6(2) ICCPR states that a 'sentence of death must be imposed only for the most serious crimes'.[36] Moreover, SCOTUS has maintained that since its decision in *Gregg v. Georgia*, the Court's 'jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes'[37] and that 'the death penalty must be reserved for the "worst of the worst"'.[38]

Finality of Process in the Death Penalty

There are also finality interests within the process to produce a death sentence. Once the process, i.e. the trial, has been carried out, either a conviction or acquittal will be rendered. If convicted, a life without the possibility of parole or death sentence will be handed down. This is regulated by both international and domestic laws and, to legitimately achieve finality, these laws must be adhered to. Article 14 ICCPR guarantees the right to a fair trial[39] and the Safeguards detail the minimum protections for those sentenced to death.[40] Furthermore, the US Constitution provides its own safeguards in capital cases. The Fifth and Fourteenth Amendments require due process of law, the Sixth Amendment requires competent counsel in all cases including capital cases, and the Eighth Amendment prohibits cruel and unusual punishment.[41] Chapter four analyses the right to a fair trial in capital cases, within the context of the UPR.

Finality and Methods of Execution

Finality is achieved by either an execution or the release from death row, and there are also finality interests in the time spent on death row and the method of execution used. Article 7 ICCPR prohibits the infliction of cruel, inhuman or degrading treatment, which encompasses conditions on death row and the method of execution.[42] The Human Rights Committee ('the Committee') – the treaty body created to monitor compliance with the ICCPR – has stated that, when considering a method of execution, the US 'must take into account the prohibition against causing avoidable pain and recommends the State party to take all necessary steps

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[36] ICCPR (n 16).
[37] *Atkins* (n 22) 319.
[38] *Kansas v Marsh* 548 US 163, 206 (2006) (Souter J, dissenting).
[39] ICCPR (n 16) Article 14.
[40] Safeguards 1984 (n 17); ECOSOC 'Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1989/64 (24 May 1989) [hereinafter referred to as 'Safeguards 1989']; ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1996/15 (23 July 1996) [hereinafter referred to as 'Safeguards 1996'].
[41] The United States Constitution, Amendments V, XIV, VI, VIII.
[42] ICCPR (n 16) Article 7.

to ensure respect of [A]rticle 7 of the Covenant'.[43] Furthermore, problems with a method of execution also pertain to an Eighth Amendment challenge under the cruel and unusual punishment clause.[44] These issues are considered further in chapter six.

Lee Kovarsky noted that '[s]ocial acceptance of final judgment reflects the confidence in the institutions and procedures that produce it. Finality therefore matures as an interest only upon completion of some reliable quantum process'.[45] Therefore, if the system is flawed, as Part II of this thesis seeks to show the capital system in the US is, then the finality interests identified above cannot legitimately be achieved in death penalty cases.

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The next section of this chapter considers the political framework within the US regarding international law. In order to do this, it considers the political framework through the lens of the US accession to the ICCPR.

2.3 The Political Framework in the US: The International Covenant on Civil and Political Rights

At the international level, once a multilateral treaty has been negotiated and agreed upon between states, state parties will then decide whether to become a signatory, and then whether it will ratify or accede to each individual treaty. The state has a sovereign right to ratify a treaty or not; a state can take no action on a treaty, or become a signatory only, or fully ratify it. However, once a state becomes a party to a treaty, the *pacta sunt servanda* principle applies, meaning that treaties are binding and states must perform them in good faith, a principle which the Vienna Convention on the Law of Treaties ('VCLT') enumerated.[46] The VCLT governs the general law of treaties, although the US is a signatory only to it.

An example of the US' inconsistent approach to international law, particularly concerning human rights, can be seen through the political process the federal government must go through in order to ratify a treaty. A key example of this in the context of the death penalty is the US' treatment of the seminal human rights agreement, the ICCPR.

[43] UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee – United States of America' (7 April 1995) UN Doc CCPR/C/79/Add.50 para 31.
[44] *See, Baze v Rees* 553 US 35 (2008); *Glossip v Gross* 135 S Ct 2726 (2015).
[45] Kovarsky (n 29) 454.
[46] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331; 8 ILM 679 (1969) [hereinafter referred to as 'VCLT'].

The ICCPR, with its two Optional Protocols, forms one third of the 'International Bill of Rights' alongside the UDHR, and the International Covenant on Economic, Social and Cultural Rights. The ICCPR's intention is to codify every human beings' civil and political rights. It entered into force internationally on 23 March 1976, although it had been open for signatories since 1966.[47] According to the Supremacy Clause of the US Constitution, once a treaty has been proposed, it will be passed to the Senate for its advice and consent before the President can ratify it.[48] However, whilst Democratic President Carter had signed the ICCPR on 5 October 1977, and passed it to the Senate to consider, the Senate did not provide its approval on the treaty until Republican President H.W. Bush's request in 1991.[49] 'Domestic and international events at the end of 1979, including the Soviet invasion of Afghanistan and the hostage crisis in Iran'[50] are cited as the reasoning for why the Senate did not make a decision on the ratification of the ICCPR following President Carter's passing of the treaty to the Senate. It is also noted that '[t]he Reagan Administration did not indicate any interest in ratifying the Covenant'.[51]

Following President Bush's request, the ICCPR was submitted to the Senate Foreign Relations Committee ('SFRC') - a sub-committee of the Senate, specifically mandated to consider, debate, and provide recommendations to the Senate on treaties.[52] A treaty will not be ratified without consideration and approval by the SFRC, granting the SFRC and the Senate a great deal of power regarding international law. When submitting the ICCPR to the SFRC for consideration, the Bush Administration also proposed a list of conditions to be attached to the ICCPR upon US accession.[53] These 'conditions' are more commonly known as reservations, understandings, and declarations ('RUDs').

2.3.1 Reservations, Understandings, and Declarations

In proposing the list of RUDs to be attached, the Bush Administration's intention was to accede to the ICCPR whilst ensuring it would have little effect in the US. In fact, 'Bush assured the Senate that ratification would require no change in [US] practice'.[54] What President Bush proposed were five reservations, and a further eight understandings and declarations to be

[47] ICCPR (n 16).
[48] The United States Constitution, Article II, § 2, Clause 2.
[49] *See* Senate Executive Report No 102-23 (1992) [hereinafter referred to as 'Senate Committee Report']; John Quigley, 'The International Covenant on Civil and Political Rights and the Supremacy Clause' (1993) 42 DePaul L Rev 1287,1287.
[50] Senate Committee Report (n 50) 2.
[51] Ibid.
[52] United States Senate Committee on Foreign Relations, 'Committee History and Rules' <www.foreign.senate.gov/about/history/> accessed 24 August 2018. For political context, in both 1991, when the negotiations on the ICCPR began in the Senate, and in 1992, when the ICCPR was ratified, the Democratic Party held the Senate.
[53] Senate Committee Report (n 50) 2.
[54] Quigley, 'The International Covenant on Civil and Political Rights and the Supremacy Clause' (n 50) 1287.

lodged against the ICCPR.[55] The SFRC considered the RUDs proposed by the Bush Administration and held a public hearing on 21 November 1991.[56] Subsequently, the requisite two-thirds majority of the Senate recommended these RUDs be attached to the ICCPR. Thereafter, the process was finalised by President Bush signing the instrument of ratification on 1 June 1992 and placing it in the requisite depository of the UN Secretary-General on 8 June 1992. This concluded the final steps required domestically, and the ICCPR with the fourteen RUDs attached came into force in the US on 8 September 1992.[57]

According to the VCLT, a 'reservation' is defined as 'a unilateral statement…made by a state…whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that [s]tate', and it can be lodged at any time between signature and ratification.[58] States have the sovereign right to place reservations against a treaty, although there is an exception to this in Article 19(c) VCLT, which provides that the reservation must not be 'incompatible with the object and purpose of the treaty'.[59] The US has been criticised by UN member states and scholars alike for its reservations lodged against Articles 6 and 7, on the basis that these provisions are non-derogable and are therefore incompatible with the object and purpose of the ICCPR.[60] In fact, these reservations are described by William A. Schabas as 'far and away the most extensive reservations to the capital punishment provisions of any international human rights treaty'.[61]

Attaching reservations to human rights treaties, such as the ICCPR, is an example of American exceptionalism to international law, as the US will sign treaties but then 'exempt itself from their provisions' through such reservations.[62] American exceptionalism is examined further in section 2.5.

The Reservation Against Article 6 ICCPR

Article 6 ICCPR provides that 'every human being has the inherent right to life',[63] whilst also stating that there is an exception to this right to life for capital punishment.[64] Article 6 then sets

[55] Senate Committee Report (n 50) 6. Whilst this is what was proposed, what was eventually passed was five reservations, five understandings and four declarations, *see* Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong Rec S4783-84 (Daily edn 2 April 1992).
[56] Senate Committee Report (n 50) 2.
[57] Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights (n 56).
[58] VCLT (n 47) Article 2(d).
[59] Ibid Article 19(c)*; See also,* Restatement (n 2) §313 (1)(c).
[60] UN Human Rights Committee, 'Comments of the Human Rights Committee – United States of America' (n 44) para 14; William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 79; Chrissy Fox, 'Implications of the United States' Reservations and Non-Self-Executing Declaration to the ICCPR for Capital Offenders and Foreign Relations' (2003) 11 Tul J Int'l & Comp L 303, 307.
[61] Schabas, *The Abolition of the Death Penalty in International Law* (n 61) 79.
[62] Michael Ignatieff, 'Introduction: American Exceptionalism and Human Rights' in Michael Igantieff (ed), *American Exceptionalism and Human Rights* (PUP 2005) 3.
[63] ICCPR (n 16) Article 6(1).
[64] Ibid Article 6(2).

out minimum standards for those states still administering the death penalty – including that the death penalty must only be administered for the 'most serious crimes'[65] and that those who committed a crime whilst under the age of eighteen and pregnant mothers should not be executed.[66]

The reservation lodged by the US against Article 6 is as follows:

> The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.[67]

John Quigley has argued that this reservation 'clearly signifie[d] an effort on the part of the [US] to protect and perpetuate current practice rather than to conform to the [ICCPR]'.[68] Although it was promulgated that the reservation was lodged purely due to the differing opinions on executing juveniles, Schabas argues that 'the reservation extends far beyond the question of juvenile executions and seeks to exclude the [US] from virtually all international norms concerning the death penalty'.[69] The SFRC's Report on the ICCPR confirmed this, as it noted that the reservation was lodged due to 'the sharply differing view taken by many of our future treaty parties on the issue of the death penalty (including what constitutes "most serious crimes" under Article 6(2))'.[70] A US State Department representative further substantiated this in 2006, when they were questioned by the Committee following the 2005 decision in *Roper v. Simmons*, wherein SCOTUS ruled that juvenile executions are unconstitutional.[71] The Committee asked the State Department representative whether the reservation against Article 6 could now be removed, given the decision in *Roper*. However, the representative confirmed that the reservation would not be withdrawn, in part due to the fact that its reservation to Article 6 involved more than the juvenile death penalty.[72]

In fact, if the reservation against Article 6 was removed, the US would be in breach of Article 6(2) which states that a 'sentence of death may be imposed only for the most serious crimes'.[73] The ICCPR does not provide a definition of 'most serious crimes', but in its General Comment 36, the Committee asserted that '[t]he term "the most serious crimes" must be read restrictively

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[65] Ibid.
[66] Ibid Article 6(5).
[67] Senate Committee Report (n 50) 11.
[68] John Quigley, 'Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights' (1993) 6 Harv Hum Rts J 59, 74.
[69] Schabas, *The Abolition of the Death Penalty in International Law* (n 61) 80.
[70] Senate Committee Report (n 50) 11.
[71] *Roper* (n 22).
[72] Robert Harris, Assistant Legal Advisor, 'US Delegation Response to Oral Questions from the Members of the Committee' (18 July 2006).
[73] ICCPR (n 16) Article 6(2).

and appertain only to crimes of extreme gravity, involving intentional killing'.[74] However, the US continues to execute those who have not actually committed murder. A recent example being Kelly Gissendaner, who was executed in Georgia in September 2015 for malice murder of her husband, despite her not carrying out the murder herself and not being present when the murder took place.[75] The Committee further noted in its General Comment 36 that 'a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty'.[76] Therefore, the US would be in breach of Article 6(2) if it removed the reservation.

The Reservation Against Article 7 ICCPR

The US also lodged the first and only reservation against Article 7 of the ICCPR.[77] Article 7 provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment',[78] which is similar to the protection afforded by the Eighth Amendment of the US Constitution which prohibits 'cruel and unusual punishment'.[79] Article 7 also codified the *jus cogens* norm prohibiting torture or cruel, inhuman and degrading treatment.[80] As shown in Part II of this thesis, Article 7 covers a number of issues relating to capital punishment that the Eighth Amendment does not, such as the harsh conditions on US death rows, the 'death row phenomenon', and certain methods of execution.[81]

The reservation lodged by the US against Article 7 is as follows:

> The United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.[82]

The SFRC stated that this reservation was lodged due to the fact 'the Bill of Rights already contains substantively equivalent protections'.[83] However, the SFRC also admitted that it attached this reservation 'because the Human Rights Committee like the European Court of

[74] UN Human Rights Committee, 'Draft General Comment 36' on 'Article 6 Right to Life' (2017) para 39 [hereinafter referred to as 'General Comment 36 2017']. The Committee provides periodic 'General Comments' on the interpretation of Article 6 ICCPR.
[75] *Gissendaner v Georgia* 532 S E 2d 677, 681-84 (2000).
[76] UN Human Rights Committee, 'Draft General Comment 36' on 'Article 6 Right to Life' (2017) (n 75) para 39.
[77] *See,* William A Schabas, 'Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States still a Party?' (1995) 21 Brook J Int'l L 277, 289.
[78] ICCPR (n 16) Article 7.
[79] The United States Constitution, Amendment VIII.
[80] *See,* UNGA, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (10 April 2014) UN Doc A/HRC/25/60 para 40; Questions Relating to the Obligation to Prosecute or Extradite *(Belgium v Senegal)* 2009 ICJ Rep 139, 99.
[81] *See,* chapter six.
[82] Senate Committee Report (n 50) 12.
[83] Ibid, referring to the Eighth Amendment protections.

Human Rights had adopted the view that prolonged judicial proceedings in cases involving capital punishment could in certain circumstances constitute such treatment' that is contrary to Article 7.[84] In fact, the reservation was a direct response to the case of *Soering v. United Kingdom*, wherein the ECtHR found that if Soering was deported to Virginia, the length of time spent on death row in harsh conditions would lead to the death row phenomenon, constituting a violation of Article 3 ECHR's protection against inhuman and degrading treatment.[85] Furthermore, comparisons were drawn between Article 7 ICCPR and Article 3 ECHR regarding the 'death row phenomenon',[86] which is examined further in chapter 6.3.1.

The SFRC concluded that, under Article 7, the US could be in contravention of international law by continuing to administer the death penalty as currently practiced, and as such lodged the reservation against it.[87] The SFRC thereafter attempted to justify this reservation by assuring the international community that the US would adhere to its own version of cruel and unusual punishment. However, not only are the protections afforded by the Eighth Amendment not as broad as those under Article 7, Article 27 VCLT provides that domestic law cannot be used to justify non-performance of a treaty, yet this is exactly what the US has done through its reservation to Article 7.[88] This is another example of American exceptionalism, with the US clearly relying on its current laws and practices to isolate itself from international human rights, *prima facie* blocking the abolition of the death penalty.[89]

Are the Reservations to Articles 6 and 7 Against the 'Object and Purpose' of the ICCPR?

Articles 6 and 7 protect non-derogable rights, and Article 7 protects a *jus cogens* norm. It can therefore be questioned whether the reservations the US lodged against them are valid, on the grounds that they undermine the object and purpose of the ICCPR. The Restatement agrees that a reservation must not be 'incompatible with the object and purpose of the agreement',[90] but says that this brings with it 'uncertainty and possible disagreement' and therefore 'the standard is intended to be an objective one'.[91]

M. Cherif Bassiouni stated that the lodging of the reservations constitutes a *de facto* rewriting of the treaty.[92] If this reasoning is followed, it can be concluded that the US is currently adhering to an alternate version of the ICCPR. This is consistent with Schabas' view that these

[84] Senate Committee Report (n 50) 12.
[85] *Soering v United Kingdom* (1989) 11 EHRR 439, 99.
[86] Ibid 88.
[87] Senate Committee Report (n 50) 12.
[88] VCLT (n 47) Article 27.
[89] Ignatieff (n 63) 8.
[90] Restatement (n 2) §313 Comment (1)(c).
[91] Ibid §313 Comment (c).
[92] M Cherif Bassiouni, 'Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate' (1993) 42 DePaul L Rev 1169, 1173.

reservations call into question whether the US is in practice a party to the ICCPR at all.[93] Schabas argued that either, the invalid reservations lodged by the US 'can be severed or separated from the [US] accession to the treaty' meaning that the US is actually bound by the entirety of the ICCPR, or 'if the invalid reservations cannot be separated from [US] accession, then the [US] is not a party to [the ICCPR]'.[94] As Schabas further argued, '[i]t is not plausible to conclude that the [US] should remain bound by the [ICCPR], with the exception of the death penalty provisions',[95] nor is it plausible for the US to be adhering to a different version of the ICCPR than the other state parties.

Although the IACHR and the Committee have both found that reservations lodged against non-derogable treaty provisions will not automatically be invalid,[96] the Committee concluded that the US' reservations against Article 6(5) and Article 7 are invalid due to them being incompatible with the object and purpose of the ICCPR.[97] Furthermore, the reservation against the prohibition of executing minors prompted eleven objections from other state parties to the ICCPR on the basis that such a reservation went against the object and purpose of the treaty.[98]

Schabas has asserted that the US should have known that the reservations would be invalid as they were lodged against non-derogable provisions of the ICCPR,[99] in that they are 'rights so fundamental and so essential that they brook no exception, even in emergency situations'.[100] As such, Schabas has concluded the reservations can be severed from the US' accession to the ICCPR, meaning that the US is a party to the treaty, including Articles 6 and 7.[101] This was also the position of the Committee in its General Comment 24/52 in 1994, wherein the Committee stated that '[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation'.[102] In support of this viewpoint, Schabas cited the ECtHR rulings in *Belilos v. Switzerland* and *Loizidou v. Turkey* wherein the court found the reservations lodged by Switzerland and Turkey against the ECHR were invalid and,

[93] Schabas, 'Invalid Reservations to the International Covenant on Civil and Political Rights' (n 78) 316-17.
[94] Ibid 278.
[95] Ibid 317.
[96] Schabas, *The Abolition of the Death Penalty in International Law* (n 61) 82-83, citing *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)* Advisory Opinion OC-3/83 (8 September 1983) Inter-Am Ct HR (Ser A) No 3 (1983) para 61; UN Human Rights Committee, General Comment 24 (52), General comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant (1994) UN Doc CCPR/C/21/Rev1/Add6 para 12.
[97] UNCHR, 'Comments of the Human Rights Committee – United States of America' (n 44) para 14.
[98] ICCPR. Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain and Sweden raised issues with the reservation. VCLT (n 47) Article 19(c) states that a reservation may not be lodged against a treaty if it is 'incompatible with the object and purpose of the treaty'.
[99] Schabas, 'Invalid Reservations to the International Covenant on Civil and Political Rights' (n 78) 323-25.
[100] Schabas, *The Abolition of the Death Penalty in International Law* (n 61) 82.
[101] Schabas, 'Invalid Reservations to the International Covenant on Civil and Political Rights' (n 78) 323-25.
[102] UN Human Rights Committee General Comment 24, General Comment 24 (52) (n 97) para 18.

importantly, that the invalid reservations were severable, meaning that the states were bound by the whole of the ECHR.[103] Schabas further noted that the US has shown its intention to be bound by the ICCPR in its entirety through its engagement with the drafting of the ACHR. Although the US is a signatory only to the ACHR, it includes very similar provisions to the ICCPR and, aside from questions about the juvenile death penalty, the US delegate engaged in the ACHR negotiations and did not raise any objections regarding the death penalty provisions.[104]

However, Curtis Bradley and Jack Goldsmith disagree that the US reservations contradict the 'object and purpose' of the ICCPR, relying on the fact that 'approximately one-third of the parties to the ICCPR made reservations to over a dozen substantive provisions'.[105] Bradley and Goldsmith further argue that 'there is no basis in international law' for the conclusion that the US' reservations are severable from the ICCPR due to their invalidity, relying upon the principle that 'in treaty relations a state cannot be bound without its consent'.[106] They conclude by saying that either the reservations are valid or the US is not a party to the ICCPR, but that they cannot be bound by the Articles they have placed reservations against.[107] Although it is correct that states have the sovereign right to choose whether to ratify and be bound by a treaty and to lodge RUDs, Bradley and Goldsmith's argument fails to consider the non-derogable nature of the provisions. Furthermore, the US is the only party with reservations lodged against Articles 6 and 7, which refutes their argument that one-third of states have lodged reservations against the ICCPR. The issue is not that the US has lodged reservations generally, but that these two particular reservations are lodged against non-derogable provisions, which go against the object and purpose of the ICCPR.

Therefore, this thesis agrees with Schabas' argument that the reservations are invalid and severable, and the US is bound by the ICCPR in its entirety. This conclusion, that the US is a party to the treaty in its entirety, also means that the US is in breach of the ICCPR Articles 6 and 7, as demonstrated in Part II of this thesis.

The Helms Proviso

Alongside the RUDs, a further proviso was recommended by the SFRC. Nicknamed the 'Helms Proviso', after its creator Senator Jesse Helms, it states that:

[103] Schabas, 'Invalid Reservations to the International Covenant on Civil and Political Rights' (n 78) 319-23, citing *Belios v Switzerland* (10328/83) (1988) ECHR 4; *Loizidou v Turkey* (15318/89) (1995) ECHR 10.
[104] Schabas, 'Invalid Reservations to the International Covenant on Civil and Political Rights' (n 78) 322-23.
[105] Curtis A. Bradley and Jack L. Goldsmith, 'Treaties, Human Rights, and Conditional Consent' (2000) 149 U Pa L Rev 399, 433.
[106] Ibid 437, citing, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* 1951 ICJ 15, 21 (28 May 1951).
[107] Bradley & Goldsmith (n 106) 438-39.

> Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.[108]

The SFRC also 'suggested that [POTUS] not communicate the proviso to the [UN] Secretary General when he deposited the instrument of ratification' on the basis that this was a matter regarding the US Constitution, which is a domestic issue and therefore not of international importance.[109] President Bush adhered to this recommendation from the Senate and did not inform the UN of the added proviso.[110]

The Helms proviso 'appears to exempt the [US] from the obligation to protect a right more broadly than it is protected by the [US] Constitution'.[111] This conflicts with the Committee's recommendation that despite the US attaching a declaration stating that the ICCPR would be a non-self-executing treaty, the US should 'ensure that effective remedies are available for violations of the Covenant, including those that do not, at the same time, constitute violations of the domestic law of the [US]'.[112] The SFRC contradicts this, noting that whilst '[t]he overwhelming majority of the provisions in the Covenant are compatible with existing [US] domestic law', if international law does not adhere to the Constitution it will not prevail.[113] The Helms Proviso also violates Article 31 VCLT that '[a] treaty shall be interpreted in good faith'.[114] Bassiouni asserted that '[t]his open-ended approach to treaties is incompatible with international law, much as it is incompatible with common sense and good judgment'.[115] This is also an example of the complex comity relationship the federal government has with international law, as noted in section 2.2.1 above.

2.3.2 Self-Executing vs. Non-Self-Executing Treaties

Equally as important (and controversial) in defining the relationship between the US and international law is the declaration lodged by the US that Articles 1 to 27 of the ICCPR are non-self-executing.[116] The concept of self-executing treaties originated in the US itself,[117] but

[108] Senate Committee Report (n 50) 24.
[109] Quigley, 'The International Covenant on Civil and Political Rights and the Supremacy Clause' (n 50) 1306-08.
[110] Ibid 1307.
[111] Ibid.
[112] UN Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of the United States of America' (23 April 2014) UN Doc CCPR/C/USA/CO/4 para 4(c).
[113] Senate Committee Report (n 50) 4.
[114] VCLT (n 47) Article 31.
[115] Bassiouni, 'Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate' (n 93) 1180.
[116] Senate Committee Report (n 50) 19.
[117] Yuji Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis' (1986) 26 Va J Intl L 627, 627, citing *Foster v Neilson* 27 US (2 Pet) *253 (1829).

has since been adopted by the global community and developed into an established component of international law.[118] In the context of treaties such as the ICCPR, if the treaty is considered to be self-executing, once it has been ratified, it will automatically become law in the ratifying state. If the treaty is considered to be non-self-executing, as the US declared the ICCPR to be, then it will not become law in the ratifying state until domestic legislation has been passed to implement it.

The SFRC explained in its report that 'the intent [of the Declaration was] to clarify that the Covenant will not create a private cause of action in the [US] courts' and this was because the SFRC believed that '[US] law generally complies with the [ICCPR]; hence, implementing legislation is not contemplated'.[119] However, this declaration has caused much confusion and differing interpretation in the US; so much so that the US Court of Appeals for the Fifth Circuit declared that '[t]he self-execution question is perhaps one of the most confounding in treaty law'.[120]

Despite the SFRC stating clearly that the intent of the declaration is to prevent a private cause of action, courts and scholars alike have been unable to agree upon what this means in practice. Some scholars, such as Carlos Vasquez and Kristen Carpenter, take the view of the SFRC – that it will simply not allow a private cause of action unless there is domestic legislation giving the ICCPR authority.[121] Vasquez also added that, 'even without a "private cause of action", private individuals may enforce such treaties defensively if they are being sued or prosecuted under statutes that are inconsistent with treaty provisions'.[122]

Some courts have also utilised the SFRC's definition of non-self-executing. For example, in an unreported case in the District of Colorado, the court substantiated its ruling that the non-self-executing declaration provides for no private right of action by citing '[d]ozens of courts' that have agreed with this point.[123] However, the Southern District Court of Florida interpreted the non-self-executing declaration more narrowly, by stating that '[a]s a non-self-executing treaty, the ICCPR is not judicially enforceable, and therefore, does not provide [the

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[118] *See,* Albert Bleckmann, 'Self-Executing Treaty Provisions' in R Bernhardt (ed), *Encyclopaedia of Public International Law 7* (Elsevier Science Publishers 1984) 414.
[119] Senate Committee Report (n 50) 19.
[120] *United States v Postal* 589 F 2d 862, 876 (5th Cir 1979).
[121] *See generally,* Carlos Manuel Vasquez, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 Am J Int'l L 695; Kristen D A Carpenter, 'The International Covenant on Civil and Political Rights: A Toothless Tiger?' (2000) 26 NC J Intl L & Com Reg 1.
[122] Vasquez (n 122) 720.
[123] *Smith v Bender* 2008 WL 2751346, 7 (D Col 11 July 2008) citing '*Hain v Gibson* 287 F 3d 1224, 1243 (10th Cir 2002) ('Even if ... the above-quoted reservation were void...it is clear that the ICCPR is not binding on the federal courts'); *see also Leombruno v Craven* 2007 WL 2265119 (D Id 2007) (unpublished); *Clancy v Office of Foreign Assets Control* 2007 WL 1051767 (E D Wis 2007) (unpublished); *Martinez–Lopez v Gonzales* 454 F 3d 500, 502 (5th Cir 2006); *Brightwell v Lehman* 2006 WL 931702 (W D Pa 2006) (unpublished); *Reaves v Warden* 2002 WL 535398 (M D Pa 2002) (unpublished); *Beazley v Johnson* 242 F 3d 248, 267 (5th Cir 2001); *Buell v Mitchell* 274 F 3d 337, 372 (6th Cir 2001); *Ralk v Lincoln County Ga* 81 F Supp 2d 1372, 1380 (S D Ga 2000); *Jama v INS* 22 F Supp 2d 353, 365 (DNJ 1998); *White v Paulsen* 997 F Supp 1380, 1387 (E D Wa 1998); *Igartúa De La Rosa v United States* 32 F 3d 8, 10 n 1 (1st Cir 1994)'.

defendant] with a defense'.[124] According to Vasquez's argument above, this ruling is incorrect and in violation of international law, as the ICCPR can be used as a defence, even without a private cause of action.[125]

In stark comparison to the narrow holding in Florida, First Circuit Judge Lipez, in his concurring opinion in *Igartúa v. US*,[126] found that '[t]he Senate's declaration that the ICCPR is non-self-executing is *ultra vires* with respect to the ratification process and as such that declaration is not binding on the courts'.[127] Quigley agreed with the First Circuit's view that the Senate was acting *ultra vires*.[128] In support of his argument Quigley noted that US courts often hold treaty provisions to be self-executing, and so there would be no reason why the US could not do so in the case of the ICCPR, as Judge Lipez did in *Igartúa*.[129] However, Carpenter contended that the treaties Quigley considered in coming to this conclusion did not have express non-self-executing declarations lodged against them as the ICCPR does.[130] Moreover, the Restatement provides that '[c]ourts in the [US] are bound to give effect to international law and to international agreements of the [US], except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation',[131] and there is currently no domestic legislation in place giving the ICCPR effect in the US. Whilst Quigley has made a valid argument, case law shows that *Igartúa* was an exception to the rule and the courts generally follow the view of the Restatement, meaning that appeals on these grounds are very unlikely to succeed.

SCOTUS' most recent view on the definition of self-executing was provided in *Medellín v. Texas*.[132] In a narrow interpretation of the notion of non-self-executing treaties, the majority opinion of the Court, delivered by Chief Justice Roberts, stated in a footnote:

> Even when treaties are self-executing in the sense that they create federal law, the background presumption is that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts".[133]

[124] *In re Extradition of Hurtado* 622 F Supp 2d 1354, 1357 (SD Florida 2009).
[125] Vasquez, 'The Four Doctrines of Self-Executing Treaties' (n 122) 720.
[126] *Igartúa v US* 626 F 3d 592 (1st Cir 2010).
[127] Ibid 625.
[128] Carpenter, 'The International Covenant on Civil and Political Rights' (n 122) 24, citing John Quigley, 'The Rule of Non-Inquiry and Human Rights Treaties' (1996) 45 Cath U L Rev 1213, 1230.
[129] Ibid.
[130] Carpenter, 'The International Covenant on Civil and Political Rights' (n 122) 24.
[131] Restatement (n 2) §111(3).
[132] *Medellin v Texas* 552 US 491 (2008).
[133] Ibid FN3, citing Restatement (n 2) §907 Comment (a).

This was in response to the fact that the VCCR, the underlying treaty in this case, was 'understood at all times to be a self-executing treaty'.[134]

These cases signify a widely inconsistent approach being taken by courts across the US regarding what the non-self-executing declaration means in practice. Such difference in interpretation was raised by the Committee when it provided its comments on the initial US report in 1995. The Committee found that 'members of the judiciary at the federal, [S]tate and local levels have not been made fully aware of the obligations undertaken by the [s]tate party under the Covenant'.[135] As identified above, this is an ongoing issue as courts are essentially left to their own devices to interpret the declaration, leading to judicial fragmentation across the US.

Notwithstanding the differing interpretations by State and federal courts alike, it appears that the intention of the SFRC was clear – the ICCPR should not create a 'private cause of action' in the US. This is further evidenced by the US in its initial report to the Committee stating that the non-self-executing declaration will not prevent US courts 'from seeking guidance from the [ICCPR] in interpreting [US] law'.[136]

However, case law shows that appeals relying on the ICCPR from death row inmates will be unsuccessful. For example, in *Buell v. Mitchell*, the Sixth Circuit heard an appeal from an Ohio state inmate who had been sentenced to death in 1984 for the murder and sexual assault of an 11-year-old girl.[137] Amongst his grounds for appeal was an international element; Buell argued that 'Ohio's death penalty statute violate[d] the Supremacy Clause' as it did not comply with the ICCPR.[138] The Sixth Circuit held that his international law argument was 'wholly meritless',[139] as the ICCPR does not call for abolition of the death penalty and, in fact, Article 6(2) acknowledges the existence of the death penalty.[140] Whilst this is correct, the court failed to add that Article 6(6) states that '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any [s]tate [p]arty to the present Covenant'.[141] Furthermore, as Schabas asserted, the *travaux préparatoires* of the ICCPR 'indicate that the general purpose of [A]rticle 6…is the limitation of the death penalty, with a view to its eventual abolition'.[142] The Sixth Circuit's reasoning for dismissing Buell's claim appeared to be in direct conflict with Article 6(6); the court was using reference to the death penalty in Article 6(2) to

[134] *Medellin v Texas* 552 US 491 (2008), Brief of International Court of Justice Experts as *Amici Curiae* in Support of Petitioner (No 06-984) 2007 WL 1886207 *8. For further discussion of the VCCR issue, *see* chapter 4.5.
[135] UNCHR, 'Comments of the Human Rights Committee – United States of America' (n 44) para 15.
[136] Ibid para 11.
[137] *Buell* (n 124) 344.
[138] Ibid 370.
[139] Ibid.
[140] Ibid 370-72.
[141] ICCPR (n 16) Article 6(6).
[142] Schabas, 'Invalid Reservations to the International Covenant on Civil and Political Rights' (n 78) 209.

continue administration of the death penalty. The previous Special Rapporteur on extrajudicial, summary and arbitrary executions, Christof Heynes, clarified this point in 2015 by stating that, '[t]he fact the death penalty may have a foothold in [A]rticle 6(2), dealing with the right to life, may thus not serve as an argument against the contention that the modern interpretation of rights…demands an end to this form of punishment'.[143] Therefore, the US courts should not be relying upon Article 6(2) as a refusal to consider a defence under the ICCPR, as the Sixth Circuit did in *Buell*.

The non-self-executing declaration showed the US' 'desire to gain a reputation as a supporter of human rights, all the while avoiding enforcement of those rights domestically'.[144] The SFRC itself stated that the US had been viewed as 'hypocritical' by other nations for criticising human rights in other countries but not having ratified the ICCPR.[145] By acceding to the ICCPR, but then making it non-self-executing, this, in theory, would allow the US to continue criticising other nations for their human rights records whilst avoiding criticism itself. However, in practice this has not been the case. The US came under fire from states and scholars alike for these RUDs – to date eleven states have objected to them.[146] This is further evidenced by figures from UPR Info – the leading non-governmental organisation on the UPR – showing the top issue recommended on in both US UPRs in 2010 and 2015 was 'international instruments'.[147] This included calls from states for the US to remove its RUDs from the ICCPR,[148] indicating that the international community is irked by this treatment of international law by the US.

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Section 2.3 has considered how the executive and legislative branches of government deal with international law and the death penalty. To understand the role that the UPR can play in the abolition of capital punishment in the US, it is also important to examine how the judicial branch of government considers international law. Therefore, section 2.4 considers how SCOTUS has approached international human rights when interpreting the US Constitution on the question of the death penalty.

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[143] UNGA 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2015) UN Doc A/70/304 para 70.
[144] Fox (n 61) 311.
[145] Senate Committee Report (n 50) 3.
[146] Objections were lodged by Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain and Sweden. Notably all European states.
[147] UPR Info, 'Statistics of Recommendations' <www.upr-info.org/database/statistics/index_sur.php?fk_sur=186&cycle=1> & <www.upr-info.org/database/statistics/index_sur.php?fk_sur=186&cycle=2> accessed 24 August 2018.
[148] *See,* UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (4 January 2011) UN Doc A/HRC/16/11; UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (20 July 2015) UN Doc A/HRC/30/12.

2.4 The Adjudicative Framework in the US: The Role of the Supreme Court[149]

Since the early 1800s, SCOTUS has afforded weight to both international law and the laws and customs of foreign nations.[150] In *The Paquete Habana*, Justice Gray stated that 'international law is part of our law'.[151] More recently, international law has also been used to interpret the Constitution. For example, the pivotal decision in modern Eighth Amendment jurisprudence came in the 1958 case of *Trop v. Dulles*, wherein the Court held that the Eighth Amendment of the US Constitution 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'.[152] In coming to its decision, SCOTUS made reference to the international community, took into account the punishments of other 'civilized nations', and referenced a UN survey in ruling that the sentence of denationalisation is unconstitutional.[153] This interpretation of the Eighth Amendment is still relied upon by SCOTUS, and is an example of the theory of living constitutionalism, in that the Constitution is not a static document and its interpretation can develop over time as society progresses.[154]

In relation to the death penalty, Carol and Jordan Steiker have identified the nuanced role of SCOTUS, in that since the death penalty's reinstatement in 1976, there has been 'intensive, top-down, constitutional regulation of [capital punishment] by the federal courts, led by [SCOTUS]'.[155] Furthermore, in engaging with this regulation, SCOTUS has relied upon international law and the consensus of other nations in a number of seminal death penalty cases. However, these decisions involving international law and the death penalty, and particularly regarding the interpretation of the Eighth Amendment, have been met with fierce dissents from the conservative side of the Court. Section 2.4 of this chapter analyses how the judicial branch of government has approached international law to interpret the US Constitution in capital punishment cases. To evaluate this, three categories have been identified: first, the theory of the US Constitution taking prominence over international law; second, the theory of international law applying only when it aligns with the US Constitution; and, third, the theory of using international law to assist with the interpretation of the US Constitution.

[149] This thesis considers cases up until the end of the 2017 Supreme Court term in June 2018.
[150] *See, Thirty Hogsheads of Sugar v Boyle* 13 US (9 Cranch) 191 (1815); *Marbury v Madison* 5 US Cranch (1 Cranch) 137, 177 (1803). *See also,* Restatement (n 2) §111(2).
[151] *The Paquete Habana* 175 US 677, 700 (1900).
[152] *Trop v Dulles* 356 US 86, 101 (1958).
[153] Ibid 102-03.
[154] *See generally,* David A Strauss, *The Living Constitution* (OUP 2010); Jack Balkin, *Living Originalism* (HUP 2011).
[155] Carol S Steiker & Jordan M Steiker, 'Lessons for Law Reform from the American Experiment with Capital Punishment' (2014) 87 S Cal L Rev 733, 733-34.

2.4.1 Theory of Prominence of US Constitution Over International Law

A number of SCOTUS justices are, or were, constitutional originalists – believing that the US Constitution should be interpreted as the Framers intended when it was written in 1787.[156] In recent decades, prominent originalist justices include Chief Justice Rehnquist and Justice Thomas. Under the Roberts Court, the stand-out originalist justice has, thus far, been Justice Antonin Scalia. Although Justice Scalia no longer sits on the Court following his passing in 2016, his opinions, both majority and dissenting, offer clear insight into the theory of the US Constitution taking prominence over international law. Furthermore, his replacement on the Court, Justice Neil Gorsuch, has shown that he takes a very similar originalist stance to Justice Scalia in his opinions,[157] indicating that Justice Scalia's opinion on international law in death penalty jurisprudence will continue on through Justice Gorsuch's decisions.

Justice Scalia's disdain for international law being used to interpret the Constitution in death penalty jurisprudence was evidenced in his dissent in *Atkins v. Virginia*, wherein the majority of the Court held that it is contrary to the Eighth Amendment and therefore unconstitutional to execute 'mentally retarded' persons.[158] In a footnote in the majority opinion, Justice Stevens made reference to an Amicus Curiae brief submitted by the European Union ('EU') which stated that the 'world community' overwhelmingly disapproves of executing 'mentally retarded' persons.[159] This was just one sentence in a footnote, but it was intensely criticised by Justice Scalia.[160] His dissent, joined by Chief Justice Rehnquist and Justice Thomas, scathingly stated that 'the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of…members of the so-called "world community"'.[161] Justice Scalia went on to state that the views of the 'world community' are 'irrelevant' and that its 'notions of justice are (thankfully) not always those of our people'.[162] This strong reaction to such a small reference to the viewpoint of the EU demonstrates the battle between the SCOTUS justices regarding international laws and practices. However, Harold Hongju Koh notes that we are living in 'an increasingly globalized society' and as such

[156] Originalism is the theory that "wish[es] to tie interpretation [of the Constitution] back to the time when the law was enacted," *see* George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 60; *See also,* Balkin (n 155).
[157] During Justice Gorsuch's Confirmation Hearings, he was questioned about international law and noted that 'as a general matter…it is improper to look abroad when interpreting the Constitution', *see,* 'Judge Gorsuch*:* International Law' (*C-SPAN* 22 March 2017) <www.c-span.org/video/?c4662742/judge-gorsuch-international-law> accessed 24 August 2018; *see,* Mary Welek Atwell, 'Capital Punishment and Federalism' in Christopher P Banks (ed) *Controversies in American Federalism and Public Policy* (Routledge 2018) 73; *see,* Brianna Frank, 'Supreme Court Death Penalty Jurisprudence and an Ardent Call for Abolition' (*Harvard Civil Rights-Civil Liberties Law Review*, 25 October 2017) <http://harvardcrcl.org/supreme-court-death-penalty-jurisprudence-and-an-ardent-call-for-abolition/> accessed 24 August 2018.
[158] *Atkins* (n 22). For further discussion of the issue of 'intellectual disability' in the death penalty see chapter 5.2.
[159] *Atkins* (n 22) FN21.
[160] Ibid 347-48.
[161] Ibid 347.
[162] Ibid 347-48.

'the opinions of other nations, and that of the international community as a whole, are more relevant today than ever before'.[163]

Three years after *Atkins*, SCOTUS held that it is unconstitutional to execute juveniles who committed a crime when they were under the age of 18 in *Roper v. Simmons*.[164] Justice Scalia was again one of the four dissenting justices in this case, and he began his dissenting opinion by stating '[b]ecause I do not believe that the meaning of our Eighth Amendment[…]should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent'.[165] Appearing offended on behalf of the citizens of the US, Justice Scalia went on to say '[t]hough the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage'.[166]

Justice Scalia was particularly indignant about the Court's *de facto* overruling of the US' reservation against Article 6 ICCPR regarding juvenile executions, stating that '[u]nless the Court has added to its arsenal the power to join and ratify treaties on behalf of the [US]' the Court must adhere to the reservation.[167] However, in its consideration of the ICCPR in 1991, the SFRC itself stated:

> [I]t may be appropriate and necessary to question whether changes in [US] law should be made to bring the [US] into full compliance at the international level. However, the Committee anticipates that changes in [US] law in these areas will occur through the normal legislative process.[168]

Whilst SCOTUS is not the legislative branch of government, it is unlikely that the intention of the SFRC was to limit SCOTUS' role to not include interpretation of the ICCPR, or indeed the Eighth Amendment as was the case in *Roper.* Furthermore, following the argument in section 2.3.2, the US reservation against Article 6 is actually invalid. As such, it is severed from the US' accession to the ICCPR, meaning that Article 6 is binding, and the majority opinion in *Roper* was correct in applying Article 6(5). In any event, the Restatement clarifies that '[c]ourts in the [US] have final authority to interpret an international agreement for purposes of applying it as law in the [US],[169] which is what Justice Kennedy did in the majority opinion.

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[163] Harold Hongju Koh, 'Paying "Decent Respect" to the World Opinion on the Death Penalty' (2002) 35 UC Davis L Rev 1085, 1108.
[164] *Roper* (n 22). This was almost 40 years after the ICCPR opened for signatures prohibiting the executions of juveniles under the age of 18.
[165] Ibid 608 (Scalia J, dissenting).
[166] Ibid 622.
[167] Ibid.
[168] Senate Committee Report (n 50) 4.
[169] Restatement (n 2) §326.

From his dissenting opinions in *Atkins* and *Roper*, it appears that Justice Scalia was set against international law having any influence on the US Constitution. Whilst it is certainly true to broadly categorise Justice Scalia as an originalist, as Koh has asserted, 'in other settings, Justice Scalia has not hesitated to argue against interpreting [US] law in a manner that "would conflict with principles of international law"'.[170] Koh cited the anti-trust case of *Hartford Fire Insurance Co. v. California,* wherein Justice Scalia led the dissenting opinion on international comity, arguing that statutes should not be interpreted in conflict with international law.[171] His dissenting opinion in *Hartford* is completely different to his approach taken to international law in *Roper,* betraying Justice Scalia's reliance on the 'originalist' stance in death penalty cases. This can potentially be explained by the threat of global abolition of the death penalty and, as Sandra Babcock stated, '[w]hereas the death penalty was once viewed as a matter of domestic penal policy, now it is seen as a human rights issue'.[172] This is something that the conservative Justices are trying to avoid, as the trend towards global abolition indicates that it is no longer a state's sovereign right to administer the death penalty.[173]

Justice Scalia's approach to international law's influence on the Constitution indicates that in practice he was of the view that the Court should take no issue with international law, but only when it affirms the current laws of the US. This leads on to the second category: the theory of international law only applying when it aligns with the US Constitution.

2.4.2 Theory of Applicability of International Law Only When It Aligns with the US Constitution

Although Justice Scalia was perceived to be a critic of international law being used to interpret the Constitution, in practice, he was a critic of international law and consensus when it conflicted with his interpretation of the US Constitution. This is similar to the approach taken by conservative Justice Sandra Day O'Connor in *Roper*. Like Justice Scalia, she dissented in the case, but provided a separate opinion, in which Justice O'Connor stated:

> [W]e should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least,

[170] Koh (n 164) 1100, citing *Hartford Fire Insurance Co v California* 509 US 764 (1993).
[171] *Hartford Fire Insurance Co v California* 509 US 764, 764 (1993).
[172] Sandra Babcock, 'The Global Debate on the Death Penalty' (2007) ABA Human Rights Magazine Vol 34 No 2.
[173] The ICCPR, ECHR Protocols 6 and 13, and ACHR all point to this. Further, 102 countries worldwide have abolished the death penalty for all crimes, and 141 countries have abolished in law or in practice, Death Penalty Information Center, 'Abolitionist and Retentionist Countries' <www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries> accessed 24 August 2018.

> the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.[174]

In sum, Justice O'Connor believed that international law can play a part in US jurisprudence, but only to the extent it is in conformity with domestic US law. Therefore, in *Roper*, Justice O'Connor did not agree that the Eighth Amendment prohibits the execution of juveniles and so, in her view, the international consensus against the juvenile death penalty should have no bearing on the Eighth Amendment. This indicates the manifestation of American exceptionalism within SCOTUS. Michael Ignatieff described the category of American exceptionalism termed 'legal isolationism', where 'American judges are exceptionally resistant to using foreign human rights precedents to guide them in domestic principles'.[175] What Justice O'Connor appears to have done in her dissent in *Roper* is a variation of legal isolationism, in noting that international law can sometimes be of relevance to domestic principles, but only when the two align.

2.4.3 Theory of Using International Law to Assist in Interpreting the US Constitution

The third and final category is the theory of SCOTUS justices using international law to interpret the US Constitution. Although international law or consensus will likely never be a dominating factor in interpreting the US Constitution, some justices have cited international law to support their conclusions when deciding death penalty cases. For example, Justice Breyer stated that although he does not purport that 'we can or should accept other nations' solutions…their examples can help us to find our own Constitution's answer to what is ultimately an American constitutional problem'.[176] Given this progressive, although still cautious, approach to international law's role in interpreting the Constitution, it is not surprising that Justice Breyer is one of the key SCOTUS justices under that consults international law, along with Justices Ginsburg, Stevens, White and, somewhat surprisingly, Kennedy.

An early example of this is the 1977 case of *Coker v. Georgia.*[177] In *Coker,* SCOTUS held that a death sentence for the rape of an adult woman is cruel and unusual punishment contrary to the Eighth Amendment.[178] Justice White delivered the majority opinion and, joined by Justices Stewart, Blackmun, and Stevens, cited the decision in *Trop,* noting that, '[i]t is thus not

[174] *Roper* (n 22) 605 (O'Connor J, dissenting).
[175] Ignatieff (n 63) 8.
[176] Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage Books 2015) 83.
[177] *Coker v Georgia* 433 US 584 (1977).
[178] Ibid.

irrelevant here that out of [sixty] major nations in the world surveyed in 1965, only [three] retained the death penalty for rape where death did not ensue'.[179]

In *Enmund v. Florida* in 1982, SCOTUS considered the weight that international opinion holds when striking down death sentences for felony murder convictions as contrary to the Eighth Amendment.[180] Justice White, again, delivered the opinion of the Court, finding that it is 'worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe'.[181]

As noted in section 2.4.1 above, Justice Stevens cited an Amicus Curiae brief submitted by the EU in a footnote in the majority opinion in the *Atkins* case.[182] Although it was just a footnote, it acknowledged that the 'world community' overwhelmingly disapproves of executing 'mentally retarded' persons.[183]

Perhaps more surprisingly, in *Roper*, conservative Justice Anthony Kennedy not only gave the swing vote to the liberal side of the Court, but he also provided the majority opinion, which relied upon international law and norms.[184] Justice Kennedy cited the UN Convention on the Rights of the Child ('CRC'), despite the US not being a party to the CRC,[185] and Article 6(5) ICCPR, despite the reservation lodged against it, noting the 'stark reality that the [US] is the only country in the world that continues to give official sanction to the juvenile death penalty'.[186] Justice Kennedy continued on to reference the United Kingdom and how it removed the juvenile death penalty as a punishment decades before it abolished capital punishment in its entirety, confirming that '[t]he United Kingdom's experience bears particular relevance here in light of the historic ties between our countries'.[187] Justice Kennedy also cited the Brief for the Human Rights Committee of the Bar Council of England and Wales in stating that '[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty'.[188] Justice Kennedy accepted that the practices of other democratic nations with a similar legal genealogy must have some bearing on the interpretation of the Eighth

[179] Ibid FN10.
[180] *Enmund v Florida* 458 US 782 (1982). Felony murder is a controversial doctrine in the US, described as, '[a] rule that allows a killing that occurs in the course of a dangerous felony, even an accidental death, to be charged against the felon as first-degree murder', *see*, Legal Information Institute, 'Felony Murder Doctrine' (*Cornell Law* School) <www.law.cornell.edu/wex/felony_murder_doctrine> accessed 24 August 2018.
[181] *Enmund* (n 181) FN22.
[182] *Atkins* (n 22). The brief was initially filed in the case of *McCarver v North Carolina* 533 US 975 (2001), but this case was dismissed after North Carolina changed its capital statute to prohibit the execution of mentally retarded persons, and permission was granted to refile the brief in the *Atkins* case.
[183] Ibid FN21.
[184] *Roper* (n 22) 575-78.
[185] Whilst the US has signed the CRC, it continues to be the only UN member state not to have ratified it.
[186] *Roper* (n 22) 575.
[187] Ibid 577.
[188] Ibid 578.

Amendment. This indicated his support for living constitutionalism, as opposed to originalism when interpreting the Constitution.[189]

This final category of interpreting the Constitution with the assistance of international law is the most progressive attitude towards international law and consensus. It will also be important for the eventual abolition of the death penalty in the US.

2.5 Challenging American Exceptionalism

Thus far, this chapter has identified how all three branches of government are 'exceptional' regarding international law and the death penalty. American exceptionalism was acknowledged as early as 1835 by Alexis de Tocqueville, who described the US as 'quite exceptional'.[190] The theory of American exceptionalism is, quite simply, that the US, just by virtue of being a super-power state, is exceptional and can therefore choose how to behave. In a speech President Obama gave at the United States Military Academy Commencement Ceremony in 2014, he said that 'I believe in American exceptionalism with every fiber of my being. But what makes us exceptional is not our ability to flout international norms and the rule of law; it is our willingness to affirm them through our actions'.[191] However, at the international human rights level, Johan D. van der Vyer has argued that American exceptionalism actually shows the US 'claim[ing] a right to be above the dictates of international law'.[192] Examples of this have already been shown through the RUDs attached to human rights treaties,[193] and the approach of some SCOTUS justices to international laws and foreign practices.[194] Furthermore, Part II of this thesis provides a detailed analysis of the US' engagement with the UPR (an international human rights mechanism), which evidences this exceptionalist stance on the international stage.

American exceptionalism is also often relied upon to explain the US' retention of the death penalty. There are different strands to this theory, generally falling into two categories: for historical or political reasons. However, this thesis challenges the reliance upon American exceptionalism as an excuse for the US' retention of the death penalty. Using the Steikers' blueprint for abolition,[195] in the following sections it is argued that reliance upon American exceptionalism is no longer acceptable, and that the abolition of the death penalty will be

[189] *See generally,* Strauss (n 155); Balkin (n 155). Justice Kennedy has now retired from SCOTUS effective 31 July 2018.
[190] Alexis de Tocqueville, *Democracy in America: Part 2* (Henry Reeve tr, Saunders and Otley 1840) 36.
[191] The White House of President Barack Obama, 'Remarks by the President at the United States Military Academy Commencement Ceremony' (28 May 2014) <https://obamawhitehouse.archives.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony> accessed 24 August 2018.
[192] Johan D van der Vyer, 'American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness' (2001) 50 Emory L J 775, 777.
[193] *See,* chapter 2.3 above.
[194] *See,* chapter 2.4 above.
[195] Carol S Steiker & Jordan M Steiker, *Courting Death: The Supreme Court and Capital Punishment* (HUP 2016) 282-84.

brought about using the proportionality doctrine espoused in the blueprint. Furthermore, it is argued that international law and, in particular, the UPR, can be used to further this blueprint for abolition. Therefore, this section begins by discussing the historical and political strands of American exceptionalism and the death penalty. It then moves on to setting out the Steikers' blueprint for abolition and how this can be used to challenge the reliance upon American exceptionalism, through moving the US towards the abolition of the death penalty.

2.5.1 American Exceptionalism and the Death Penalty: History

The exceptionalist approach the US takes to the death penalty has been explained through the US' violent history. In particular, Franklin E. Zimring has argued that it is the vigilante tradition in the US that roots the death penalty within society,[196] and James Q. Whitman has asserted that the US' propensity to degrade its citizens is the cause of the entrenchment of capital punishment.[197]

In Zimring's view, the US takes an exceptionalist approach to capital punishment when compared with its Western European counterparts, because of the US' 'vigilante tradition'.[198] Zimring made the link between the US States that used to regularly carry out lynchings, and States that now retain the death penalty and frequently conduct executions.[199] He has argued that '[t]he greater force of the American vigilante tradition and the greater expression of these values generated in the American federal system are the most likely cause of America's persistence as an executor'.[200]

Related to Zimring's historical interpretation of the retention of the death penalty is Whitman's argument that American exceptionalism in the context of the death penalty is fixed in the US' cultural roots in punishment and its inclination to 'degrade' those in its criminal justice system.[201] Whitman argued that because European countries had a history of using degrading punishments, in the modern day, '[d]ignity concerns are pursued in Europe with an intensity unlike anything to be found in the [US]'.[202] Whitman asserted that this is because the US had no brutal history of punishments in the same way that the Europeans did, therefore the US now continues to degrade its prisoners, including those on death row.[203] A key example of this is the Thirteenth Amendment of the US Constitution, which abolished slavery for all but those

[196] Franklin E Zimring, *The Contradictions of American Capital Punishment* (OUP 2003).
[197] James Q Whitman, *Harsh Justice* (OUP 2005).
[198] Zimring (n 197) 126.
[199] Ibid 89.
[200] Ibid 126.
[201] Whitman (n 198).
[202] Ibid 84.
[203] Ibid 197.

who are incarcerated in prisons across the US.[204] However, whilst the comparison between European and US history in terms of punishment from Whitman is correct, and there is a clear empirical link between States that used lynching and modern executing States,[205] these should not be accepted as reasons for the continued retention of the death penalty in 2018. We live in an evolving society that progresses with time, and so this thesis argues that historical punishments in the US should have no bearing on what is cruel and unusual punishment in the 21st Century.

2.5.2 American Exceptionalism and the Death Penalty: Politics

Although the death penalty is well-rooted in US history, the reliance upon the US' historical practices does not explain the continued retention of the death penalty in 2018. David Garland also disagreed with the historical, 'culturist version of American exceptionalism'[206] discussed by Zimring and Whitman. Instead, Garland argued that the US death penalty is a product of the last few decades and the related political and legal decisions, rather than the last few centuries.[207] To affirm this argument, he relied upon the idea of 'radical local democracy', that the US has 'devolv[ed] most social and penal policy decisions to local political actors' and this has led to the entrenchment of capital punishment within certain geographical areas of the US.[208] Garland further suggested that there can be no comparison between Europe and the US, because in Western European countries capital punishment did not form part of the political landscape, including elections and accountability, as it does in the US.[209] In a similar vein to this, alongside his historical, vigilante tradition argument for the American exceptionalist approach to the death penalty, Zimring also argued that there is a political reason for the retention of capital punishment in the US. He found that the difference between Western Europe and the US on the question of the death penalty is that in the US it continues to be a political issue, whereas in Europe it is now a human rights issue instead.[210] However, that does not explain the UK's abolition of the death penalty in the 1960s, when public opinion was in favour of capital punishment.[211]

Garland also suggested that the US cannot be compared to Europe because it is more difficult for the US to abolish the death penalty, on the basis that other nations can legislate on criminal

[204] Ibid 176; The United States Constitution Amendment XIII.
[205] Zimring (n 197) 89.
[206] David Garland, 'Capital Punishment and American Culture' (2005) Punishment and Society 7(4) 347.
[207] Ibid.
[208] David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (OUP 2010) 96, 273.
[209] Ibid 166. Garland, 'Capital Punishment and American Culture' (n 207) 362.
[210] Zimring (n 197) 16-17.
[211] Ibid 23.

justice issues for the entire country, whereas the US cannot.[212] However, this fails to take into account the judicial branch of the federal government's powers in regulating the death penalty. Although Zimring asserted that '[t]he detailed regulation of what a [S]tate may or may not put in its capital punishment penal law is the type of micromanagement of [S]tate criminal law deeply resented by the [S]tates',[213] Carol and Jordan Steiker have noted that, whether rightly or wrongly, the regulation of the death penalty by SCOTUS has become an accepted as part of the capital system.[214]

Therefore, this reliance upon exceptional politics within the US as an excuse for the retention of the death penalty is also unsatisfactory, when considering the role of SCOTUS. The US strives to be a 'more perfect union'[215] and, in order to achieve that, the death penalty must be abolished.

2.5.3 American Exceptionalism and the Death Penalty: Towards Abolition

The Steikers have argued, with which this thesis agrees, that capital punishment will be abolished in the US through a constitutional decision from SCOTUS, rather than through State-by-State repealing of death penalty legislation alone.[216] Until 31 July 2018, this relied upon the composition of the Court being 5-4 in favour of the conservatives, but that the four liberal justices would vote in favour of abolition, along with a swing-vote from Justice Kennedy. However, on 31 July, Justice Kennedy retired from SCOTUS, leaving a vacant seat that President Trump is hoping to fill with his nominee, staunch conservative Brett Kavanaugh, who would be unlikely to provide the required swing vote.[217] Although this is a blow for abolitionists, all hope is not lost. The Steikers have provided a 'blueprint for abolition', detailing how they believe the death penalty will be abolished in the US. This thesis uses the blueprint for abolition as the framework when analysing the effectiveness of the UPR in the context of the abolition of the death penalty in the US.

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[212] Garland, 'Capital Punishment and American Culture' (n 207) 362.
[213] Garland, *Peculiar Institution* (n 209) 71.
[214] Steiker & Steiker, *Courting Death: The Supreme Court and Capital Punishment* (n 196) 217.
[215] The United States Constitution, Preamble; Barack Obama, 'Obama on Race and Politics' (18 March 2008) <www.youtube.com/watch?v=pWe7wTVbLUU> accessed 24 August 2018.
[216] Steiker & Steiker, *Courting Death: The Supreme Court and Capital Punishment* (n 196) 255. It should be noted that in order to fulfil the 'national consensus' requirement of the proportionality doctrine, it will involve more States repealing their capital statutes. It has also been argued that 'a constitutional amendment appears to be a more feasible path to abolishing the death penalty, at least absent a dramatic change in the composition of the Court', *see,* Renee Knake, 'Abolishing Death' (2018) 13 Duke J Const L & Pub Poly 1, 3. However, this thesis disagrees with Knake, as do other scholars, not least because this has been attempted previously and failed all five times. *See,* James E Coleman, 'One Way Or Another the Death Penalty Will be Abolished, but Only After the Public No Longer Has Confidence in its Use' (2018) 13 Duke J Const L & Pub Poly 15, 16-17.
[217] BBC News, 'Anthony Kennedy: US Supreme Court Judge to Retire' (27 June 2018) <www.bbc.co.uk/news/world-us-canada-44634176> accessed 24 August 2018; The New York Times, 'Trump Announces Brett Kavanaugh as Supreme Court Nominee' (9 July 2018) <www.nytimes.com/2018/07/09/us/politics/trump-supreme-court-announcement-transcript.html> accessed 24 August 2018.

The blueprint for abolition of the death penalty in the US utilises the 'proportionality doctrine'.[218] This doctrine is two-fold, involving firstly, 'objective evidence' and, secondly, SCOTUS' 'own judgement' on Eighth Amendment issues.[219] It is important to note that this proportionality doctrine has been used by the Court a number of times, including in *Atkins* and *Roper*.[220]

The first part of the doctrine is the objective evidence, for example, a national consensus, public opinion, and even international law and consensus. In terms of the death penalty, *prima facie*, there is still a national consensus in favour of it. However, although only nineteen of the fifty States have abolished the death penalty, a further eleven States have not executed anybody in almost a decade.[221] Furthermore the rate of death sentences and executions, factors which come under the objective evidence category, are both falling in the US.[222] To a lesser extent, but still persuasive, is public opinion on capital punishment.[223] A study carried out by Pew Research Center, published in September 2016, showed that public support for executions is at a record low, with 49% of the general public supporting the death penalty.[224] Through its analysis of the UPR, this thesis can provide further evidence of the international consensus against the death penalty.

The second part of the proportionality doctrine is the Court's own judgment. This involves the justices using their own judgment on pertinent issues within the capital system, such as racial discrimination, wrongful convictions, and long stays on death row, to interpret the Eighth Amendment.[225] An assessment of these issues has already been carried out by Justice Breyer in his dissenting opinion in *Glossip v. Gross*.[226] This thesis can also provide evidence to further the second prong of the proportionality doctrine under the blueprint for abolition. The key issues within the capital system that the Court will consider include racial discrimination, mental illnesses, wrongful convictions, access to competent counsel, conditions on death row, method of execution etc., which are discussed within the UPR. Therefore, Part II's analysis of the US UPRs on the question of the death penalty, along with the findings and suggestions to improve the UPR mechanism, will further this second prong of the proportionality doctrine.

Although the appointment of Justice Gorsuch to the Court in 2017, and the retirement of Justice Kennedy in 2018, is a setback for the fulfilment of this blueprint for abolition, it is not a closed door. When President Reagan first appointed Justice Kennedy to SCOTUS, he had

[218] Steiker & Steiker, *Courting Death: The Supreme Court and Capital Punishment* (n 196) 271, 278.
[219] Ibid 282, 278.
[220] Ibid 271-72.
[221] Ibid 282.
[222] Ibid.
[223] Ibid 284.
[224] Pew Research Center, '5 Facts About the Death Penalty' (24 April 2017) <www.pewresearch.org/fact-tank/2017/04/24/5-facts-about-the-death-penalty/> accessed 24 August 2018.
[225] Steiker & Steiker, *Courting Death: The Supreme Court and Capital Punishment* (n 196) 284.
[226] *Glossip v Gross* 135 S Ct 2726 (2015) (Breyer J, dissenting).

deep-rooted conservative views and voted with the staunch conservatives on the Court.[227] However, as time progressed, he moved more towards the centre of the Court and, as already discussed, provided the swing-vote in key death penalty decisions. Therefore, there is also the possibility that other conservative justices will follow in Justice Kennedy's footsteps. Moreover, this change on the Court may see the four liberal justices, particularly Justices Sotomayor and Kagan, becoming increasingly more liberal. It has been suggested that 'there are already four Justices on the [SCOTUS] who would have voted to declare the death penalty unconstitutional as cruel and unusual punishment'.[228] However, there is no evidence to suggest that this is true, as Justices Sotomayor and Kagan have not stated that they believe capital punishment to be cruel and unusual punishment, and both Justices did not join Justice Breyer's finding that the death penalty *per se* is unconstitutional in his dissent in *Glossip*.[229] However, this staunch conservative shift on the Court may actually see Justices Sotomayor and Kagan take a more liberal stance in future capital cases.

As such, this thesis assesses the effectiveness of the UNHRC's UPR through the lens of the abolition of the death penalty in the US. From this analysis, it argues for changes to be made to the UPR to improve the mechanism generally, and to facilitate the abolition of the death penalty through the Steikers' blueprint for abolition. It can be used to gather evidence for the two prongs of the blueprint, in preparation for the Court hearing a case on the constitutionality of the death penalty in the future.

2.6 Conclusion

This chapter has considered the thorny relationship the US has with international law through all three branches of government. It has also provided a preliminary challenge to the American exceptionalism theory as a reason for the retention of capital punishment, and identified that the Steikers' blueprint for abolition can be utilised to abolish the death penalty in the US.

Furthermore, it has been identified that the UPR can be used to both ensure US adherence to international law, and further the eventual abolition of the death penalty in the US by gathering evidence to substantiate the Steikers' blueprint. Before the 2010 and 2015 US UPRs can be analysed in terms of their approach to the question of capital punishment in Part II, chapter three sets out what the UPR is and how it works.

[227] Christopher E Smith, 'Supreme Court Surprise: Justice Anthony Kennedy's Move Toward Moderation' (1992) 45 Okla L Rev 459, 462.
[228] Erwin Chemerinsky, 'Trump, the Court, and Constitutional Law' (2018) 93 Ind L J 1, 74.
[229] *Glossip* (n 227).

CHAPTER THREE
THE UNIVERSAL PERIODIC REVIEW

The primary aim of this thesis is to assess the effectiveness of the UPR in the context of the abolition of the death penalty in the US. As the UPR is based upon international law, chapter two provided a consideration of the complex, and often exceptional, relationship all three branches of US government have with international law. Chapter three will provide an examination of the UPR, with the predominant focus on the US' engagement with the mechanism in the context of the death penalty, in order to set up the analysis of the 2010 and 2015 US UPRs on the question of capital punishment in Part II of the thesis.

First, this chapter sets out the status of human rights at the UN level, including the role of the UNHRC. Second, it examines the framework of the UPR. To do this, the chapter details how the UPR was created, and then considers each stage of the UPR, exploring how the US has engaged with the mechanism in its first two cycles.

3.1 Human Rights at the United Nations

3.1.1 The Commission on Human Rights

The Commission 'was the first international organisation mandated to deal with international human rights' at the UN.[1] It was central to the development of modern-day protections, including the drafting of the UDHR and other seminal treaties such as the ICCPR.[2] The US also played an important role in this, providing leadership in the architecture of contemporary human rights, for example, through Eleanor Roosevelt's work in the creation of both the UDHR and the Commission itself.[3]

However, over time, the Commission began to receive criticism for its deep-rooted politicisation, earning a reputation for addressing 'human rights violations in only a limited number of countries'.[4] For example, the Commission allowed regionalism to manifest through tactical voting by geographic and political blocs of states, which, in turn, permitted states to shield allies and exacerbate already fraught political relations.[5] The selectivity of the

[1] Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge 2013) 9.
[2] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) [hereinafter referred to as 'UDHR']; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [hereinafter referred to as 'ICCPR'].
[3] John Carey, 'The UN Human Rights Council: What would Eleanor Roosevelt Say?' (2009) 15 ILSA J Intl & Comp L 459, 459-60.
[4] Hilary Charlesworth & Emma Larking, 'Introduction: The Regulatory Power of the UPR' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015) 13.
[5] *See,* Rosa Freedman, 'The United Nations Human Rights Council: More of the Same?' (2013) 31 Wis Intl LJ 208, 212-13.

Commission saw 'country-specific [R]esolutions increasingly [being] used'[6] to continuously target specific countries,[7] whereas other states 'with equally problematic human rights records were able to escape any scrutiny'.[8]

Towards the end of the Commission's existence, it was widely criticised and the US was particularly vocal about its concerns. The US condemned the Commission for allowing Sudan to retain its seat in light of the genocide that was occurring in Darfur, arguing that 'only "real democracies" should enjoy the privilege of membership'.[9] This followed the US losing its seat on the Commission in 2001, which commentators surmised was due to the US' retention of the death penalty and its then-continued executions of juveniles.[10]

The Commission's fate was sealed in 2003, when a Resolution was passed that in effect gave veto powers to each member state of the Commission,[11] meaning that the much-needed reform was now practically impossible. As such, the only plausible way forward was to disband the Commission and create a new human rights body entirely, in the form of the UNHRC.[12]

3.1.2 The Human Rights Council

The UNHRC is the current, principal UN body mandated to protect and promote human rights across the globe. Sitting at the Palais des Nations in Geneva, Switzerland, the UNHRC was established by UNGA Resolution 60/251 upon the dissolution of the Commission in 2006.[13] The UNHRC now encompasses two of the key mechanisms in the global promotion and protection of human rights: the special procedures and the UPR. Alongside these mechanisms, the UNHRC has a complaints procedure, wherein individual complaints of human rights abuses can be made, and its own human rights 'think tank' through its advisory committee.[14]

However, prior to Resolution 60/251 being passed, negotiations between states regarding the details of the proposed UNHRC began in 2005 and involved a great deal of compromise, although Philip Alston has argued that there was a broad consensus on three main issues.

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[6] Ibid 220-22.
[7] Ibid 209.
[8] Walter Kalin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015) 28-29.
[9] Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) Melbourne Journal of International Law 7, 188.
[10] *See, e.g.*, Harold Hongju Koh, Editorial, 'A Wake-Up Call on Human Rights' *Washington Post* (8 May 2001) <https://law.yale.edu/yls-today/news/wake-call-human-rights-op-ed-prof-harold-hongju-koh> accessed 24 August 2018; Felix G. Rohaytn, 'America's Deadly Image' *Washington Post* (20 February 2001). The United States abolished juvenile executions in 2005 in the SCOTUS case of *Roper v Simmons* 543 US 551 (2005).
[11] Kalin (n 8) 29.
[12] Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (n 1) 29.
[13] UNGA Res 60/251 (3 April 2006).
[14] UNGA Res 5/1 (18 June 2007).

First, the Commission had failed in its mandate, second, it needed to be replaced, and, third, the UN institutional human rights mechanisms needed to be strengthened.[15] Whilst this almost worldwide agreement was indeed an achievement, Alston asserted that this consensus hid the troubling fact that the exact reasons why the Commission had failed were not agreed upon.[16] With this not being dealt with at the time of negotiations taking place, there was the potential for the problems that led to the Commission's downfall being passed on to the UNHRC.

A notable reason for the Commission's failure was that its composition allowed states to use their membership to avoid scrutiny of their own human rights protection and promotion.[17] In comparison, Resolution 60/251 ensures the UNHRC member states cannot sit as members for more than two consecutive three-year terms, and there is better regional representation as membership is based on 'equitable geographical distribution'.[18] There are forty-seven seats on the UNHRC and the member states of the UN are currently divided into five regional groups, with each group being allotted a certain number of seats on the UNHRC – the African group (thirteen seats), the Asia-Pacific group (thirteen seats), the Eastern European group (six seats), the Latin American and Caribbean group (eight seats) and the Western European and Others group (seven seats).[19] There are four special cases wherein the state does not belong to the regional group their state is located in, including the US, which is not formally a member of any group although it is considered to be an observer state in the Western European and Others group for voting purposes.[20] However, whilst the geographical distribution of the UNHRC membership is now allegedly fairer, states from the same regional group still tend to vote together in blocs, which often exacerbates the global north/south divide in the UNHRC.[21]

Furthermore, states are elected to the UNHRC by a majority UNGA vote under secret ballot. Whilst UNGA 'take[s] into account the contribution of candidates to the promotion and protection of human rights',[22] some regional groups have put forward a 'closed slate', wherein the group enters the same number of states as there are available seats, meaning 'each candidate will run unopposed and is virtually guaranteed a seat on the Council'.[23] This has led to states with poor human rights records being elected to the UNHRC. For example, Saudi

[15] Alston (n 9) 186.
[16] Ibid.
[17] UNGA, Report of the High-Level Panel on Threats, Challenges and Change, chaired by Anand Panyarachun, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565 para 283.
[18] UNGA Res 60/251 (n 13) para 7.
[19] United Nations Department for General Assembly and Conference Management, 'United Nations Regional Groups of Member States' (9 May 2014) <www.un.org/depts/DGACM/RegionalGroups.shtml> accessed 24 August 2018.
[20] Ibid.
[21] Freedman, 'The United Nations Human Rights Council: More of the Same?' (n 5) 213.
[22] UNGA Res 60/251 (n 13) para 8.
[23] Sarah Trister, 'Assessing the 2012 UN Human Rights Council Elections: One-Third of Candidates Unqualified for Membership' (*Freedom House,* 18 October 2012) <https://freedomhouse.org/article/assessing-2012-un-human-rights-council-elections-one-third-candidates-unqualified-membership> accessed 24 August 2018.

Arabia gained a seat in 2013[24] despite its grave human rights violations.[25] This indicated that, despite 'the presence of known human rights abusers as members of the Commission' being instrumental in the Commission's downfall,[26] this politicisation continues to mar the UNHRC.

During the negotiations for the creation of the UNHRC, the US put forward a number of suggestions, including a two-thirds majority vote needed for a seat on the UNHRC, which were rejected.[27] In retaliation, the George W. Bush Administration voted against the UNHRC's creation and, when the Resolution was passed and the UNHRC was created, refused to put the US forward for membership in the first round.[28] The then-US Representative to the UN, in giving reasons for the vote against the Resolution, said 'the Council diminished itself when the worst human rights violators had a seat at the table…Failure to address membership issues did a disservice to those people standing up for universal human rights'.[29] The US did put itself forward for, and was elected to, the UNHRC following President Obama's election in 2009. However, in June 2018, the Trump Administration withdrew from the UNHRC, citing similar reasons to the Bush Administration, adding that the UNHRC is biased against Israel.[30]

In general, observers have concluded that the UNHRC is not as significantly different from the Commission as it had been intended to be[31] and that '[g]roup alliance and factionalism remains a veritable force'.[32] The Commission was criticised for its high level of politicisation and it has been argued that the UNHRC continues to be similarly plagued.[33] However, politicisation is unavoidable and is to be expected.[34] Comprised of 193 governments that communicate and negotiate a vast array of diplomatic issues aside from human rights, the UN is a political body in its nature. Therefore, it should be expected that these diplomatic relations will form part of the workings of the UNHRC. However, what was hoped to be the difference between the two was the new, innovative mechanism, the Universal Periodic Review.

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[24] United Nations Human Rights, 'Current Membership of the Human Rights Council, 1 January – 31 December 2016' <www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx> accessed 24 August 2018.
[25] Amnesty International, 'Saudi Arabia 2017/2018' <www.amnesty.org/en/countries/middle-east-and-north-africa/saudi-arabia/report-saudi-arabia/> accessed 24 August 2018.
[26] Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (n 1) 19.
[27] Alston (n 9) 199.
[28] *See,* Maximilian Spohr, 'United Nations Human Rights Council: Between Institution-Building Phase and Review of Status' (2010) Max Planck Yearbook of the United Nations Law, Volume 14, FN23 at 182.
[29] UNGA, 'Five Years after Creation, General Assembly Maintains Human Rights Council as Subsidiary Body, Concluding Review of Work, Functioning' Sixty-fifth General Assembly Meeting (17 June 2011) UN Doc GA/11101.
[30] BBC News, 'US Quits 'Biased' UN Human Rights Council' (20 June 2018) <www.bbc.co.uk/news/44537372> accessed 24 August 2018.
[31] Alston (n 9) 209-10.
[32] Allehone Mulugeta Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) Human Rights Law Review, Vol 9, Issue 1, pp 1-35.
[33] *See,* Olivier de Frouville, 'Building a Universal System for the Protection of Human Rights: The Way Forward' in M Cherif Bassiouni and William Schabas (eds) *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 244.
[34] Ibid.

3.2 The Universal Periodic Review

3.2.1 The UPR: What is it and How Does it Work?

Passed on the 6 April 2006, despite the vote against it from the US, UNGA Resolution 60/251 created the UPR to be a universal and intergovernmental peer review process, intended to appraise every UN member states' protection and promotion of human rights. The idea for such a mechanism was first voiced publicly by Kofi Annan, the former UN Secretary-General, when deliberating the dissolution of the Commission and the proposed new UNHRC during his address to the Commission in Geneva in 2005. Annan said in his speech:

> [The UNHRC] should have an explicitly defined function as a chamber of peer review. Its main task would be to evaluate the fulfilment by all states of all their human rights obligations. This would give concrete expression to the principle that human rights are universal and indivisible…every Member State could come up for review on a periodic basis.[35]

Following the ideology articulated by Annan, and a year of fraught negotiations between states, Resolution 60/251 was passed, stating that the new UNHRC should:

> Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each [s]tate of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all [s]tates; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session.[36]

Resolution 60/251 left the modalities of the UPR for the UNHRC to detail, which are provided for in Resolution 5/1.[37] Resolution 5/1 clarifies that the UPR is based upon the Charter, the UDHR, the human rights treaties to which the state is a party to, voluntary commitments and pledges, and international humanitarian law.[38] However, as Emma Hickey points out, the UPR is 'based, *inter alia*, on the International Bill of Rights' meaning that in practice it 'embraces the whole spectrum of human rights irrespective of the [t]reaties which the state under review

[35] Kofi Annan, In Larger Freedom: Development, Security and Human Rights for All, United Nations: New York (2005).
[36] UNGA Res 60/251 (n 13).
[37] UNGA Res 5/1 (n 14).
[38] Ibid para 1.

has ratified'.[39] Whilst the treaty bodies have been monitoring the implementation of states' co-operation with human rights treaties for some time, they only monitor the states that are a party to the individual treaties.[40] Therefore, should a state not sign and ratify a treaty they will not be monitored by the corresponding treaty body. This is where the UPR can step in to fill the gap in the monitoring of human rights.[41]

Resolution 5/1 also provided the thirteen principles of the UPR. These principles include words and phrases which embody the intention of the mechanism, including 'universality',[42] 'cooperative',[43] 'equal treatment',[44] 'transparent',[45] and 'non-politicized'.[46] Furthermore, for the UPR to be successful, Patrick Flood argued that it must also be impartial and even-handed, in contrast to the Commission's way of dealing with violations of human rights which saw 'states engaged in an ad-hoc open political warfare'.[47] However, these terms can be construed as oxymoronic; how can the UPR be both intergovernmental and non-politicised? The very nature of a process including government delegations engaging in peer review will undoubtedly be politicised even with the best intentions for it not to be. Just as the UNHRC should be considered with the expectation of some politicisation, so should the UPR.

In terms of the practicalities of the UPR, each state is to be reviewed in cycles; the first cycle was four years whereas the second cycle was extended to four and a half years.[48] The third cycle is currently underway and is due to complete in 2020. In order for the UPR to function effectively, it encompasses numerous stages and requires cooperation from a range of actors. The UPR begins with the preparation and dissemination of the three key documents that the review is based upon. This leads on to the review which takes place in Geneva, during which recommendations from other UN member states will be made as to how the state under review can better protect and promote human rights. Following the review, the Working Group Report (also referred to as the 'Outcome Report') will be compiled by the troika – the three countries enlisted to assist with the organisation of the UPR process – alongside the state under review

[39] Emma Hickey, 'The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground?' (2013) ICL Journal, Vol 7, No 4, 4. Emphasis added. *See, also,* Gareth Sweeney & Yuri Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council' (2009) Human Rights Law Review 9:2 203-223, 206.
[40] Felice D Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) Human Rights Law Review 7:1, 109-139, 125.
[41] *See,* Manfred Nowak, 'It's Time for a World Court of Human Rights' in M Cherif Bassiouni and William Schabas (eds) *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 23, noting that 'most [s]tates seem to take the UPR more seriously than the [s]tate reporting procedure before treaty bodies'.
[42] UNGA Res 5/1 (n 14) para 3(a).
[43] Ibid para 3(b).
[44] Ibid para 3(c).
[45] Ibid para 3(g).
[46] Ibid.
[47] Patrick J Flood, 'The U.N. Human Rights Council: Is its Mandate Well-designed?' (2009) ILSA Journal of International & Comparative Law, 15(2), 477.
[48] UNHRC Resolution 16/21 (25 March 2011) para 3.

and the OHCHR.[49] The UNHRC will then consider and adopt the report at a plenary session some months later. Finally, the follow-up to the review will take place wherein the accepted recommendations are implemented by the state under review. Although not a formal part of the UPR process, the importance of the UPR Pre-sessions should be noted. Organised and conducted by the non-governmental organisation ('NGO'), UPR Info, the Pre-sessions were created in 2012 to give a greater voice to NGOs within the mechanism.[50] UPR Info advised that the Pre-sessions were created to provide 'civil society [with] an international platform to directly advocate to [s]tate delegations ahead of the UPR session' and also 'to facilitate diplomatic delegations to ascertain information on countries' human rights landscapes'.[51] In doing this, '[t]he ultimate aim of the Pre-sessions was to ensure that the recommendations that would be made at the [r]eview would be specific and welltargeted'.[52] The UPR Pre-sessions have been an unprecedented success, and a number of the recommendations made in this thesis to strengthen the UPR suggest that the Pre-sessions are the ideal platform to implement them.[53]

To have all 193 UN member states cooperate with this mechanism and have their human rights protections and, in some cases, abuses discussed and criticised in an open forum was an ambitious task. However, November 2016 saw the end of the UPR's second cycle of reviews, with the UPR attracting 100% cooperation from all 193 UN member states since its beginning in 2008.[54] The US was reviewed in 2010 and 2015, and its next review will take place in 2020.[55] However, despite the positive engagement the UPR has attracted, there are still concerns over the impact the UPR has had in practice, and whether it has facilitated meaningful change for human rights on the ground as it was created to do.[56] The following sub-sections will consider the functions of the UPR process in sequence, to allow for the analysis of the strengths and weaknesses of the mechanism in the context of the abolition of the death penalty in the US to take place in Part II of this thesis.

[49] UNGA Res 5/1 (n 14) para 32.
[50] UPR Info, 'UPR Info Pre-sessions: Empowering Human Rights Voices from the Ground' (2016) 5 <www.upr-info.org/sites/default/files/general-document/pdf/2016_pre-sessions_empowering_human_rights_voices_from_the_ground.pdf> accessed 24 August 2018.
[51] Ibid 11.
[52] Ibid.
[53] *See,* chapter 7.
[54] UPR Info, 'UPR by Country' <www.upr-info.org/en/review> accessed 24 August 2018.
[55] UPR Info, 'United States' <www.upr-info.org/en/review/United-States> accessed 24 August 2018.
[56] UNGA Res 5/1 (n 14) para 4(a).

3.2.2 Preparation and Dissemination of UPR Documents

Each state UPR is based upon three documents – the National Report prepared by the state under review, and the Compilation of United Nations Information and the Summary of Stakeholders' Information, both of which are compiled by the OHCHR.[57] All three documents are disseminated via the UN website and must be ready at least six weeks before the review itself takes place, to allow time for translation into the six official languages of the UN.[58]

3.2.2.1 National Report

The first document to be prepared and submitted to the Working Group of the UNHRC is the National Report, which is compiled by the state under review and must be comprised of twenty pages or less.[59] At the sixth session of the UNHRC, clear guidelines on how the National Report should be set out were created,[60] which the US largely cooperated with in both 2010 and 2015.[61]

In collating its National Report, the state under review is also 'encouraged to prepare the information through a broad consultation process at the national level with all relevant [S]takeholders'.[62] In preparation for both UPRs, the US federal government engaged in consultations with civil society and members of the public.[63] Sarah H. Paoletti noted that '[t]hese consultations marked the first time the government had gone on the road to hear individuals' concerns about [US] human rights obligations',[64] an indication of one of the positive effects the mechanism has had to date.

In both National Reports, the US acknowledged the concerns surrounding capital punishment. In 2010, the US used this space to set out the constitutional safeguards in place for those facing a death sentence and execution, and made a domestic comity observation concerning the distinction between the federal and US States' death penalty systems. It noted that '[t]he federal government utilizes a system for carefully examining each potential federal death penalty case',[65] while explaining that '[S]tate governments retain primary responsibility for

[57] Ibid para 15.
[58] Ibid para 17.
[59] Ibid para 15(a).
[60] UNGA, 'Report of the Human Rights Council on its Sixth Session' (14 April 2008) UN Doc A/HRC/16/11, 83. The document should set out the methodology and broad consultation process, the framework for protection and promotion of human rights, protection and promotion of human rights on the ground, identification of achievements and challenges, key national priorities, expectations of capacity building, and, for subsequent reviews, the follow-up to the previous review.
[61] *See,* UNHRC, 'National Report of the United States of America' (23 August 2010) UN Doc A/HRC/WG.6/9/USA/1 [hereinafter referred to as 'National Report 2010']; UNHRC, 'National Report of the United States of America' (13 February 2015) UN Doc A/HRC/WG.6/22/USA/1 [hereinafter referred to as 'National Report 2015'].
[62] UNGA Res 5/1 (n 14) para 15(a).
[63] UNHRC, 'Annex II: Selected Civil Society Consultations' (2015) UN Doc A/HRC/WG6/22/USA/1/USA/AnnexII/E; US Department of State Bureau of Democracy, Human Rights, and Labor, '2015 UPR Report Fact Sheet on U.S. Process' (6 Feburary 2015) <www.state.gov/j/drl/upr/2015/237251.htm> accessed 24 August 2018.
[64] Sarah H. Paoletti, 'Using the Universal Periodic Review to Advocate Human Rights: What Happens in Geneva must not Stay in Geneva' [Sept-Oct 2011] Clearinghouse Review Journal of Poverty Law and Policy, 268-278, 270.
[65] National Report 2010 (n 67) para 62.

establishing procedures and policies that govern [S]tate capital prosecutions'.[66] In both reports, the US detailed the reduction in the number of executions carried out in the previous year and how many jurisdictions in the US have abolished the punishment.[67] This appeared to be an attempt to justify the US' retention of capital punishment. However, 2017 saw a shift in this trend, as twenty-three people were executed, three more than in 2016.[68] This is an issue that must be addressed by the US in its National Report for the 2020 UPR, as a steady decline in executions can no longer be used as a justification for retaining the death penalty.

In 2015, the US utilised the National Report to respond to the specific recommendations it had accepted in 2010, including some regarding the death penalty. It also attached Annex IV to the National Report, which provided further responses to recommendations accepted and accepted in part from the 2010 review.[69] Again, the US discussed the constitutional safeguards in place protecting those facing the death penalty, but this time in more detail. For example, it addressed the Eighth Amendment protections, stating that '[t]here are strict prohibitions against the use of any method of execution that would inflict cruel and unusual punishment'.[70] The report advised that a case was to be heard by SCOTUS 'on whether the lethal injection protocol used in executions by Oklahoma constitutes cruel and unusual punishment under the Eighth Amendment of our Constitution'.[71] This referenced the controversial *Glossip v. Gross* case,[72] wherein SCOTUS ruled in a 5-4 decision in June 2015 that the use of midazolam in Oklahoma's three-drug cocktail did not amount to cruel and unusual punishment.[73] While the US cited this in its National Report as a positive step taken by SCOTUS, during the consideration and adoption of the outcome report and following the judgment in *Glossip v. Gross,* Ireland 'regretted that [SCOTUS] had recently upheld the use of the lethal injection'.[74] In fact, not only did SCOTUS uphold the use of midazolam, the majority opinion held that 'some risk of pain is inherent in any method of execution' and, as such, some pain would not necessarily constitute cruel and unusual punishment contrary to the Eighth Amendment.[75] As the issue of methods of execution in the US continues to be of international significance, it is likely that this will be a feature in the US' 2020 UPR, and methods of execution in the US UPR is examined in more detail in chapter six.

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[66] Ibid para 63.
[67] Ibid; National Report 2015 (n 67) para 51.
[68] Death Penalty Information Center, 'Execution List 2017' (2017) <https://deathpenaltyinfo.org/execution-list-2017> accessed 24 August 2018.
[69] UNHRC, 'National Report of the United States of America Annex IV' (2015) UN Doc A/HRC/WG.6/22/USA/1/AnnexIV [hereinafter referred to as 'National Report of the United States of America Annex IV'].
[70] National Report 2015 (n 67) para 49.
[71] Ibid.
[72] *Glossip v Gross* 135 S Ct 2726, 2726 (2015).
[73] Ibid.
[74] UNHRC, 'Draft Report of the Human Rights Council on its Thirtieth Session' (10 May 2016) UN Doc A/HRC/30/2 para 380 [hereinafter referred to as 'Report of the UNHRC Thirtieth Session'].
[75] *Glossip* (n 78) 2733.

3.2.2.2 Compilation of United Nations Information

The second of the three documents to be prepared is the Compilation of United Nations Information ('Compilation Report'). Compiled by the OHCHR, it begins by setting out the current scope of the state under review's international obligations, and moves on to include 'information contained in the reports of treaty bodies, special procedures, including observations and comments by the [s]tate concerned, and other relevant official [UN] documents'.[76] However, how the OHCHR decides upon what information will be included and excluded is not currently known.

Once a state becomes a party to a treaty, it has an obligation to take part in the corresponding reporting procedure, which includes the treaty bodies formulating detailed reports and recommendations, and they feed directly into the Compilation Reports of the UPR. The special procedures are divided into two categories – country-specific and thematic – and as of 1 August 2017 there were forty-four thematic mandates and twelve country mandates.[77] Each special procedure is tasked with its own mandate and led by independent human rights experts (usually known as Special Rapporteurs)[78] who are able to bring their own individual expertise to specific human rights issues. There is also a reporting element to the work of the special procedures, and these reports also feed into the Compilation Reports of the UPR, with the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions ('SRE') and the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('SRT') being particularly relevant to the issue of the death penalty in the US.

Furthermore, the work of the OHCHR and UNGA is considered when compiling the Compilation Reports of the UPR. For example, in the 2010 US UPR, the OHCHR had 'expressed concerns, in August 2008, about the decision of the authorities in Texas to proceed with the execution of a [foreign national], despite an order to the contrary by the [ICJ]'.[79] Given the significant role the OHCHR plays in international human rights, it is important that its input can be recorded in the UPR through the Compilation Report. In terms of UNGA, a relatively recent and seemingly effective way of its involvement in the death penalty is through its regular Resolutions on a global moratorium. The most recent Resolution was in December 2016, which saw 117 votes in favour of a global moratorium, thirty-one abstentions, forty votes against, and five absences.[80] The UNGA Resolutions were cited in both the US 2010 and 2015

[76] UNGA Res 5/1 (n 14) para 15(b).
[77] OHCHR, 'Special Procedures of the Human Rights Council' <www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> accessed 24 August 2018.
[78] They can also be referred to as 'independent experts', 'special representatives', 'Working Groups' etc. For the purpose of this thesis they will be referred to as 'Special Rapporteurs'.
[79] UNHRC, 'Compilation of UN Information – United States of America' (12 August 2010) UN Doc A/HRC/WG6/9/USA/2 para 26 [hereinafter referred to as 'Compilation Report 2010']. For further examination of this issue see chapter 4.5.
[80] UNGA Res 71/187 (19 December 2016).

Compilation Reports, noting that the US had consistently voted against the global moratorium.[81]

3.2.2.3 Summary of Stakeholders' Information

The third and final document to be produced and disseminated is the Summary of Stakeholders' Information ('Stakeholder Report').[82] Both the UN and the US State Department agree that a 'Stakeholder' includes NGOs (also known as Civil Society Organisations 'CSOs') and National Human Rights Institutions ('NHRIs'),[83] although the US does not currently have an NHRI and has rejected calls during the UPR to create one.[84] Civil society is encouraged to play an integral role in the UPR process and this includes each Stakeholder submitting a five-page submission. Resolution 5/1 sets out that this should be '[a]dditional, credible and reliable information provided by other relevant [S]takeholders'.[85] There is no specific definition provided of 'credible and reliable information', although guidance has been produced by the OHCHR, which Stakeholders can use as advisory material when compiling their individual reports.[86] In practice, the OHCHR will consider all of the individual Stakeholder submissions – of which there were 103 in 2010[87] and ninety-one in 2015 for the US [88] – and summarise them into a ten-page document. The individual reports are an important part of the UPR mechanism as they provide a wealth of information on a range of human rights issues on the ground, including the death penalty. Part II of this thesis analyses these individual reports to provide an insight as to why it is imperative that the Stakeholders' voices are heard throughout the UPR.

Similar to the Compilation Report, there is little literature on how the OHCHR decides what information will be selected and rejected from the individual reports to go into the final

[81] Compilation Report 2010 (n 85) para 25; UNHRC, 'Compilation of UN Information – United States of America' (2 March 2015) UN Doc A/HRC/WG.6/22/USA/2 para 17 [hereinafter referred to as 'Compilation Report 2015'].
[82] UNGA Res 5/1 (n 14) 15(c).
[83] Ibid para 3(m); US Department of State, 'Universal Periodic Review Frequently Asked Questions' <www.state.gov/j/drl/upr/faq/index.htm> accessed 24 August 2018. The OHCHR also includes 'human rights defenders, academic institutions and research institutes, regional organizations, as well as civil society representatives' in that list, *see* OHCHR, Universal Periodic Review: Information and Guidelines for Relevant Stakeholders' Written Submissions <www.ohchr.org/Documents/HRBodies/UPR/TechnicalGuideEN.pdf> 2 accessed 24 August 2018. For more information on NHRIs, *see* OHCHR, 'OHCHR and NHRIs' <www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx> accessed 24 August 2018.
[84] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (4 January 2011) UN Doc A/HRC/16/11 paras 92.72-92.74 [hereinafter referred to as 'Report of the Working Group 2010']; UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (20 July 2015) UN Doc A/HRC/30/12 paras 176.75-176.90 [hereinafter referred to as 'Report of the Working Group 2015'].
[85] UNGA Res 5/1 (n 14) para 15(c).
[86] *See,* OHCHR, Universal Periodic Review: Information and Guidelines for Relevant Stakeholders' Written Submissions <www.ohchr.org/Documents/HRBodies/UPR/TechnicalGuideEN.pdf> accessed 24 August 2018.
[87] UNHRC, 'Summary of Stakeholders Information – United States of America' (14 October 2010) UN Doc A/HRC/WG.6/9/USA/3/Rev1 [hereinafter referred to as 'Stakeholder Report 2010].
[88] UNHRC, 'Summary of Stakeholders Information – United States of America' (16 February 2015) UN Doc A/HRC/WG.6/22/USA/3 [hereinafter referred to as 'Stakeholder Report 2015'].

Stakeholder Report.[89] However, when Julie Billaud undertook a three-month internship with the drafting team, she noted that the OHCHR cannot synthesise any of the individual submissions and therefore the report is 'made up of a collection of direct quotes extracted from NGOs' contributions'.[90] Furthermore, Hilary Charlesworth and Emma Larking have noted that the drafting teams have a 'genuine desire' to 'give consideration to issues raised by [S]takeholders who might not otherwise be heard'.[91] This is imperative to the authenticity of the Stakeholder Report, given that some NGOs will not always have the funds to attend the review in Geneva. It is also a way of NGOs voicing the human rights situation on the ground which, in turn, legitimises the UPR process.

There have been particular criticisms of the five-page limit on individual submissions, as it has caused NGOs to feel 'forced to be "selective and strategic" in identifying a few key issues' to include in its individual report.[92] In fact, many NGOs will attach a number of lengthy appendices, and will direct readers to even lengthier submissions on their own websites.[93] For example, United States Human Rights Network ('USHRN') attached twenty-five appendices to its 2010 submission to the US UPR.[94] The main issue with this is that most UN member states will not read these additional documents and therefore key information may be missed.

Furthermore, the 2010 review saw much repetition from Stakeholders on the issue of the death penalty. For example, both USHRN and Amnesty International ('AI') advised that there continues to be executions of the mentally disabled and criticised the poor conditions on death row.[95] To limit this issue to some extent, the second cycle of the UPR saw more NGOs collaborating to provide joint submissions rather than individual reports. For example, in 2015, USHRN provided a joint submission - 'JS41' - which was a 'summary of [thirty-four] [S]takeholder reports submitted by our members and partners'.[96] As this increases the maximum page limit from five to ten pages, these joint submissions were hoped to have a

[89] Lawrence C Moss, 'Opportunities for Nongovernmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council' (2010) Journal of Human Rights Practice Vol 2, Number 1, 122 –150, 132.
[90] Jane K Cowan, 'The Universal Periodic Review as a Public Audit Ritual: An Anthropological Perspective on Emerging Practices in the Global Governance of Human Rights' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015) 75.
[91] Charlesworth & Larking (n 4) 17.
[92] Cowan, 'The Universal Periodic Review as a Public Audit Ritual' (n 96) 61.
[93] Ibid.
[94] United States Human Rights Network, 'United States Universal Periodic Review Stakeholder Submission Annex 5 Death Penalty' (2010) <http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/USHRN_UPR_USA_S09_2010_Annex5_Death%20Penalty%20Joint%20Report%20USA.pdf> accessed 24 August 2018.
[95] Stakeholder Report 2010 (n 93) para 30.
[96] Joint Submission 41, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> accessed 24 August 2018. USHRN was the main Stakeholder collating the data for JS41.

greater impact upon the UPR, allowing NGOs to jointly and potentially more successfully monitor the implementation of recommendations as they are tasked to do by Resolution 5/1.[97]

The number of joint submissions in the US UPR more than doubled from twenty-five in 2010 to fifty-two in 2015,[98] and while this is certainly a positive step, in terms of the death penalty this tactic appears not to have had the desired effect. In 2010, the Stakeholder Report cited five NGOs[99] which raised eight different issues regarding the death penalty.[100] However, in 2015, the Stakeholder Report again cited five NGOs or joint submissions,[101] but between them only raised six issues regarding capital punishment.[102] Therefore, despite the use of joint submissions, less information was cited in the final report regarding the death penalty. This is not because the capital system in the US is not being raised in the individual Stakeholder submissions, but because only certain information is being referred to in the final Stakeholder Report. For example, AI's original Stakeholder submission stated that, '[i]n numerous cases, prisoners have gone to their deaths…where inadequate legal representation for indigent defendants meant that the sentencing jury had not been presented with the full array of mitigating evidence available in the case'.[103] However, this was not relayed in the final document. To understand why certain issues are not included in the report, more transparency from the OHCHR is needed regarding the process utilised to decide how it selects the content of the final report. This idea is explored further in Part II.

This shortage of information regarding the death penalty in the 2015 Stakeholder Report had an effect on the reduced discussion of capital punishment throughout the rest of the UPR. In the rankings of 'most recommended upon issues', the death penalty slipped from 4th place in 2010 to 5th in 2015.[104] This indicates that what makes it into the Stakeholder Report will be influential on the recommendations, as less information was relayed into the final Stakeholder Report in 2015 than in 2010. As such, the OHCHR should aim to ensure that the Stakeholder Report is as comprehensive as possible.

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[97] UNGA Res 5/1 (n 14) para 33; UPR Info, 'NGO Written Submission for the Universal Periodic Review Information for NGOs' <www.upr-info.org/sites/default/files/general-document/pdf/upr_factsheet_2_ngo_submission_e.pdf> accessed 24 August 2018.
[98] Stakeholder Report 2010 (n 93); Stakeholder Report 2015 (n 94).
[99] Stakeholder Report 2010 (n 93) para 30, citing USHRN, ABA, AI, ACLU, and AHR.
[100] Stakeholder Report 2010 (n 93).
[101] Stakeholder Report 2015 (n 94) para 30, 37, citing AI, HRW JS29, JS41, and JS17.
[102] Stakeholder Report 2015 (n 94).
[103] Amnesty International, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> accessed 24 August 2018.
[104] UPR Info, 'Statistics of Recommendations' <www.upr-info.org/database/statistics/> accessed 24 August 2018.

As would be expected, the drafting of these three documents and the decisions of what to include and exclude involves 'disagreements and conflicts, and negotiations and compromises'.[105] However, whilst the process for preparing the documents in the UPR is not an easy one, getting it right is imperative to ensuring the smooth running of the review.

3.2.3 The Review

Following the submission of the three documents, the US was reviewed on 5 November 2010 and 11 May 2015. In order for the UPR to be a success, it relies upon the effective involvement of the UN member and observer states, particularly during the interactive dialogue wherein 'any UN Member State can pose questions, comments and/or make recommendations to the [s]tates under review'.[106] As Walter Kalin noted, '*[i]n extremis,* a state could be reviewed in its absence, but peer review without peers is not possible'.[107] Resolution 5/1 advises that '[t]he review will be conducted in one working group, chaired by the President of the Council and composed of the 47 member [s]tates of the Council',[108] and while '[o]bserver [s]tates may participate in the review',[109] Stakeholders may only 'attend the review' with no rights of audience.[110]

For each review, three UNHRC member states act as rapporteurs, known as the 'troika'. The OHCHR provides the 'necessary assistance and expertise' to the troika as is required, with the aim to ensure the UPR process runs as smoothly as possible.[111] The state under review can request that a troika state be from their regional group and they can alternate one of the troika on one occasion only.[112] The troika assists at various points during this stage of the UPR,[113] for example, prior to the review taking place, UN member states can submit questions in advance via the troika.[114] This allows the state under review time to reflect upon the points raised in advance and the opportunity to discuss them during the interactive dialogue. For instance, in 2015, Belgium, Germany, Norway, Sweden, and Switzerland all submitted advance questions to the US regarding preventing the execution of those with intellectual disabilities and other mental illnesses.[115] However, this is an informal process. The advance

[105] Cowan, 'The Universal Periodic Review as a Public Audit Ritual' (n 96) 56.
[106] UNGA Res 5/1 (n 14) para 26.
[107] Kalin (n 8) 30.
[108] UNGA Res 5/1 (n 14) para 18(a).
[109] Ibid para 18(b).
[110] Ibid para 18(c).
[111] UNGA Res 5/1 (n 14) para 18(d).
[112] Ibid para 19.
[113] For the US, the troika in 2010 was France, Japan and Cameroon and in 2015 it was Botswana, Netherlands and Saudi Arabia.
[114] UNGA Res 5/1 (n 14) para 21.
[115] UNHRC, 'Advanced Questions to the United States of America' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> accessed 24 August 2018, Belgium 'Taking into regard the principled opposition of Belgium to capital punishment we request the delegation of the US to give an overview of:…The guarantees that people with mental illness shall not be subjected to capital punishment'; 'Which steps is the United States taking in order to

questions are not presented in a formal UN document with a designated document number, it is just a simple Microsoft Word document, and they are only provided in one language, rather than the six official UN languages. Moreover, states do not have an obligation to respond to these questions during the interactive dialogue and, certainly in the US UPRs, there were no repercussions when the government delegation did not respond to an advance question. Therefore, Part II of this thesis identifies ways in which this part of the UPR process can be improved.

The first cycle of the UPR saw three hours allocated to each review.[116] However, this limited the number of states able to speak during the interactive dialogue and, in turn, saw poor practices emerging. For example, in order to obtain a place on the speaking list, 'state representatives [would stay] overnight' in order to 'ensure blocks of ally nations got to speak together and thereby increase the impact of their praise or criticism'.[117] This was particularly prevalent during the US UPR in 2010, wherein German representatives witnessed diplomats spending 'the night in front of the UN building to get on the list'[118] and Cuba and Venezuela starting 'their own list more than a week before, which delegations then rushed to get on'.[119] Though this list was declared invalid by the Secretariat,[120] it indicated that the current formulation of the review encouraged politicisation in the first cycle. It was therefore considered how this could be remedied during the five-year review of the UNHRC in 2011 and, when Resolution 16/21 was passed, the time limit for each review was increased to three hours thirty minutes with the confirmation that all states can take the floor during the interactive dialogue if necessary.[121]

In order for the review to be successful, it must rely upon the 'strong participation of states that ask questions and make recommendations'.[122] Kalin has cautioned that, because of the somewhat time consuming nature of the UPR, 'there is a real risk that over time the willingness of states to serve as peers will decline to a core group of diehards' with a large number of

prevent the execution of mentally/intellectually disabled persons?"; Norway ""What steps can the federal level take to ensure application of the constitutional principle that individuals with a significant intellectual disability do not receive the death penalty?'; Sweden 'Could the Government of the United States elaborate on the status of the death sentence, any plans to impose a national moratorium on federal use and on new measures to ensure that the death penalty complies with minimum standards under international law, including to exempt people with mental illness from execution to ensure that the origin of the drugs used for executions is made public?'; Switzerland 'Despite recent rulings of the United States Supreme Court, there seems to be wide discrepancies in the way individual States define and assess intellectual disability among those sentenced to death, and it still happens that some mentally ill convicts are executed in certain States. What is being done to address these issues, especially when considering that the protection of the intellectually disabled and mentally ill from the death penalty is an increasingly recognized international norm?'.

[116] UNGA Res 5/1 (n 14) para 22.

[117] Hickey (n 39) 41.

[118] International Service for Human Rights, 'UPR of the United States: No New Commitments' (5 November 2010) <www.ishr.ch/news/upr-united-states-no-new-commitments> accessed 24 August 2018.

[119] Hickey (n 39) 41.

[120] Ibid.

[121] UNHRC Res 16/21 (25 March 2011) para 11.

[122] Kalin (n 8) 30.

states only appearing for states who persistently commit human rights violations or for politically motivated reasons.[123] Furthermore, the wide scope of the UPR can put a strain on smaller states that do not have a permanent mission in Geneva. At present though, following the amendments to the time limitations, overall the review appears to be working more smoothly, efficiently, and transparently, with regular cooperation from a large number of states, particularly throughout the recommendations section of the review.

3.2.3.1 Recommendations

The recommendations are an integral part of the UPR as this is where UN member states provide suggestions, during the interactive dialogue, as to how the state under review can better promote and protect human rights.[124] Furthermore, the recommendations accepted by the state will be the focus of the follow-up to its UPR and will underpin the subsequent review.[125] They are also a measurable part of the UPR, as implementation of accepted recommendations can be quantified. The troika has a role to play in this process and can choose to 'group issues…to ensure that the interactive dialogue takes place in a smooth and orderly manner'.[126] There is very little guidance from the UN on recommendations, such as how they should be formed, how long they should be, or how much detail should be included, with Resolution 5/1 merely stating:

> Recommendations that enjoy the support of the [s]tate concerned will be identified as such. Other recommendations, together with the comments of the [s]tate concerned thereon, will be noted. Both will be included in the outcome report to be adopted by the Council.[127]

In practice recommendations are 'accepted' or 'noted', and the US also 'supports in part' some recommendations, clarifying that this means it 'support[s] the proposed action or objective but reject[s] the often-provocative assumption or assertion embedded in the recommendation'.[128] 'Noted' recommendations are essentially *de facto* rejections. This is a wider issue with the UPR process, as Resolution 5/1 sets out that subsequent reviews are based on recommendations accepted in the previous cycle,[129] meaning that states can be tactical when considering whether to accept or note recommendations and use this to avoid addressing certain human rights issues. This can be frustrating, but the non-mandatory nature of the UPR,

[123] Ibid 31.
[124] UNGA Res 5/1 (n 14) para 26.
[125] Ibid para 34.
[126] Ibid.
[127] Ibid para 32.
[128] National Report of the United States of America Annex IV (n 75) 29.
[129] UNGA Res 5/1 (n 14) para 34.

and the fact that the recommendations are not binding upon states, allows them to retain their sovereign power and has attracted 100% cooperation from states to date.

Furthermore, partly due to the lack of official guidance on the content of the recommendations, there are considerable issues with how recommendations are formed and presented. Largely, recommendations will be too broad, meaning they 'are unlikely to translate to specific action on the ground'[130] and, often, 'so called friendly states' will bestow 'meaningless praise upon each other' despite this not reflecting the 'human rights situation on the ground'.[131] When Edward McMahon published a study in 2010 of all recommendations made in the first five UPR sessions, he categorised them into five groups.[132] Category five is '[r]ecommendations of specific action (undertake, adopt, ratify, establish, implement, recognize – in international legal sense)'[133] and McMahon gives an example of one such recommendation being '[a]bolish the death penalty'.[134] However, while this recommendation does ask for a specific action, absent further details of how or why capital punishment should be abolished, it is unlikely to lead to any meaningful implementation. All recommendations in the 2010 and 2015 UPRs suggesting that the US to abolish the death penalty or place a moratorium on it were noted and no action taken on them.[135] Therefore, such broad recommendations are unlikely to lead to the abolition of the death penalty, and this is a particular area of the UPR that would benefit from reform, as examined in Part II.

Some states have simply failed to engage with the recommendation process entirely. In its first review, North Korea 'did not accept a single recommendation' and Israel only accepted three recommendations 'and failed to provide clear answers to many others'.[136] This lack of engagement with the recommendations is disappointing, considering many states made well-reasoned and constructive recommendations to both countries. Equally as concerning is that some states will 'respond to recommendations by claiming that they are already recognising rights when this is clearly not the case'.[137] To be dismissive of the recommendations could potentially undermine the entire UPR review process. Other states have been accused of hypocrisy, such as the US, which 'recommended that Switzerland provide "consular

[130] Charlesworth & Larking (n 4)15.
[131] Hickey (n 39) 6-7.
[132] Edward McMahon, 'Herding Cats and Sheep: Assessing State and Regional Behavior in the Universal Periodic Review Mechanism of the United Nations Human Rights Council' (July 2010) University of Vermont, 9 <www.upr-info.org/sites/default/files/general-document/pdf/-mcmahon_herding_cats_and_sheeps_july_2010.pdf> accessed 24 August 2018.
[133] Ibid.
[134] Ibid.
[135] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum' (8 March 2011) UN Doc A/HRC/16/11/Add1 para 9 [hereinafter referred to as 'Report of the Working Group Addendum 2010']; UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (14 September 2015) A/HRC/30/12/Add1 para 10 [hereinafter referred to as 'Report of the Working Group Addendum 1 2015']. *See, also,* Appendix.
[136] Kalin (n 8) 31.
[137] Charlesworth & Larking (n 4) 14-15.

notification and access consistent with applicable international legal obligations, including Article 36 of the Vienna Convention on Consular Relations, to detained foreign nationals"', despite the ICJ finding the US to be in violation of Article 36 on two separate occasions in relation to the death penalty.[138] Chapter four of this thesis provides more detail on why this action appears to be hypocritical. However, this thesis argues that these issues should still be raised, even though the recommending state would also benefit from a similar recommendation in its own UPR.

3.2.3.2 The US and Recommendations

The US has maintained its involvement in both its own UPRs and the UPRs of other states; in the first cycle the US provided 465 recommendations to other states and in the second cycle it provided 490.[139] However, what is perhaps most interesting is that the US received the highest total number of recommendations to date in the entirety of the UPR process.[140] In 2010, the US received 228 recommendations in total, of which 173 were supported in whole or in part.[141] In 2015, the US received 343 recommendations in total, wherein 150 were accepted, eight-three noted, and 110 supported in part.[142]

Of the 228 recommendations the US received in 2010, the death penalty was the focus of twenty-two, or 9.6% of the total recommendations made.[143] Forty-four human rights issues were raised during the 2010 UPR and the death penalty was ranked as being the fourth most recommended upon issue.[144] Six of the twenty-two death penalty recommendations in 2010 were accepted in full or part by the US.[145] In 2015, the number of recommendations spiked, and the US received 343 in total. Forty-three of these recommendations, or 12.54%, were made regarding capital punishment but only five were accepted in full or part.[146] Furthermore, the death penalty was demoted to being the fifth most recommended upon issue, overtaken by women's rights and racial discrimination.[147]

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[138] Kalin (n 8) 35.
[139] UPR Info, 'Database of Recommendations' <www.upr-info.org/database/> accessed 24 August 2018.
[140] Ibid.
[141] National Report 2015 (n 67) para 3.
[142] Report of the UNHRC Thirtieth Session (n 80) para 403.
[143] *See,* Appendix. These calculations are based upon figures contained in the official UN UPR documents. Note that some death penalty recommendations were solidified into one recommendation. UPR Info analyses all recommendations individually, regardless of whether they have been grouped together. Therefore, in 2010 UPR Info counts 280 recommendations in total, with the death penalty being the focus of 32 recommendations, or 11.43%, *see* UPR Info, 'Database of Recommendations' (n 145).
[144] UPR Info, 'Statistics of Recommendations' (n 110).
[145] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum' (8 March 2011) UN Doc A/HRC/16/11/Add1, para 7-9 [hereinafter referred to as 'Report of the Working Group Addendum 2010'].
[146] *See,* Appendix. These calculations are based upon figures contained in the official UN UPR documents. Note that some death penalty recommendations were solidified into one recommendation. UPR Info analyses all recommendations individually, regardless of whether they have been grouped together. Therefore, in 2010 UPR Info counts 388 recommendations in total, with the death penalty being the focus of 51 recommendations, or 13.14%, *see* UPR Info, 'Database of Recommendations' (n 145).
[147] UPR Info, 'Statistics of Recommendations' (n 110).

Scholars and practitioners alike are sceptical of the effect high numbers of recommendations will have on human rights. Hickey stated that the 'more critical issues will tend to get diluted'[148] and De la Vega and Lewis commented that it causes 'difficulties with attempts to develop a plan to implement the recommendations'.[149] As such, Chauville has found that because of this, '[s]tates are forced to prioritise…[making] it likely they will act on the least challenging recommendations first',[150] despite them not necessarily being the most important. This area of the recommendations process could also be strengthened, as detailed in Part II.

3.2.4 Consideration and Adoption of the Outcome Report

Subsequent to the review, the troika, the OHCHR, and the state under review will prepare the Outcome Report (or 'Working Group report') detailing the member states' 'conclusions and/or recommendations, and voluntary commitments of the State concerned', including any initial responses of the state under review to the recommendations it received.[151] Once the report is prepared, it is then considered and adopted at a UNHRC plenary session in Geneva a few months after the review.[152] This gives the state under review time to consider which recommendations it will accept and provide any additional comments in an Addendum to the Report of the Working Group. The US provided an Addendum in both 2010 and 2015, wherein it provided more detail on why it accepted, or accepted in part, certain recommendations.[153] At the OHCHR's request, the US provided further clarification on its 'supported in part' recommendations in the Report of the Working Group Appendix to the Addendum document in 2015.[154] These documents are analysed further in Part II of this thesis.

At the plenary session, prior to the adoption of the Outcome Report, the state under review, member and observer states, and Stakeholders are given the opportunity to make 'general comments' upon it.[155] It is at this stage that the Stakeholders are given the opportunity to voice their opinions on the human rights situation on the ground, in front of the UNHRC. There is often a vast difference between Stakeholders' and member states' comments. During a research visit to the US' plenary session in September 2015, it was observed that some member and observer states used this time to skirt around important issues or to provide unnecessary praise to the state under review. However, when the Stakeholders took the floor

[148] Hickey (n 39) 6.
[149] De la Vega and Lewis (n 55) 381.
[150] Roland Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015) 97.
[151] UNGA Res 5/1 (n 14) para 26; UNHRC Res 16/21 (n 127).
[152] UNGA Res 5/1 (n 14) para 25.
[153] Report of the Working Group Addendum 2010 (n 141); Report of the Working Group Addendum 1 2015 (n 141).
[154] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Appendix to the Addendum' (2015) [hereinafter referred to as 'Report of the Working Group Appendix to the Addendum 2015'].
[155] UNGA Res 5/1 (n 14) para 28-31.

they would be more critical, but still provided praise where appropriate. This is a by-product of the mechanism being intergovernmental, as comments made by states during the UPR process will more than likely be considered in future diplomatic relations. This is where the role of the Stakeholders is key, as they are not involved in the political relations between states and so can speak openly and honestly about the human rights situation on the ground. For example, in 2010, 'Morocco thanked the [US] delegation for providing further information on the recommendations received and the efforts to comply with the promotion and protection of human rights'.[156] In contrast, in 2015, Human Rights Watch ('HRW') had considered that no action had been taken on France's recommendation on racial disparities in 2010, and so 'urged the [US] to specify how they plan to implement recommendations they supported on looking into racial disparities in the application of the death penalty'.[157] As UPR Info has noted, it is important that this stage of the process is used 'to obtain clear responses to recommendations [and] details on implementation plans',[158] which is exactly what HRW was aiming to do. This is arguably the part of the UPR process where the Stakeholders can currently have the most impact. It also further legitimises the role of the Stakeholders in the UPR, as they do not have to only rely upon lobbying other UN member states and submitting reports, and can provide their own comments and opinions before the UNHRC.

This stage of the mechanism has also been used to consider the US' general engagement with the UPR itself, which is also significant when considering the impact the UPR can have on the death penalty abolition movement. In 2010, Cuba, Iran, China, and Bolivia all noted that it was concerning that the US had rejected so many recommendations.[159] In contrast, Russia 'noted with appreciation the acceptance of a large number of recommendations',[160] highlighting the continued politicisation of the UPR, particularly as in the 2015 interactive dialogue, Russia stated it 'regretted that the [US] had paid insufficient attention to the recommendations made during the first review cycle'.[161] The Stakeholders also considered the US' commitment to the UPR. In 2015, the American Civil Liberties Union ('ACLU') criticised the US' implementation of 2010 recommendations, calling it 'disappointing' and stating that 'the Government engagement has not translated into any meaningful changes in domestic policies'.[162] Furthermore, HRW 'regretted that the [US] appear to use the UPR process more as a way to highlight their current policies than to commit to improving their human rights

[156] UNHRC, 'Draft Report of the Human Rights Council on its Sixteenth Session' (6 April 2011) UN Doc A/HRC/16/L4 para 744 [hereinafter referred to as 'Report of the UNHRC Sixteenth Session'].
[157] Report of the UNHRC Thirtieth Session (n 80) para 395.
[158] UPR Info, 'The Butterfly Effect – Spreading Good Practices of Implementation' (10 November 2016) 39 <www.upr-info.org/en/news/the-butterfly-effect-spreading-good-practices-of-upr-implementation> accessed 24 August 2018.
[159] Report of the UNHRC Sixteenth Session (n 162) para 736, 737, 740, 743.
[160] Ibid para 741.
[161] Report of the Working Group 2015 (n 90) para 49.
[162] Report of the UNHRC Thirtieth Session (n 80) para 394.

record'.[163] As HRW has noted, '[t]he UPR is ineffective if limited to a conceptual exercise, and no country should claim success by accepting recommendations that require no identifiable outcomes or even proof of a deliberative process'.[164] This links to the first objective of the UPR, which is '[t]he improvement of the human rights situation on the ground'.[165] The UPR will be unsuccessful if it is not resulting in actual improvements to the human rights situation in the US or any of the other 192 UN member states.

The state under review also has the opportunity to provide its comments on the report. The US delegation noted in 2015 that the 'federal system enhances protections for human rights, and that [S]tate, local, and tribal officials are often best positioned to solve problems'.[166] However, Stakeholders have argued that this inaccurate. For example, Africans in the America for Restitution and Repatriation ('AA4RR') asserted that the federal system is hindering the role of human rights in the US, particularly because compliance with the ICCPR and ICERD 'is left largely to the unchecked discretion of [S]tate and local authorities as demonstrated in the Ferguson riots between African Americans with [S]tate and local officials'.[167] AI also noted that because of the non-self-executing declarations attached to international human rights treaties, '[f]or individuals under US jurisdiction, the fact of the US[] becoming a party to a human rights treaty has often been more symbolic than real'.[168]

Also in 2015, Deputy Assistant Secretary of State Scott Busby stated that '[t]he [US] did not support the majority of recommendations on capital punishment, noting that continuing differences in this area are a matter of policy, and not what the rules of international human rights law currently require'.[169] However, Part II of this thesis shows that this statement is incorrect, as the US does not consistently comply with international human rights regarding the death penalty.

3.2.5 Follow-Up to the Review

The follow-up to the review takes place outside of the scrutiny of the UN. Once the review process has been completed, and the Outcome Report has been adopted, the accepted recommendations must then be implemented.[170] Primarily, it is the state's duty to implement

[163] Ibid para 395.
[164] HRW, 'United States Universal Periodic Review Stakeholder Submission' (2015) para 4 <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> accessed 24 August 2018.
[165] UNGA Res 5/1 (n 14) para 4(a).
[166] Report of the UNHRC Thirtieth Session (n 80) para 346.
[167] AA4RR, 'United States Universal Periodic Review Stakeholder Submission' (2015) 4 <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> accessed 24 August 2018.
[168] AI, 'Stakeholder Submission' (2015) (n 109) 2.
[169] Report of the UNHRC Thirtieth Session (n 80) para 357.
[170] UNGA Res 5/1 (n 14) para 33.

recommendations, although the Stakeholders should assist 'as appropriate'[171] and other UN member states should also help where necessary.[172] Despite the importance of this part of the UPR, there is no official UN-led monitoring of implementation and very little guidance on how to do so. Chauville argued that 'the lack of an independent United Nations-led assessment mechanism' is a weakness of the UPR.[173] He suggested that '[a]n objective assessment by the OHCHR, published one month before the review in the format of a report, would be an effective way to fill this gap'.[174] However, John Carey viewed the idea of an independent assessment as 'too authoritarian' and 'likely to chill the warm reception' that the UPR has received to date.[175]

The issue of follow-up and implementation of recommendations was raised in the US UPRs. In the 2010 Stakeholder Report, the Center for Economic and Social Rights ('CESR') had 'recommended establishing an effective and inclusive process to follow-up on the recommendations from the [UPR]'.[176] During the 2010 interactive dialogue, 'Norway stated that it looked forward to the transparent and inclusive follow-up in the [UPR] implementation phase',[177] and Austria provided a recommendation to '[c]ontinue consultations with non-governmental organisations and civil society in the follow up',[178] which the US accepted with no comment.[179]

Again, in 2015, recommendations focused on the follow up stage of the UPR. For example, Paraguay recommended that the US should '[c]onsider the possibility of establishing a system to follow up on international recommendations, including [UPR] accepted recommendations'.[180] The US accepted this recommendation, noting that '[t]he federal government has established interagency working groups to coordinate follow-up to supported UPR recommendations and to consider recommendations by human rights treaty bodies'.[181] However, when Norway recommended that 'a mechanism be established at the federal level to ensure comprehensive and coordinated compliance with international human rights instruments at the federal, local and [S]tate levels',[182] the US only supported this in part. The delegation clarified this in its Working Group Appendix document, stating that '[w]e do not support the part of this recommendation asking us to create a single mechanism with respect

[171] Ibid.
[172] UPR Info, 'A Guide for Recommending States at the UPR' (2015) 4 <www.upr-info.org/sites/default/files/general-document/pdf/upr_info_guide_for_recommending_states_2015.pdf> accessed 24 August 2018.
[173] Chauville (n 156) 87-88.
[174] Ibid 96.
[175] Carey (n 3) 470.
[176] Stakeholder Report 2010 (n 93) para 15.
[177] Report of the Working Group 2010 (n 90) para 66.
[178] Ibid para 92.225.
[179] Report of the Working Group Addendum 2010 (n 141) para 25.
[180] Report of the Working Group 2015 (n 90) para 176.107.
[181] Report of the Working Group Appendix to the Addendum 2015 (n 160) 4.
[182] Report of the Working Group 2015 (n 90) para 176.108.

to the [S]tate and local levels'.[183] The response from the key UPR actors clearly indicates that the follow-up to the review is considered an integral part of the UPR, but that it could be improved and strengthened, particularly through some oversight of the process.

Constance de la Vega and Cassandra Yamasaki highlighted that, subsequent to the 2010 review, the US delegation noted that the UPR is 'a useful tool to assess how our country can continue to improve in achieving its own human rights goals',[184] but 'failed to say how these goals would be implemented'.[185] However, during the consideration and adoption of the Outcome Report in 2010, the US delegation stated that since the review, 'US federal agencies held numerous meetings with civil society to discuss the response to the recommendations'.[186] Moreover, in its 2015 individual submission, Joint Submission 29 ('JS29') noted that following the review in 2010, 'the [US] government established several interagency working groups to follow up on accepted recommendations and also encouraged exchanges between these working groups and civil society'.[187] The US did the same in 2015, describing the consultations as follows:

> The UPR Working Groups have both an *internal coordination* and a *public outreach* mandate. Each Working Group meets internally to identify and discuss proposals to address accepted UPR recommendations, identify opportunities for interagency collaboration, share best practices on cross-cutting issues, and discuss public engagement.[188]

The Working Groups also consider recommendations of the treaty bodies and special procedures, although they only provide responses to the UPR recommendations. By only responding to UPR recommendations, this shows that the mechanism is having a greater effect than the others in the US. However, the question is what impact is this having for human rights on the ground? Particularly relevant for the death penalty was Working Group 2 on Criminal Justice, led by the US Department of Justice ('DOJ'), which took place on 1 August

[183] Report of the Working Group Addendum 1 2015 (n 141) para 20.
[184] Constance de la Vega & Cassandra Yamasaki, 'The Effects of the Universal Periodic Review on Human Rights Practices in the United States' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015) 214, citing Harold Hongju Koh Mission of the United States to Geneva, Switzerland, 'Completion of the First UPR of the United States: Statement by Harold Hongju Koh' (18 March 2011) <https://geneva.usmission.gov/2011/03/18/us-upr-adoption/> accessed 24 August 2018.
[185] De la Vega & Yamasaki (n 190) 214.
[186] Report of the UNHRC Sixteenth Session (n 162) para 724.
[187] Joint Submission 29, 'United States Universal Periodic Review Stakeholder Submission' (2015) para 30 <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> accessed 24 August 2018. JS29 was comprised of The Leadership Conference Education Fund, The Leadership Conference on Civil and Human Rights with the Lawyers' Committee for Civil Rights Under Law, and the National Association for the Advancement of Colored People (NAACP).
[188] US Department of State, 'Fact Sheet: Your Guide to the Universal Periodic Review and the UPR Working Groups' (15 April 2016) <www.humanrights.gov/dyn/04/fact-sheet-your-guide-to-the-universal-periodic-review-and-the-upr-working-groups/> accessed 24 August 2018.

2016 in Washington D.C.[189] Unfortunately, there is relatively little information on the outcome of the Working Group sessions, attributed to the fact that the DOJ's invitation to the Working Group session was cited as being 'off the record and closed to the press'.[190] A vital part of implementing recommendations is the dissemination of the progress being made, in order for the key UPR actors to effectively monitor the situation. This cannot be done if the follow-up Working Groups are off the record and their outcomes remain unpublished. Furthermore, JS29, which has been particularly involved in the Equality Working Group, noted that 'since its mandate and authority are very limited, it is not a sufficiently systematic or strong mechanism to assure implementation of human rights commitments'.[191]

This highlights a further issue of the US' non-engagement with the UPR's mid-term reporting. Although there is no official UN mechanism to track progress, one way of monitoring the implementation of recommendations is through states having the opportunity to voluntarily provide a mid-term report around half way between reviews, to advise on its progress. However, only fifty-five states submitted these voluntary mid-term reports in the first cycle, with the US declining to submit a report.[192] The mid-term report not only allows the key UPR actors to monitor the progress of implementation of recommendations, but it also allows the state under review to further consider 'noted' recommendations. For example, 'following its first UPR in 2011, Denmark accepted [twenty] new recommendations in its 2014 midterm report'.[193] The US has the resources to collate a mid-term report, and the fact that it did not submit one indicates an unwillingness to fully engage with the UPR process. To contribute to the mid-term reporting process, the outcome of the Working Groups in 2016 could be collated and submitted, which would seemingly involve little extra work for the US government. The US has also not submitted a mid-term report for cycle two, despite it being due in early 2018.[194]

Other than the voluntary mid-term report, the only other way to monitor implementation of recommendations is through the subsequent UPR, four and a half years later. Resolution 16/21 provides that:

> The second and subsequent cycles of the review should focus on, *inter alia*, the implementation of the accepted recommendations and the developments of the human rights situation in the [s]tate under review.[195]

[189] US Department of State, 'US Government 2016 Calendar for UPR Consultations' <www.ushrnetwork.org/resources-media/us-government-2016-calendar-upr-consultations> accessed 24 August 2018.
[190] US Department of State, 'Civil Society Consultation on UPR Implementation Criminal Justice Issues' <www.ushrnetwork.org/sites/ushrnetwork.org/files/upr_lh_mm_invite_8.1.16.pdf> accessed 24 August 2018.
[191] Joint Submission 29, 'Stakeholder Submission' (2015) (n 193) para 30.
[192] OHCHR, 'UPR Mid-term Reports' (24 June 2016) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx> accessed 24 August 2018.
[193] UPR Info, 'The Butterfly Effect' (n 164) 18.
[194] OHCHR, 'UPR Mid-Term Reports' (n 198).
[195] UNHRC Res 16/21 (n 157) para 6. Emphasis added.

In some respects, this is an effective method of monitoring implementation of accepted recommendations, but it is a lengthy and protracted one as we must wait four and a half years until the next cycle. Furthermore, the heavy reliance on the recommendations *accepted* by states in previous reviews is potentially a downfall of the UPR, particularly when considering its role in the movement towards the abolition of capital punishment. As Charlesworth and Larking pointed out, this method of follow-up '[risks diverting] attention from the most pressing human rights issues in the country concerned' through non-acceptance of certain recommendations in the previous cycle.[196] In practice, it allows states to be selective in which recommendations it accepts and, as such, states can avoid certain human rights issues if it chooses to. The death penalty in the US is a clear example of this in practice. In the US' first review it received many recommendations to abolish the death penalty, none of which were accepted by the US. The US State Department then emphasised that the second review in 2015 was to be based upon the recommendations accepted in the 2010 review,[197] giving the US the opportunity to avoid this issue.

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In general, the success of the UPR can tentatively be measured by the fact that all states to date have cooperated with the mechanism.[198] Israel is the only country not to engage with the UPR process in January 2013 when its government delegation did not submit its National Report or attend its scheduled review. However, this was due to Israel boycotting the UNHRC in general, rather than specifically the UPR mechanism.[199] Its UPR was postponed until October 2013, which the delegation attended, and Israel's second review was completed.[200] Further positives of the UPR include that the 'big fish' states of the UN, including the US, cannot avoid the scrutiny of its human rights records, as it could do so under the Commission. Given the transparency of the UPR mechanism, to be viewed as a human rights violator by the international community is not only embarrassing for a state, but also can have damaging political implications including on trade and tourism.

[196] Charlesworth & Larking (n 4) 15-16.
[197] US Department of State, '2015 UPR Report Fact Sheet on U.S. Process' (6 February 2015) <www.state.gov/j/drl/upr/2015/237251.htm> accessed 24 August 2018.
[198] Charlesworth & Larking (n 4) 7.
[199] UPR Info, 'Israel Absent from its own UPR' (30 January 2013) <www.upr-info.org/en/news/israel-absent-its-own-upr> accessed 24 August 2018.
[200] UNHRC, 'Universal Periodic Review Second Cycle – Israel' <www.ohchr.org/EN/HRBodies/UPR/Pages/ILIndex.aspx> accessed 24 August 2018.

Most scholars are positive about the role the UPR has in promoting and protecting international human rights,[201] although others disagree.[202] For example, Olivier de Frouville has faulted the UPR for 'overshadowing the work of the treaty bodies and of the special procedures'.[203] Although it is extremely important that the views and recommendations of independent experts are given sufficient prominence, the UPR covers all human rights issues, as opposed to particular states or issues as the treaty bodies and special procedures do.[204] Also, as de la Vega and Lewis note, '[t]he recommendations made to countries under review often refer to the treaty bodies and special procedures'.[205] This thesis argues that all three mechanisms are pivotal to the global protection of human rights. Moreover, this thesis also argues that all 193 states have engaged with the UPR, compared with the sporadic engagement with the treaty bodies and special procedures. From this alone, the UPR must be a step in the right direction. Furthermore, de Frouville has argued that, given the UPR is based upon international law, it is difficult for states 'to address legal norms', as the extent of these norms will be regarded with 'national interest' in mind.[206] However, this is where the expertise of the UN bodies and NGOs, through the Compilation Report and Stakeholder Report, is vital, as they can independently verify the extent of the legal obligations. Although not perfect, this thesis believes that the UPR is a positive factor towards ensuring the protection and promotion of human rights globally.

However, some critics are still cautious about bestowing too much praise on the 100% cooperation of all states at this early stage.[207] As discussed above, the UPR is still a politicised mechanism due to its intergovernmental nature. Therefore, much of the interaction between states is based upon diplomatic relations. Furthermore, as the analysis in Part II of this thesis uncovers, the UPR is still in its infancy as a mechanism and, accordingly, the UPR in its current form should not be accepted as the finished product. Instead, it must be given the time and opportunity to develop to its full potential.

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[201] *See,* Natalie Baird, 'The Role of International Non-Governmental Organisations in the Universal Periodic Review of Pacific Island States: Can 'Doing Good' Be Done Better?' (2015) Melb J Intl L Vol 16 No 2, FN3, citing, Alex Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism' (2011) 9 NZ Y Int'l L 187; Elvira Domínguez-Redondo, 'The Universal Periodic Review – Is There Life beyond Naming and Shaming in Human Rights Implementation?' (2012) 4 NZ L Rev 673; Rosa Freedman, 'New Mechanisms of the UN Human Rights Council' (2011) 29 NQHR 289; Edward McMahon and Marta Ascherio, 'A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council' (2012) 18 Global Governance 231; Constance de la Vega and Tamara N Lewis, 'Peer Review in the Mix: How the UPR Transforms Human Rights Discourse' in M Cherif Bassiouni and William A Schabas (eds) *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011); Charlesworth & Larking (n 4). *See, also,* Sweeney & Saito (n 39) 222-23; James Gomez and Robin Ramcharan (eds) *The Universal Periodic Review of Southeast Asia* (Palgrave Macmillan 2017) 33-34.
[202] De Frouville (n 33) 250.
[203] Ibid 251.
[204] *See,* De la Vega and Lewis (n 55) 368-69.
[205] Ibid 372.
[206] Ibid 254.
[207] Kalin (n 8) 30.

3.3 Conclusion

This chapter has identified the different stages of the UPR process, and how the US has engaged with each stage. The examination of the UPR in this chapter has found that it has great potential to be an important and effective international human rights mechanism. In particular, the UPR can be used to further the aims of this thesis. Namely, to ensure the US is adhering to international law whilst it retains the death penalty, to gather information to further the Steikers' blueprint for abolition, and to ensure the protection and promotion of human rights across the world. However, to ensure its success, there are ways in which the UPR needs to be improved. Part II of the thesis analyses the 2010 and 2015 US UPRs through the lens of capital punishment, in order to assess how effective the UPR has been in the context of the abolition of the death penalty. From this analysis, it provides suggestions for reform for the UPR to increase its effectiveness, both generally as a human rights mechanism, and specifically for the abolition of capital punishment in the US.

PART II

Part I of this thesis outlined the US' thorny relationship with international law in chapter two, including its American exceptionalist attitude towards international human rights and the death penalty. It also introduced the UPR mechanism in chapter three. Part II of this thesis builds upon Part I, by analysing the 2010 and 2015 US UPRs as to the mechanism's effectiveness in the context of the abolition of the death penalty. This analysis is carried out through the three broad areas of capital punishment identified by the author: chapter four examines the death penalty and the right to a fair trial within the US UPRs, chapter five considers intellectual disabilities and mental illnesses within the US UPRs, and chapter six reviews the implementation of a death sentence and how the US UPRs dealt with this. These three chapters take on a similar structure: they identify the particular issue within the US capital system, consider the relevant international and domestic laws, and then analyse the 2010 US and 2015 US UPRs. The examination in these chapters highlights the positive and negative aspects of the UPR and, from this analysis, chapter seven identifies and argues for a number of recommendations to be made to improve the UPR mechanism. These changes aim to firstly further the abolition of the death penalty in the US, and, secondly, improve the mechanism in its entirety.

From the outset, it is clear that the US response to the UPR is evidence of the American exceptionalism explored in chapter two. Despite this, it is argued in this thesis that the exceptionalist attitude should not been seen as a barrier to the UPR being used as a vehicle to further the abolition of capital punishment in the US. Changes can be made to the UPR to ensure the US cannot hide behind American exceptionalism as an excuse for non-adherence to international law, as identified throughout Part II and substantiated in chapter seven. The world is now wise to the US' reliance upon American exceptionalism as an excuse for retaining the death penalty and not engaging meaningfully with international human rights on capital punishment. This knowledge can now be used to improve the UPR mechanism, ensure US adherence to international law whilst it retains the death penalty, and further the Steikers' blueprint for abolition.

CHAPTER FOUR

THE US DEATH PENALTY, THE RIGHT TO A FAIR TRIAL, AND THE UNIVERSAL PERIODIC REVIEW

4.1 The Right to a Fair Trial in Capital Cases

The right to a fair trial and due process of law are fundamental human rights embedded within both the international legal framework and domestic US law. Article 10 UDHR provides that '[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal'.[1] Furthermore, Article 14 ICCPR sets out the basics required for a trial to be 'fair'.[2] The 'equality of arms' is a principle referred to by the UN, meaning that both the prosecution and defence should be equal under the right to a fair trial.[3] The equality of arms principle includes the rights under Article 14(3), such as the right to a public trial without undue delay, the right to counsel and to have adequate time to prepare a defence, the right to cross-examination, and the right to an interpreter where necessary.[4] The Committee has also acknowledged that a death sentence that does not follow the fair trial guarantees in Article 14 will also breach Article 6 ICCPR.[5] Furthermore, in order to ensure the specific protections are afforded to a capital defendant resulting from Article 14, ECOSOC adopted its Safeguards in 1984.[6] In 1989 and 1996 these Safeguards were strengthened by ECOSOC,[7] and to monitor adherence to the Safeguards, the UN Secretary-General provides a quinquennial report on 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty'.[8]

In US capital cases, fair trial protections are heightened due to the severity of the punishment, earning itself the term 'super due process' following the SCOTUS decision in *Lockett v. Ohio*.[9]

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[1] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) Article 10 [hereinafter referred to as 'UDHR'].
[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 14 [hereinafter referred to as 'ICCPR'].
[3] *See,* UNHRC, 'General Comment No 32' on 'Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial (2007) UN Doc CCPR/C/GC/32; *Khuseynov and Butaev v Tajikistan* Communication No 1263-1264/2004 UN Doc CCPR/C/94/D/1263-1264/2004 (2008); William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 121.
[4] ICCPR (n 2) Article 14.
[5] UN Human Rights Committee, 'Draft General Comment 36' on 'Article 6 Right to Life' (2017) para 21 [hereinafter referred to as 'General Comment 36 2017'].
[6] ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1984/50 (25 May 1984) [hereinafter referred to as 'Safeguards 1984'].
[7] ECOSOC 'Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1989/64 (24 May 1989) [hereinafter referred to as 'Safeguards 1989']; ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1996/15 (23 July 1996) [hereinafter referred to as 'Safeguards 1996'].
[8] ECOSOC 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General' UN Doc E/2015/49 para 61 (13 April 2015) [hereinafter referred to as 'Report of the Secretary-General 2015'].
[9] *Lockett v Ohio* 438 US 586 (1978). Roger Hood and Carolyn Hoyle have noted that the 'super due process' available for capital trials is not working in practice for a myriad of reasons including: '[p]oor legal representation for those facing the death penalty;

The US has relied upon the fact that its Constitution provides adequate fair trial guarantees without the need for the ICCPR's protections, namely through the Fifth and Fourteenth Amendments' due process clauses, that no person shall 'be deprived of life, liberty, or property, without due process of law'.[10]

This chapter will examine four key areas of due process within the capital system that were identified throughout the US UPRs: the right to counsel, racial discrimination, wrongful convictions, and foreign nationals' right to consular assistance. Each of these four due process protections will be analysed in turn, in the following format. First, it will be considered how the protection is codified in international law, and the extent to which it is assimilated into US law. Second, the effectiveness of the UPR will then be examined, analysing to what extent the fair trial guarantee was raised in the 2010 and 2015 US UPRs and where this highlights inadequacies within the UPR mechanism.

4.2 The Right to Competent Defence Counsel

4.2.1 International Law

The equality of arms principle, and Article 14 ICCPR, provide for the international right to legal assistance, including state-provided counsel for indigent defendants.[11] This right also includes having 'adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing',[12] and the right to examine and cross-examine witnesses.[13] The Safeguards reiterate these protections,[14] whilst also adding the right to 'adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases'.[15] The right to counsel is also noted in the UN Secretary-General's quinquennial reports and, in his 2017 supplement to the quinquennial report, the Secretary-General noted the correlation between poverty and the denial of the right to counsel leading to death sentences.[16]

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huge variations in the rules relating to DNA evidence; inadequate proportionality review of death sentences; flaws in the statutory definitions of capital murder; imprecise definitions of intellectual disability; failures to identify and respond appropriately to those with mental illness; and a lack of means to ensure the absence of racial discrimination', Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) 137.

[10] The United States Constitution, Amendment V, Amendment XIV.

[11] ICCPR (n 2) Article 14 3(d); *Reid v Jamaica* Communication No 250/1987 UN Doc CCPR/C/51/D/355/1989 (1994) para 13; *Pratt and Morgan v Jamaica* Communication No. 210/1986 UN Doc CCPR/C/35/D/210/1986 (1989) para 13.2; *La Vende v Trinidad and Tobago* Communication No 554/1993 UN Doc CCPR/C/61/D/554/1993 (1997) para 5.8.

[12] ICCPR (n 2) Article 14 3(b).

[13] Ibid Article 14 3(e).

[14] Safeguards 1984 (n 6) Number 5; Safeguards 1989 (n 7) para 1(a).

[15] Safeguards 1989 (n 7) para 1(a).

[16] ECOSOC 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General Yearly Supplement of the Secretary-General to his Quinquennial Report on Capital Punishment' UN Doc A/HRC/36/26 para 12 (22 August 2017) [hereinafter referred to as 'Supplement of the Secretary-General to his Quinquennial Report on Capital Punishment 2017'].

The Committee has also adjudicated on these rights in a number of cases regarding assistance of counsel in capital cases, including in *Little v. Jamaica*[17] and *Reid v. Jamaica*.[18] In *Little*, the Committee advised that the definition of 'adequate' in terms of the adequate time to prepare a defence must be considered on a case-by-case basis,[19] but, as in the present case, a thirty minute consultation before trial is a clear breach of the standard in Article 14(3)(b).[20] Similarly in *Reid*, the Committee held that this provision was breached when Reid only met with his lawyers on the day of the trial.[21] Moreover, not having access to a lawyer when initially detained was also considered to be a breach of Article 14 in *Rolando v. Philippines*,[22] just as it was decided that allowing two days for an adjournment is not enough time for counsel to adequately prepare a defence in *Chan v. Guyana.*[23] Equally, when a defendant is only allowed access to counsel for a few moments each day during trial, the Committee found in *Rayos v. Philippines* this will breach Article 14, and, as a sentence of death was imposed, this also breached Article 6.[24] In *Zhuk v. Belarus*, it was found that spending just five minutes with a lawyer, and being without legal representation for most of the 'investigative proceedings' despite asking for assistance, was a breach of the equality of arms principle and Article 14(3)(b) and (d).[25]

4.2.2 Domestic Law

The Sixth Amendment of the US Constitution provides that, '[i]n all criminal prosecutions, the accused shall…have the assistance of counsel for his defense'.[26] Subsequent SCOTUS decisions have confirmed the right not only to defence counsel, but to *effective* legal representation.[27] The case of *Strickland v. Washington*[28] set out the two-prong test for determining whether counsel was ineffective: counsel must have fallen below the objective

[17] *Little v Jamaica* Communication No 283/l988 UN Doc CCPR/C/43/D/283/l988 (1991).
[18] *Reid* (n 11).
[19] *Little* (n 17) para 8.3.
[20] Ibid para 8.4.
[21] *Reid* (n 11) para 11.3.
[22] *Rolando v Philippines* Communication No 1110/2002, UN Doc CCPR/C/82/D/1110/2002 (2004) para 5.6.
[23] *Chan v Guyana* Communication No 913/2000, UN Doc UN Doc CCPR/C/85/D/913/2000 (2006) para 6.3.
[24] *Rayos v Philippines* Communication No 1167/2003, UN Doc CCPR/C/81/D/1167/2003 (2004) para 7.3.
[25] *Zhuk v Belarus* Communication No 1910/2009, UN Doc CCPR/C/109/D/1910/2009 (2013) para 8.5; *See, also, Kovaleva & Kozyar v Belarus* Communication No 2120/2011, UN Doc CCPR/C/106/D/2120/2011 (2012) para 11.5, 11.7; *Khuseynov and Butaev v Tajikistan* (n 3) para 8.5; *Larrañaga v Philippines* Communication No 1421/2005, UN Doc CCPR/C/87/D/1421/2005 (2006) para 7.7. The Committee continues to hear cases regarding the equality of arms and right to legal assistance. For example, in 2017, it heard the non-capital case of *Chelakh v. Kazakhstan*. The Committee found that by not allowing Clelakh's newly appointed counsel time to prepare for the case, this violated his Article 14(3)(b) right. *Clelakh v Kazakhstan* Communication No 2645/2015, UN Doc CCPR/C/121/D/2645/2015 (2017). *See, also, Allaberdiev v Uzbekistan* Communication No 2555/2015, UN Doc CCPR/C/119/D/2555/2015 (2017) para 8.9; *Berezhnoy v Russian Federation* Communication No 2107/2011, UN Doc CCPR/C/118/D/2107/2011 (2016) para 9.5.
[26] The United States Constitution, Amendment VI.
[27] *Strickland v Washington* 466 US 668 (1984); *Powell v Alabama* 287 US 45 (1932); *Gideon v Wainwright* 372 US 335 (1963); *Wiggins v Smith* 539 US 510 (2003).
[28] *Strickland* (n 27).

standard of reasonableness, and counsel's deficiencies must have prejudiced the defendant's case.[29]

However, there is a strong presumption of competence afforded to trial counsel. This was established in *Strickland*, wherein Justice O'Connor, in delivering the opinion of the Court, stated that counsel must have a 'wide latitude' to make 'tactical decisions'.[30] This presumption of competence was confirmed following the restrictions placed on federal habeas corpus appeals set out in the AEDPA.[31] When considering a federal habeas appeal on the grounds of ineffective assistance of counsel ('IAC') under AEDPA, the courts must 'use a "doubly deferential" standard of review that gives both the [S]tate court and the defense attorney the benefit of the doubt'.[32] An example of this deference can be seen in the 'sleeping lawyer case' of *Burdine v. Johnson*.[33] Burdine was convicted of murder and sentenced to death in 1984, whilst his 'attorney slept repeatedly throughout the guilt-innocence phase' of his trial.[34] Despite this apparent breach of Burdine's Sixth Amendment right to effective counsel, a number of appeals were denied on these grounds, including a denial of certiorari from SCOTUS.[35] It was not until 2001 that the Fifth Circuit held that his trial lawyer's actions had prejudiced the defendant's case and his capital conviction was vacated.[36] In fact, since the death penalty was reinstated in 1976 up until 2018, SCOTUS has reversed only five capital convictions on the grounds of IAC.[37] In these successful cases, ineffective conduct has included defence counsel providing an expert showing statistics that the defendant was more likely to reoffend because he was black,[38] failure to investigate the defendant's previous conviction for a serious offence,[39] and counsel's failure to investigate and present mitigating evidence on the basis of the defendant's mental health, family history, and military service.[40]

The vast majority of those sentenced to death in the US are indigent, resulting in the appointment of state-funded defence counsel, a right which mirrors the Article 14 protection. However, public defenders are often underpaid, overworked, and lacking in the requisite experience and knowledge to undertake the daunting task of defending a person's life.[41] The

[29] Ibid.
[30] Ibid 689.
[31] 28 USC § 2254.
[32] *Burt v Titlow* 571 US 12, 15 (2013) (quoting *Cullen v Pinholster* 563 US 170, 189 (2011)).
[33] *Burdine v Johnson* 262 F 3d 336 (5th Cir 2001).
[34] Ibid.
[35] *Ex Parte Calvin Jerod Burdine* 901 S W 2d 456 (Mem) (Texas 1995); *Burdine v Texas* 515 US 1107 (1995). A writ of certiorari is granted by SCOTUS to review the judgment of a lower court.
[36] *Burdine v Johnson* (n 33).
[37] *Buck v Davis* 137 S Ct 759 (2017); *Rompilla v Beard* 545 US 374 (2005); *Porter v McCollum* 558 US 30 (2009); *Wiggins v Smith* 539 US 510 (2003); *Williams v Taylor* 529 US 362, 390, 398-9 (2000). Correct as at 24th August 2018.
[38] *Buck v Davis* (n 37).
[39] *Rompilla v Beard* (n 37).
[40] *Porter v McCollum* (n 37); *Wiggins v Smith* (n 37); *Williams v Taylor* (n 37).
[41] *See,* Stephen B Bright, 'Counsel for the Poor: The Death Sentence Not for the Worst Crimes but for the Worst Lawyer' (1994) 103 Yale LJ 1835.

American Bar Association ('ABA'), a voluntary organisation made up of over 400,000 legal professionals in the US,[42] plays an important role in the right to counsel in the US by providing the 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases'.[43] These guidelines set out the many standards capital defence counsel must abide by. Although the guidelines are not legally binding, they are given considerable weight, including by SCOTUS in IAC cases.[44] The objective of the guidelines 'is to set forth a national standard of practice for the defence of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction'.[45] Practitioners have asserted that, in general, the guidelines 'include[] a responsibility to maintain a strong ongoing relationship with clients, through the post-conviction stage of representation, even after someone has been convicted of the death penalty'.[46] However, despite the intentions of the ABA, '[i]n 2008, only [ten] of the [thirty-six] [S]tates that allowed the death penalty possessed [S]tate-wide capital-defence schemes which satisfied the ABA that its standards were being adhered to'.[47]

It is therefore unsurprising that many capital post-conviction appeals rely upon trial counsel being ineffective. As SCOTUS Justice Ruth Bader Ginsburg famously said, '[p]eople who are well represented at trial do not get the death penalty'.[48] Moreover, Hood and Hoyle have argued, 'the inadequacy of the legal representation provided has, in many cases, been shown to be the Achilles heel of the death penalty system'.[49] This problem with access to competent defence counsel continues to be a key issue in the US, and is the type of capital issue expected to be raised throughout the UPR.

4.2.3 The 2010 Universal Periodic Review and Capital Defence Counsel

National Report

In its 2010 National Report, the US clarified that it is realising its obligations under Article 14 ICCPR regarding access to counsel, by stating that:

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[42] American Bar Association 'About the American Bar Association' <www.americanbar.org/about_the_aba.html> accessed 24 August 2018.
[43] American Bar Association, 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases' (2003) 31 Hofstra L Rev 913.
[44] *See,* Justice Breyer's dissent in *Glossip* 135 S Ct 2726, 2762 (2015); Justice Breyer's dissent in *Sanchez-Llamas v Oregon* 548 US 331, 382 (2006); *Rompilla v Beard* (n 37) FN7; *Wiggins v Smith* (n 37) 524.
[45] ABA, 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases' (n 43) Guideline 1.1 A.
[46] Elizabeth Compa, Cecelia Trenticosta Kappel & Mercedes Montagnes, 'Litigating Civil Rights on Death Row: A Louisiana Perspective' (2014) 15 Loy J Pub Int L 293, 308.
[47] Hood & Hoyle (n 9) 280.
[48] American Civil Liberties Union, 'Inadequate Representation' <www.aclu.org/other/inadequate-representation> accessed 24 August 2018.
[49] Ibid 275.

> The [US] Constitution, as well as federal and [S]tate statutes, provides a number of substantive and procedural protections for individuals accused of committing crimes…includ[ing]…the right to an attorney…[and] the right to cross-examine witnesses at trial.[50]

However, despite this assurance from the US government, throughout the 2010 UPR, the extent of these protections was questioned, particularly by the Stakeholders.

Stakeholder Reports

Considering the importance of the ABA in the capital system, it is no surprise that it was a pivotal Stakeholder in both the 2010 and 2015 US UPRs. In 2010, the ABA provided an individual Stakeholder submission plus five appended 'background documents', presumably due to the strict five-page limit on the submission.[51] The ABA's finding that 'some jurisdictions in the US…fail[] to meet fundamental standards of competency of defense counsel' was cited in the main Stakeholder Report.[52] However, much more detail was provided in its individual submission documents. For example, one of the ABA's appended background documents was a letter to President Obama regarding prosecutors seeking the death penalty for six alleged 9/11 terrorists.[53] In the letter, the ABA set out the basic standards that its guidelines require from capital defence counsel:

> The Guidelines call for defense teams -- consisting of at least two qualified attorneys, one investigator, and one mitigation specialist -- with sufficient experience and training to provide high quality legal representation to those who face execution if convicted.[54]

Unfortunately, it is doubtful that other member states participating in the UPR will have read this appended background document. The government delegations potentially have 192 UPRs to contribute to, and so considering the limited time and resources available, it is unlikely that states will consider any documents other than the three main reports. However, for UN member states formulating recommendations, it would have been beneficial for them to be aware of the details of the ABA guidelines before the review took place. Therefore, in order to ensure as much information is conveyed to the member states as possible, this thesis argues that the advance questions section of the UPR should also include questions from Stakeholders, as well as UN member states as it does at present.[55] This would allow the ABA

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[50] UNHRC, 'National Report of the United States of America' (23 August 2010) UN Doc A/HRC/WG.6/9/USA/1 para 56 [hereinafter referred to as 'National Report 2010'].
[51] *See,* chapter 7.1.2.
[52] UNHRC, 'Summary of Stakeholders Information – United States of America' (14 October 2010) UN Doc A/HRC/WG.6/9/USA/3/Rev1 para 30 [hereinafter referred to as 'Stakeholder Report 2010'].
[53] ABA, 'United States Universal Periodic Review Stakeholder Submission Annex 4' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> 2 accessed 24 August 2018.
[54] Ibid.
[55] *See,* chapter 7.2.1.

the autonomy to decide what information would be provided to the member states, rather than leaving it to the OHCHR to select the content of the Stakeholder Report from its individual submission. Although the Stakeholders would be able to ask advance questions on any area of human rights, it would be logical for the ABA to deal with the right to counsel, given its expertise.

Although, in its individual Stakeholder submission, the ABA did note that some US States are not meeting the requisite standards required of counsel, the only explanation provided for this was that the '[s]erious deficiencies in the competence of capital counsel remain, in part because Congress in 1996 eliminated all federal funding from Post-Conviction Defender Organizations'.[56] However, there are many other reasons for capital defendants receiving ineffective assistance of counsel. For example, the main Stakeholder Report cited the ACLU, which had noted other reasons for IAC, such as 'indigent capital defendants…are often appointed attorneys who are overworked and lacking critical resources, and the lack of adequate counsel in post-conviction proceedings leaves them with little recourse'.[57] This is in contravention of ABA guideline 6.1, which states that '[t]he Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation'.[58]

A further issue is the underpayment of capital attorneys, and ABA guideline 9.1.B provides that '[c]ounsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation'.[59] The ABA provided further detail about under-compensating capital attorneys in its study 'The State of the Modern Death Penalty in the US' which, although not cited in the UPR, provided a wealth of information regarding many different areas of the death penalty. In this context, the study confirmed that some States are 'distinguishing between in-court and out-of-court work and imposing caps on compensation',[60] which in turn means these '[i]n- and out-of-court rate disparities and flat fees can induce counsel to bring a case to trial, as opposed to negotiating a plea agreement that, in many capital cases, is in the best interest of the client'.[61] What this leads to is '[q]ualified counsel [opting] not to represent capital defendants out of concerns that their considerable

[56] ABA, 'United States Universal Periodic Review Stakeholder Submission' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> para 16 accessed 24 August 2018.
[57] Stakeholder Report 2010 (n 52) para 30.
[58] ABA, 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases' (n 43) Guideline 6.1.
[59] Ibid Guideline 9.1.B.
[60] ABA, 'The State of the Modern Death Penalty in America' <www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/aba_state_of_modern_death_penalty_web_file.authcheckdam.pdf> 8 accessed 24 August 2018.
[61] Ibid.

efforts will not be fairly compensated'.[62] Given the life or death nature of representing a client facing a capital sentence, the amount of money required to ensure counsel is effective should be of little concern. If the State budget does not cover competent counsel's fees commensurate with the complexity of the work carried out, then death sentences should not be sought by prosecutors, as it violates the equality of arms principle. A lack of funds to pay competent counsel does not override a defendant's Sixth Amendment and Article 14 ICCPR rights, and USHRN similarly noted in its Death Penalty Annex to its UPR submission, that 'income, like race, should never be a factor in who is sentenced to death'.[63]

In its National Report, the US government stated that '[m]any of our [S]tates have adopted procedures of their own to provide experienced counsel for indigent defendants'.[64] However, the ACLU's individual submission contradicts this, making it clear that IAC 'is not isolated to a few bad attorneys; it is a widespread and systematic failure to ensure access to justice for defendants facing capital charges and those convicted of capital crimes'.[65] The ACLU gives substance to its assertions by noting that '[i]nadequate counsel not only adversely affects the client at trial and sentencing, but substandard attorneys fail to investigate and preserve objections, resulting in an inadequate trial record' which, in turn, causes problems on appeal.[66] It is often difficult enough at the post-conviction stage to prove a violation of the petitioner's constitutional rights, but the ACLU noted that 'beyond the first appeal to federal court, people fighting their death sentences have no constitutional right to a lawyer, and the quality of available counsel can be even more abysmal in these appeals than at the trial level'.[67] It would have added clarity to the problem of access to counsel in the capital system if the ACLU had challenged the US government on its statement in the National Report. This could have been done during the UNHRC plenary session, or through the advance questions if Stakeholders were able to provide them.[68]

Ineffective Assistance of Counsel in the Medellín, Cardenas, and Leal Garcia Cases

The sub-standard performance by capital attorneys was evidenced by the IACHR in its individual submissions to the US UPR, which included the case report of José Ernesto Medellín, Ramírez Cardenas, and Leal García, three men facing execution in Texas.[69] Their

[62] Ibid.
[63] United States Human Rights Network, 'United States Universal Periodic Review Stakeholder Submission Annex 5' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> para 5 accessed 24 August 2018.
[64] National Report 2010 (n 50) para 62.
[65] ACLU, 'United States Universal Periodic Review Stakeholder Submission' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> 2 accessed 24 August 2018.
[66] Ibid 3.
[67] Ibid.
[68] *See,* chapter 7.2.1.
[69] Inter-American Commission on Human Rights, 'United States Universal Periodic Review Stakeholder Submission Annex 2' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> accessed 24 August 2018. The IACHR also provided information about the Orlando Hall case: IACHR, 'United States Universal Periodic Review Stakeholder Submission

petitions included a number of constitutional and international law grievances, including breaches of the Vienna Convention on Consular Relations ('VCCR') and concerns over the lethal injection, but also regarding the performance of their State-appointed attorneys.

Medellín's trial counsel 'was under a six month suspension from the practice of law for ethics violations in another case' and had actually been jailed for a week prior to the trial for practicing while suspended.[70] Furthermore, it was alleged that trial counsel 'spent a total of eight hours on the investigation prior to the commencement of jury selection…[and] failed to strike jurors who revealed their inclination to impose automatically the death penalty'.[71] In its individual submission, the ACLU noted that this was a widespread issue, stating that 'capital cases are among the most complex, time-intensive and financially draining cases to try' but that despite this, '[i]ncompetent defense attorneys fail to investigate cases thoroughly, fail to present compelling or mitigating evidence, and fail to call witnesses that would aid in the defense'.[72] ABA guideline 10.7.A says that '[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty',[73] which was breached in this case.

Another problem raised by the Medellín case and also cited by the ACLU in its individual submission, is counsel having 'a critical lack of resources for investigation and expert assistance'.[74] Indigent defendants have the right to State-funded expert assistance under *Ake v. Oklahoma,* but only when relevant factors are significant at trial.[75] For example, there is no right to a jury expert under *Ake,* and there will often be no funds available to instruct one, as in Medellín's case. This is concerning, as jury selection in the US is a significant part of a capital trial – Steven Serio has asserted that it 'can be a matter of life or death'.[76] During a trial, a jury expert 'drafts a model of potential jurors, uses the model to select an appropriate jury panel, and educates the attorney about effective jury selection strategies'.[77] This, in turn, allows counsel to 'focus[] on questioning the venire'.[78] Given the bifurcated nature of capital trials which means jurors not only decide on guilt or innocence, but also make the life or death

Annex 8' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> para 24 accessed 24 August 2018. Hall was also denied his constitutional right to effective counsel – following his initial attorneys withdrawing on the grounds of a conflict of interest, his 'new attorneys unreasonably relied on the superficial and incomplete work done by prior counsel, and failed to prepare adequately for the penalty phase of Mr. Hall's trial. According to the petitioners, these attorneys did not obtain or present expert testimony on Mr. Hall's neuropsychological impairment. The petitioners further contend that the attorneys neglected to present mitigating evidence to support a custodial sentence for Mr. Hall and that they further failed to adduce character evidence in favor of Mr. Hall, save for testimony from his mother and sister'.

[70] IACHR, 'Stakeholder Submission Annex 2' (2010) (n 69) para 18.

[71] Ibid para 19.

[72] ACLU, 'Stakeholder Submission' (2010) (n 65) 2.

[73] ABA, 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases' (n 43) Guideline 10.7.A.

[74] ACLU, 'Stakeholder Submission' (2010) (n 65) 2.

[75] *Ake v Oklahoma* 470 US 68 (1985).

[76] Steven C Serio, 'A Process Right Due? Examining Whether a Capital Defendant has a Due Process Right to a Jury Selection Expert' (2004) 53 Am U L Rev 1143, 1148.

[77] Ibid 1153.

[78] Ibid.

sentencing decision,[79] it is crucial that jury selection is effective. ABA guideline 10.10.2.C states that '[c]ounsel should consider seeking expert assistance in the jury selection process'.[80] However, Serio argues that, due to the vital role of the jury, a capital defendant should have the constitutional right under *Ake* to a jury selection expert to ensure a fair trial.[81] There are clear examples of defendants who were not afforded a jury expert and were subsequently sentenced to death, for example, in the case of *Quintero v. State*[82] and in Medellín's case presented to the IACHR.

In Cardenas' case, he was not appointed counsel at the arraignment hearing 'even though he was indigent and was constitutionally entitled to legal representation'.[83] This was a violation of Cardenas' Sixth Amendment right to counsel 'at all critical stages' which, as per the SCOTUS case of *Powell v. Alabama,* includes arraignment.[84] It was also a violation of his right to 'adequate assistance of counsel at every stage of the proceedings', and the equality of arms principle, under international law.[85]

Leal García's attorneys were also allegedly 'grossly ineffective', and the petitioner reported to the IACHR that '[o]ne of them had been disciplined on three occasions for violating State ethics rules and twice he had been given a probated suspension for neglecting legal matters'.[86] Furthermore, at the penalty phase following the guilty verdict, 'the prosecution introduced evidence that Mr. Leal García had sexually assaulted another teenager who was acquainted with him' despite Leal García never being prosecuted for or convicted of this offence.[87] The IACHR, citing a previous decision regarding the US death penalty, took particular exception to this, finding that 'the [S]tate's conduct in introducing evidence of unadjudicated crimes during a sentencing hearing was "antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes"'.[88] Whilst this involves a separate issue regarding prosecution ethics, it is also a failure on the part of the defence attorney; Leal García's defence team 'did nothing to investigate this allegation'[89] in contravention of ABA guideline 10.7.A.[90]

The IACHR particularly lamented the Texas capital public defender system, noting that it:

[79] *See, Ring v Arizona* 536 US 584 (2002).
[80] ABA, 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases' (n 43) Guideline 10.10.2.C.
[81] *See generally,* Serio, 'A Process Right Due?' (n 76).
[82] *Quintero v State* No M2005-02959-CCA-R3-PD, 2008 WL 2649637 (Tenn Crim App 7 July 2008).
[83] IACHR, 'Stakeholder Submission Annex 2' (2010) (n 69) para 27.
[84] *Powell v Alabama* 287 US 45 (1932).
[85] Safeguards 1989 (n 7) para 1(a).
[86] IACHR, 'Stakeholder Submission Annex 2' (2010) (n 69) para 41.
[87] Ibid para 47.
[88] Ibid para 145.
[89] Ibid para 47.
[90] ABA, 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases' (n 43) Guideline 10.7.A.

> [Had] no [S]tate-wide agency responsible for providing specialized representation in capital cases [and a] great majority of lawyers who handle death penalty cases in Texas are sole practitioners lacking the expertise and resources necessary to properly defend their clients, and as a result, capital defendants frequently receive deficient legal representation.[91]

The IACHR concluded that, where there had been violations of the fair trial guarantees, the State of Texas should '[v]acate the death sentences imposed and provide the victims with an effective remedy, which includes a new trial in accordance with the equality, due process and fair trial protections'.[92] However, despite these grave violations of international and domestic law, all three petitioners have now been executed.[93]

Through the submission of these petitions to the UPR, the IACHR evidenced that IAC in death penalty cases is a serious issue requiring urgent remedy in the US. It highlighted specific examples of how incompetent counsel can lead to a death sentence and eventual execution, whilst also pointing to the failings of the 'super due process' standards that are supposedly afforded to capital defendants in the US. Despite this, reference was not made to these cases in the Stakeholder Report. These petitions shed light on serious inadequacies in the US capital system that all key UPR actors would have benefited from reading about, in particular the member states when formulating their recommendations. More transparency is needed from the OHCHR as to how they decide upon the content of the reports in order to understand why certain important information is being omitted.[94] A further example of why this transparency is needed is that the issue of IAC was also raised as a concern by the Committee on the Elimination of Racial Discrimination ('CERD') – the UN treaty body mandated to ensure compliance with the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') – in its 2008 report on the US.[95] However, whilst this report was cited in relation to other human rights issues in the 2010 Compilation Report, this specific issue of the right to capital counsel did not make it into the report.

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[91] IACHR, 'Stakeholder Submission Annex 2' (2010) (n 69) para 139.
[92] Ibid para 160.
[93] Mark Warren, 'Confirmed Foreign Nationals Executed Since 1976' (*Death Penalty Information Center* updated 12 March 2018) <https://deathpenaltyinfo.org/foreign-nationals-part-ii> accessed 24 August 2018.
[94] *See,* chapter 7.1.1.
[95] UNCERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination – United States of America' (8 May 2008) UN Doc CERD/C/USA/CO/6 para 22 [hereinafter referred to as 'Concluding Observations of the Committee on the Elimination of Racial Discrimination 2008'], '[t]he Committee recommends that the State party adopt all necessary measures to eliminate the disproportionate impact that persistent systemic inadequacies in criminal defence programmes for indigent persons have on defendants belonging to racial, ethnic and national minorities, inter alia, by increasing its efforts to improve the quality of legal representation provided to indigent defendants and ensuring that public legal aid systems are adequately funded and supervised'.

Recommendations

Despite IAC being such an important issue, no recommendations or advance questions were provided by any UN member states in 2010. A potential reason for this has been discussed by Chauville, who found that the information provided in the Compilation Report 'has been extensively used by countries making recommendations to the state under review'.[96] As there was no discussion of the issues surrounding the right to capital counsel in the Compilation Report, and limited references in the Stakeholder Report, this likely had an effect on the lack of advance questions and recommendations. There was a wealth of information regarding the issue of IAC in capital cases in the 2010 UPR, but this may not have been relayed to the recommending states. This adds to the argument in this thesis that the OHCHR needs to be more transparent about how it decides on the content of its reports.[97] From this, the UN bodies and Stakeholders would be able to amend their individual submissions accordingly. Furthermore, by permitting Stakeholders to provide advance questions this would allow key issues such as IAC to be raised, especially if it had not been discussed in detail in the main reports.[98] This may then prompt the member states to provide recommendations on IAC, including ways in which the US can improve access to competent counsel in death penalty cases, which would provide the impetus for changes to be made in this area in the US.

4.2.4 The 2015 Universal Periodic Review and Capital Defence Counsel

National Report

Although the right to counsel continued to be a concern between the 2010 and 2015 UPRs, the second US UPR saw a sharp reduction in discussion of this issue. There was only one mention of it in the three main reports, which was, surprisingly, in the National Report, despite there being no recommendations from the previous cycle for the US delegation to respond to. The National Report stated that '[t]he Constitution requires that all criminal defendants, including capital defendants, receive effective assistance of counsel'.[99] However, this was just recitation of sections of the Constitution, as already discussed, there is clear proof that indigent defendants are not receiving effective assistance of counsel. Therefore, this assertion from the US should have been challenged throughout the rest of the UPR process.

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[96] Roland Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015). Elvira Domínguez Redondo also noted that 'conclusions of special procedures and treaty bodies were broadly used as a basis for the questions and comments made during the interactive dialogue'; Elvira Domínguez Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) Chinese Journal of International Law, Vol 7, No 3, 721-734, 730.
[97] *See,* chapter 7.1.1.
[98] *See,* chapter 7.2.1.
[99] UNHRC, 'National Report of the United States of America' (13 February 2015) UN Doc A/HRC/WG.6/22/USA/1 para 50 [hereinafter referred to as 'National Report 2015'].

Stakeholder Reports

There was no discussion of the right to counsel in the Compilation Report or Stakeholder Report, and there was only one mention in the individual submissions by AI, which found that '[i]n numerous cases, prisoners have gone to their deaths…where inadequate legal representation for indigent defendants meant that the sentencing jury had not been presented with the full array of mitigating evidence available in the case'.[100] Furthermore, the IACHR did not submit case reports in the way that it did in 2010. This was despite a number of potential cases regarding IAC being heard by the IACHR, including regarding Ivan Teleguez, wherein the petitioner alleged that IAC 'was a significant --if not the most significant-- factor leading to his being found guilty and then being sentenced to death'.[101]

The substantial reduction of Stakeholders discussing the right to counsel may have been due to the lack of recommendations made in 2010. As the subsequent reviews are based upon recommendations accepted in the previous review,[102] and there were no recommendations made on this in 2010, the US was not expected to carry out any follow-up. Therefore, this may have influenced the Stakeholders' discussion of the right to counsel in their individual submissions, indicating that in its current format the UPR is allowing some human rights issues to be overlooked. This suggests a need for change in the approach to the UPR, particularly from the Stakeholders. This thesis argues that, alongside allowing Stakeholders to submit advance questions, another way to strengthen the UPR is to encourage Stakeholders to provide reports thematically to ensure important issues regarding the death penalty are not overlooked in future reviews.[103] For example, the ABA's expertise is in matters regarding counsel and so it could use this expert knowledge to provide a submission specifically on this area. Other examples include the Innocence Project, which could submit a report on wrongful convictions,[104] and Reprieve, which could submit a report on methods of execution due to their expert knowledge and engagement on this issue.[105]

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[100] Amnesty International, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> 3 accessed 24 August 2018.
[101] IACHR, Report No 53/13, Case 12.864 Merits (Publication) Ivan Teleguez, United States, 15 July 2013 para 22; *See, also,* IACHR, Report No 81/11, Case 12.776 Merits (Publication) Jeffrey Timothy Landrigan, United States, 21 July 2011; IACHR, Report No 52/13, Cases 11.575, 12.333 and 12.341Merits (Publication) Clarence Allen Lackey e*t al.*; Miguel Ángel Flores, and James Wilson Chambers, United States, 15 July 2013; IACHR, Report No 13/14, Case 12.422 Merits (Publication) Abu-Ali Abdur' Rahman, United States, 2 April 2014; IACHR, Report No 44/14, Case 12.873 Merits (Publication) Edgar Tamayo Arias, United States, 17 July 2014.
[102] UNHRC Resolution 5/1 (18 June 2007) para 34.
[103] *See,* chapter 7.2.2.
[104] The Innocence Project, 'About' <www.innocenceproject.org/about/> accessed 24 August 2018.
[105] Reprieve, 'About' <https://reprieve.org.uk/about/> accessed 24 August 2018.

Recommendations

Again, just as in 2010, there were no advance questions asked regarding defence counsel. However, despite the reduction in discussion of the right to counsel generally, Poland recommended that the US should '[s]trengthen safeguards against wrongful sentencing to death and subsequent wrongful execution by ensuring, *inter alia*, effective legal representation for defendants in death penalty cases, including at the postconviction stage'.[106] Although this recommendation was supported by the US, it did not provide any further detail and there is no evidence that this has been implemented.[107] A potential way to remedy this to ensure that during the follow-up to the review implementation is measurable, would be to require the state under review to briefly address how it will implement accepted recommendations and why it did not accept noted recommendations.[108] The US already provides an Addendum to the Working Group Report, highlighting reasons behind some accepted or accepted in part recommendations, but this is inconsistent.[109] In providing such extra details, for example how it will implement Poland's recommendation on ensuring effective counsel in capital cases, this would allow a discussion to take place during the UNHRC plenary session. The state under review, UN member states, and Stakeholders could provide details regarding how they can assist with the implementation of accepted recommendations, while also considering the reasons why the noted recommendations were not accepted. This would inform the other UN member states and Stakeholders as to the barriers blocking the remedy of specific human rights issues in the US and would allow them to formulate their advance questions and recommendations for the next UPR accordingly, whilst also disseminating key information locally to affect change on the ground.

The fact that only one recommendation was made on the right to counsel indirectly highlights a wider issue with the recommendations in general – that the US has received a high number of similar recommendations. For example, in 2015, eight recommendations were made asking the US to just generally adhere to 'human rights instruments'.[110] In order to reduce the number of recommendations when collating the Outcome Report, the troika should group them together thematically.[111] The troika already has the option to collate identical and very similar recommendations, but this is not being carried out consistently. Furthermore, instead of making such broad recommendations on international instruments, which are sometimes used

[106] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (20 July 2015) UN Doc A/HRC/30/12 paras 176.200 [hereinafter referred to as 'Report of the Working Group 2015']. Emphasis added.
[107] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (14 September 2015) A/HRC/30/12/Add1 para 8 [hereinafter referred to as 'Report of the Working Group Addendum 1 2015']
[108] *See,* chapter 7.5.1.
[109] Report of the Working Group Addendum 1 2015 (n 107).
[110] Report of the Working Group 2015 (n 106) paras 176.1-176.8.
[111] *See,* chapter 7.4.1.

'a way of sparing states under review from criticism',[112] states should instead consider the benefits of providing specific recommendations on important issues, such as the right to defence counsel as Poland did in the 2015 review.[113] Not only do specific recommendations prevent states from hiding from criticism, but their implementation is more measurable, which may also encourage engagement on critical human rights issues.

4.3 Racial Discrimination and the Right to a Fair Trial

4.3.1 International Law

Another prevalent concern regarding many capital defendants' right to a fair trial is racial discrimination. The racially disparate use of the death penalty contravenes a number of international standards, including ICERD, a treaty the US signed in 1966 and acceded to in 1994 with a list of RUDs.[114] Particularly relevant is Article 5, which provides that parties to ICERD should:

> [U]ndertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of…[t]he right to equal treatment before the tribunals and all other organs administering justice.[115]

Furthermore, Article 2 UDHR sets out that when applying the rights set out in the UDHR, no distinction should be made on the basis of race,[116] and Article 2 ICCPR provides that each party to the treaty must undertake not to discriminate on the basis of race when applying the provisions of the ICCPR.[117] Article 26 ICCPR also guarantees that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race'.[118] Although the US is a party to the ICCPR, it lodged an understanding against Articles 2 and 26, explaining that the distinctions stated in the Articles would only be permitted when they were 'rationally related to

[112] Walter Kalin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015) 33.
[113] Report of the Working Group 2015 (n 106) 176.200; *See,* chapter 7.4.2.
[114] Senate Resolution of Advice and Consent to Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong Rec S7634-02 (24 June 1994).
[115] International Covenant on the Elimination of Racial Discrimination (adopted 21 December 1965, entered in force 4 January 1969) UNGA Resolution 2106 (XX)2 Article 5(a) [hereinafter referred to as 'ICERD'].
[116] UDHR (n 1) Article 2.
[117] ICCPR (n 2) Article 2(1).
[118] Ibid Article 26.

a legitimate governmental objective'.[119] The Committee's General Comment 36 from 2015 noted that:

> Data about the disproportionate representation on death row of members of religious or ethnic minorities or foreign nationals may suggest that the application of the death penalty has an unequal effect on members of such groups and it may be, as a result, contrary to [A]rticle 6, paragraphs 1 and 2.[120]

This was a cautious approach from the Committee. It did not directly state that executions based upon a discriminatory application of a death sentence would violate Article 6 ICCPR, but suggested that there was the possibility. This thesis argues that the Committee needs to be bolder in its assertions, setting clear guidelines for states.

Although the Safeguards do not explicitly mention racial discrimination, the Secretary-General in the 2015 quinquennial report discusses the issue under the fair trial heading. For example, the report highlighted that EU guidelines provide that the death penalty 'must not be applied or used in a discriminatory manner on any ground including political affiliation, sex, racial or ethnic origin'.[121] The report also specifically noted the issue of black people being vastly overrepresented in the death row population in the US.[122] In fact, the Secretary-General's yearly supplement to the quinquennial report in 2017 was focused on the right to equality and the death penalty.[123] It noted that '58 per cent of death row inmates in the [US] are from African American, Hispanic or other communities with economically vulnerable backgrounds'.[124]

4.3.2 Domestic Law

Article 5 ICERD is similarly worded to the Equal Protection Clause of the Fourteenth Amendment to the US Constitution, which provides that the US shall not 'deny to any person within its jurisdiction the equal protection of the laws'.[125] The Fourteenth Amendment was enacted in 1868 following the abolition of slavery in the US, and there is a history of racial discrimination in the US that traces back to slavery and lynchings.[126] As AA4RR noted in its individual UPR submission in 2015, '[f]rom the days of slavery, Jim Crow and Willie Lynch to more modern issues of racial discrimination, the plight of Africans in the [US] has continually

[119] Senate Executive Report No 102-23 (1992) 22.
[120] UNHRC, 'General Comment 36' on 'Article 6 Right to Life' (2015) CCPR/C/GC/R.36/Rev.2 para 46 [hereinafter referred to as 'General Comment 36 2015'].
[121] Report of the Secretary-General 2015 (n 8) para 95.
[122] Ibid para 96.
[123] Supplement of the Secretary-General to his Quinquennial Report on Capital Punishment 2017 (n 16).
[124] Ibid para 14.
[125] The United States Constitution, Amendment XIV.
[126] *See generally,* chapter five in Franklin E Zimring, *The Contradictions of American Capital Punishment* (OUP 2003).

received world-wide attention'.[127] In *Furman v. Georgia,* Justice Douglas found in his concurring opinion, that '[i]t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices'.[128] Matthew C. Altman believes that Justice Douglas was 'worried specifically that juries were basing their sentencing decisions on racial prejudice, sentencing black defendants to death who did not deserve it and giving lighter sentences to white defendants who deserved the death penalty'.[129] Although the death penalty was reinstated in 1976 on the basis that it would be applied more fairly,[130] research has shown that race continues to be influential in a jury's decision to sentence to death.[131]

Detailed studies have been carried out on the link between race and the death penalty, which show 'a correlation between holding racially biased beliefs and support for the death penalty in the [US]'.[132] For example, the Baldus Study, a sophisticated study carried out on sentencing within cases in the 1970s and the racial disparities in the death penalty in Georgia,[133] found that there was a 4.3:1 chance of a defendant receiving the death penalty for killing a white person than a black person.[134] From this, the authors concluded that the race of the victim is almost as influential as a defendant having previously been convicted of crimes such as robbery.[135] Furthermore, when the raw data was analysed it showed that even in this category black defendants were more likely to be executed than white defendants.[136] In the case of *McCleskey v. Kemp,*[137] the appellant attempted to rely upon the Baldus study to show that 'the Georgia capital sentencing process is administered in a racially discriminative manner in violation of the Eighth and Fourteenth Amendments'.[138] However, in a 5-4 decision, SCOTUS rejected this argument and, in delivering the opinion of the Court, Justice Powell found that for an Equal Protection claim to stand, an appellant must prove 'that the decision-makers in *his* case acted with discriminatory purpose'. [139] The majority found McCleskey had not done this,

[127] Africans in America for Restitution and Repatriation, 'United States Universal Periodic Review Stakeholder Submission' <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> (2015) 3 accessed 24 August 2018.
[128] *Furman v Georgia* 408 US 238, 242 (1972).
[129] Matthew C Altman, 'Arbitrariness and the California Death Penalty' (2016) 14 Ohio St J Crim L 217, 223.
[130] *Gregg v Georgia* 428 US 153 (1976).
[131] Terrence Rogers, 'Using International Human Rights Law to Combat Racial Discrimination in the U. S. Criminal Justice System' (2011) 14 Scholar 375, 412-14.
[132] Hood & Hoyle (n 9) 286.
[133] Although commonly referred to as 'the Baldus Study', there were actually two studies conducted. David C. Baldus et al., 'Monitoring and Evaluating Temporary Death Sentencing Systems: Lessons from Georgia' (1985) 18 UC Davis L Rev 1375; David C. Baldus et al., 'Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience (1983) 74 J Crim L & Criminology 661 [hereinafter collectively referred to as the 'Baldus Study'].
[134] Ibid.
[135] Ibid.
[136] Ibid; Michael Mears, 'The Georgia Death Penalty: A Need for Racial Justice' (2008) 1 J Marshall LJ 71, 81.
[137] *McCleskey v Kemp* 481 US 279 (1987).
[138] Ibid 286.
[139] Ibid 292.

as he had relied solely on the findings of the Baldus study, rather than on the facts of his own case.[140]

This problem has not improved over time. The Death Penalty Information Center ('DPIC') carried out a study of all capital cases from 1976 to June 2015, which provided statistical results showing that '[o]ver 75% of the murder victims in cases resulting in an execution were white, even though nationally only 50% of total murder victims generally are white'.[141] Furthermore, the 2015 report to the UN Secretary General on the consequences of the death penalty identified that the race of the victim and/or the defendant is a 'major factor' in death penalty cases and stated that, in the US, racial discrimination 'persists unabatedly'.[142] Concerns about these statistics are echoed by many other UN mechanisms, including throughout the UPR.

4.3.3 The 2010 Universal Periodic Review and Racial Discrimination in the Death Penalty

In its 2010 National Report, the US addressed civil society's concerns about 'racial disparities in sentencing'[143] and advised that the federal capital system 'operates to help ensure that the death penalty is not applied in an arbitrary, capricious, or discriminatory manner'.[144] However, despite this assurance from the US government, CERD was cited in the 2010 Compilation Report as it 'remained concerned about the persistent racial disparities regarding the imposition of the death penalty'.[145] Furthermore, both CERD and the Committee 'recommended that the State adopt all necessary measures, including a moratorium, to ensure the death penalty is not imposed as a result of racial bias'.[146] The Compilation Report did not advise whether CERD or the Committee provided any further guidance on how this should be carried out. However, upon consideration of CERD's original report, in its Concluding Observations to the US, CERD 'recommend[ed] that the [US] undertake further studies to identify the underlying factors of the substantial racial disparities in the imposition of the death penalty, with a view to elaborating effective strategies aimed at rooting out discriminatory practices'.[147] This was also recommended on in the 2010 UPR by France, which suggested

[140] Ibid 292-93.
[141] Death Penalty Information Center, 'Facts about the Death Penalty' (2 June 2015) <www.deathpenaltyinfo.org/FactSheet.pdf> accessed 24 August 2018.
[142] ECOSOC 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General Yearly Supplement of the Secretary-General to his Quinquennial Report on Capital Punishment' (16 July 2015) UN Doc A/HRC/30/18 para 36.
[143] National Report 2010 (n 50) para 57.
[144] Ibid para 62
[145] UNHRC, 'Compilation of UN Information – United States of America' (12 August 2010) UN Doc A/HRC/WG6/9/USA/2 para 19 [hereinafter referred to as 'Compilation Report 2010'].
[146] Ibid para 25.
[147] Concluding Observations of the Committee on the Elimination of Racial Discrimination 2008 (n 95) para 23.

the US should '[u]ndertake studies to determine the factors of racial disparity in the application of the death penalty, to prepare effective strategies aimed at ending possible discriminatory practices'.[148] Although the US accepted this recommendation it provided no explanation as to how it would be implemented,[149] which became an issue when it was made clear in the 2015 UPR that this recommendation had not been acted upon.[150] This indicates a flaw in the UPR's follow-up to the review. As argued above, a way to remedy this to ensure implementation is measurable, would be to require the state under review to briefly address how it will implement accepted recommendations and why it did not accept noted recommendations.[151]

Definition of Racial Discrimination

A further issue highlighted in the 2010 UPR was the incompatibility between the definition of racial discrimination under international law and US law: international law protects against non-intentional discrimination, whereas US law does not. To raise this point within the UPR, the Compilation Report cited CERD, which had 'recommended that the [s]tate review the definition of racial discrimination used in the federal and [S]tate legislation and in court practice, so as to ensure it is consistent with that of [ICERD]'.[152] This was also raised by the Stakeholders in 2010. In the Stakeholder Report, it was cited that 'USHRN noted the failure to address *de facto* and *de jure* discrimination and the definition of discrimination is not in accordance with the ICERD'.[153] In fact, one of the twenty-five annexes to USHRN's individual submission was a document dedicated to ICERD. In this Annex, they further explained that the difference between definitions is that '[w]ith few exceptions cognizable racial discrimination in the US requires evidence of *intent* to discriminate' and '[t]his requirement is contrary to [ICERD's] framework',[154] as ICERD's definition includes non-intentional discrimination.[155] Non-intentional discrimination encompasses the links between race, poverty, and education with crime and, ultimately, the death penalty. Therefore, a key factor to consider is how the US can be held accountable specifically to the ICERD standard through the UPR. China recommended on this issue in 2010, suggesting that the US '[m]odify the definition of the

148 UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (4 January 2011) UN Doc A/HRC/16/11 para 92.95 [hereinafter referred to as 'Report of the Working Group 2010'].
149 UNHRC, 'National Report of the United States of America Annex IV' (2015) UN Doc A/HRC/WG.6/22/USA/1/AnnexIV <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSAddInfoS22.aspx> 3, recommendation 95 accessed 24 August 2018.
150 UNHRC, 'Compilation of UN Information – United States of America' (2 March 2015) UN Doc A/HRC/WG.6/22/USA/2 para 12, para 18 [hereinafter referred to as 'Compilation Report 2015']; UNHRC, 'Summary of Stakeholders Information – United States of America' (16 February 2015) UN Doc A/HRC/WG.6/22/USA/3 para 30 [hereinafter referred to as 'Stakeholder Report 2015']; UNHRC, 'Draft Report of the Human Rights Council on its Thirtieth Session' (10 May 2016) UN Doc A/HRC/30/2 para 395 [hereinafter referred to as 'Report of the UNHRC Thirtieth Session'].
151 *See,* chapter 7.5.1.
152 Compilation Report 2010 (n 145) para 8.
153 Stakeholder Report 2010 (n 52) para 25. Emphasis added.
154 USHRN, 'United States Universal Periodic Review Stakeholder Submission Annex 2' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> para 11 accessed 24 August 2018.
155 CERD, General Recommendation XIV (1993).

discrimination in the law to bring it in line with the ICERD and other international standards'.[156] However, the US noted this recommendation, stating that '[w]e believe that our law is consistent with our [I]CERD obligations'.[157] The language used by the US in noting *our* obligations, indicates the manifestation of American exceptionalism in seeking to differentiate between its obligations and other member states' obligations under ICERD. This is also opaque and closed-off language, the direct opposite of the transparency encouraged by the UPR.

Furthermore, the Organization for Defending Victims of Violence ('ODVV') noted that the link between poverty and race 'creates structural problems that go far beyond patterns of income…it interacts with a number of mutually reinforcing factors, such as poor educational attainment, low-paying wages and inadequate housing, which create a vicious cycle of marginalization and exclusion of minorities'.[158] USHRN, in its Annex to its individual report, argued that a '[r]eduction of racial disparities in poverty, education, health, and incarceration are essential to a healthy and vibrant democracy and will put the US on the path to eliminating racial discrimination'.[159] These basic economic and social factors must be remedied in order to reduce racial disparities in the criminal justice system. In its Death Penalty Annex, USHRN cited the Committee in its 2006 report on the US, which recommended the US 'assess the extent to which [the] death penalty is disproportionately imposed on ethnic minorities and on low-income population groups, as well as the reasons for this, and adopt all appropriate measures to address the problem'.[160] This was not cited in the Stakeholder Report or Compilation Report, but is a vital strand to the racial discrimination argument, furthering the position in this thesis that there needs to be more transparency from the OHCHR as to how it decides upon the content of its reports.[161] This thesis also argues that links should be made between economic and social factors and the death penalty, and this could be done through member states providing specific recommendations on this, as opposed to the broadly drafted ones often seen in the 2010 and 2015 US UPRs.[162]

Stakeholder Reports

More generally, the Stakeholder Report cited AI, USHRN, and the ABA regarding their findings that racial disparities permeate the entirety of the criminal justice and capital systems.[163] The

[156] Report of the Working Group 2010 (n 148) para 92.63. Bolivia also provided a similar recommendation at para 92.62.
[157] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (8 March 2011) UN Doc A/HRC/16/11/Add1 para 30 [hereinafter referred to as 'Report of the Working Group Addendum 2010'].
[158] Organization for Defending Victims of Violence, 'United States Universal Periodic Review Stakeholder Report' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> 2, para 1 accessed 24 August 2018.
[159] USHRN, 'Stakeholder Submission Annex 2' (2010) (n 154) para 4.
[160] USHRN, 'Stakeholder Submission Annex 5' (2010) (n 63) para 1.
[161] *See,* chapter 7.1.1.
[162] *See,* chapter 7.4.2.
[163] Stakeholder Report 2010 (n 52) para 27, 30.

Report noted that 'AI called on the US to address racial disparities in the criminal justice system and to pass legislation to bar racial profiling in law enforcement, with effective complaints and compliance procedures'.[164] It also noted that the 'ABA reported that some jurisdictions in the US continue to impose the death penalty in a manner that reflects racial disparities'.[165] It is positive that racial discrimination featured in the Stakeholder Report, but there was much more discussion on this issue in the individual Stakeholder submissions. For instance, Advocates for Human Rights ('AHR') acknowledged that '[s]tudies show defendants convicted of killing white victims are more likely to receive death sentences than defendants convicted of killing African-American victims'.[166] AHR went on to reference a 2007 study sponsored by the ABA,[167] which 'showed African-American defendants received the death penalty at three times the rate of white defendants where the victims were white'.[168] Given the many studies showing that there is clear racial discrimination in the capital system, it can be questioned what the value of another study on the implications of race and the death penalty, as recommended in the US UPR, would be in practice. Alternatively, this thesis argues that it would be better to recommend on how the US can use these studies to eliminate racial discrimination, including focusing on the definition of discrimination.[169]

The IACHR provided an individual submission of its case report on Orlando Hall, 'an indigent African-American man' who was sentenced to the federal death penalty in Fort Worth, Texas 'by an all-white jury'.[170] Although not cited in the main report, this submission by the IACHR raised two issues: first, racial discrimination in the federal death penalty, and second, the issue of racially discriminate juries.

The federal death penalty is often cited by the US government in terms of the rare numbers of capital sentences and executions.[171] However, in the case before the IACHR regarding Orlando Hall, the Federal Death Penalty Resource Council provided statistics that 'illustrate[d] that the death penalty [was] applied more than three times as often against non-whites as against whites and more than twice as often against blacks as against whites'.[172] Furthermore, the petitioner had specifically cited the federal death penalty in Texas, wherein 'black

[164] Ibid para 27.
[165] Ibid para 30.
[166] Advocates for Human Rights, 'United States Universal Periodic Review Stakeholder Report' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> para 5 accessed 24 August 2018; *See also,* Amnesty International, 'United States Universal Periodic Review Stakeholder Submission' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> 4 accessed 24 August 2018.
[167] AHR, 'Stakeholder Report' (2010) (n 166) para 5.
[168] Ibid. USHRN noted a specific county this is an issue in, finding that 'black defendants in Philadelphia County are sentenced to death at a significantly higher rate than similarly situated non-black defendants', USHRN, 'Stakeholder Submission Annex 5' (2010) (n 63) para 3.
[169] *See,* chapter 7.4.2.
[170] IACHR, 'Stakeholder Report Annex 8' (2010) (n 69) para 29.
[171] National Report 2010 (n 50) para 61-62; National Report 2015 (n 99) para 51.
[172] IACHR, 'Stakeholder Report Annex 8' (2010) (n 69) para 33.

defendants are 5.3 times more likely than white defendants to face the death penalty in Texas federal prosecutions; and 10.3 times more likely than Hispanic defendants'.[173] This suggests that whilst the federal death penalty is not used as often, it is more discriminatory based on race.

The second issue this case raised concerned racially discriminatory juries. A number of studies into capital juries have been carried out in the US, with the Capital Jury Project ('CJP') finding that 'what mattered most in influencing whether or not a defendant was sentenced to death was the racial composition of the jury'.[174] The CJP found 'this had the greatest impact in cases where the defendant was black and the victim white'.[175] Studies carried out by Bowers *et al* on behalf of CJP showed that '[w]here there were four or fewer white males on the jury, [thirty] per cent of cases were sentenced to death, but where there were five or more [seventy] per cent were sentenced to death'.[176]

In Orlando Hall's case, the petitioner argued that the case was tried 'in the Northern District of Texas, Ft. Worth Division, rather than in the Eastern District of Arkansas, Pine Bluff Division, where the murder occurred and where African-Americans comprised a significant[ly] larger percentage of the prospective jury pool'.[177] This did not provide a fair cross-section of society and was not a jury of Mr. Hall's peers, which is a breach of his Sixth Amendment right according to *Taylor v. Louisiana*.[178] This indicates that the issue of racial discrimination in the modern-day death penalty is even more complex and nuanced. It cannot just be categorised into the race of the defendant or victim, but also the race of the jurors. The ACLU in its individual submission also noted that many defendants 'have suffered serious constitutional violations, such as…racially discriminatory jury selection'.[179] NGO International CURE made an important recommendation to the US government in its individual submission to '[m]ake certain juries actually reflect the racial make-up of the community'.[180] However, this recommendation is not measurable, as Stakeholders cannot provide recommendations in the UPR. This adds weight to the argument in this thesis that the Stakeholders should be allowed to provide advance questions, in order to ask questions on issues such as the racial composition of juries, which do not make it into the main report, but are equally as important.[181]

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[173] Ibid.
[174] Hood & Hoyle (n 9) 288, citing William J Bowers, Thomas W Brewer & Charles S Lanier ,'The Capital Jury Experiment of the Supreme Court' in Charles S Lanier, William J Bowers, James R Acker (eds) *The Future of America's Death Penalty* (Carolina Academic Press 2009) 199–221.
[175] Ibid.
[176] Ibid 289.
[177] IACHR, 'Stakeholder Report Annex 8' (2010) (n 69) para 30.
[178] *Taylor v Louisiana* 419 US 522 (1975).
[179] ACLU, 'Stakeholder Report' (2010) (n 65) 3.
[180] NGO International CURE, 'United States Universal Periodic Review Stakeholder Report' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> 2 accessed 24 August 2018.
[181] *See,* chapter 7.2.1.

Recommendations

The US received thirty recommendations in total on the issue of racial discrimination in 2010,[182] although only one of these recommendations was about the death penalty and a second was more generally regarding the criminal justice system.[183] Considering the negative impact racial discrimination has on the death penalty and the broad discussion by the UN mechanisms and civil society, more recommendations on this issue would have been beneficial to raise awareness and to affect change on the ground in the US.[184]

As discussed above, France recommended that the US '[u]ndertake studies to determine the factors of racial disparity in the application of the death penalty, to prepare effective strategies aimed at ending possible discriminatory practices'.[185] This was supported by the US,[186] but there is no evidence available to suggest this has been implemented. Austria recommended that the US '[t]ake appropriate legislative and practical measures to prevent racial bias in the criminal justice system'.[187] This was also supported by the US,[188] but, again, there is no evidence that this has been implemented. Furthermore, it appears that the US States are doing the opposite of Austria's recommendation, as evidenced by the repealing of North Carolina's Racial Justice Act. In a move against ending racial discrimination in the death penalty, '[o]n 10 June 2013, in North Carolina, the State's Racial Justice Act from 2009, which allowed death row inmates to challenge their sentences on racial grounds, was repealed by the Governor. He claimed that the Act "created a judicial loophole to avoid the death penalty and not a path to justice"'.[189] In fact, in July 2018, four people on death row in North Carolina who had their death sentences commuted when the Racial Justice Act was instated, but then were resentenced to death when the Act was repealed, raised a legal challenge against the State court's decision.[190] To remove a person from death row because of racial discrimination, only to resentence them to death because of retroactive repealing of legislation, appears to be cruel and unusual punishment. This should also be raised in future US UPRs.

[182] Report of the Working Group 2010 (n 148) paras 92.3 (Russia); 92.45 (Venezuela); 92.62 (Bolivia); 92.63 (China); 92.64 (Egypt); 92.67 (Democratic People's Republic of Korea); 92.68 (Democratic People's Republic of Korea); 92.79 (Guatemala); 92.82 (Venezuela); 92.94 (Cuba); 92.95 (France); 92.96 (Austria); 92.97 (Haiti); 92.98 (Egypt); 92.99 (Bangladesh); 92.100 (Libya); 92.101 (Mexico); 92.102 (Sudan); 92.103 (Ecuador); 92.104 (Vietnam); 92.106 (Bangladesh); 92.107 (Ghana); 92.108 (Mexico); 92.110 (Ecuador); 92.111 (Qatar); 92.151 (China); 92.190 (Iran); 92.207 (Cuba); 92.219 (Qatar); 92.220 (Algeria).
[183] Ibid 92.95 (France); 92.96 (Austria).
[184] *See,* chapter 7.4.2.
[185] Report of the Working Group 2010 (n 148) para 92.95.
[186] Report of the Working Group Addendum 2010 (n 157) para 7.
[187] Report of the Working Group 2010 (n 148) para 92.96.
[188] Report of the Working Group Addendum 2010 (n 157) para 7.
[189] OSCE 'The Death Penalty in the OSCE Area' (2013) <www.osce.org/odihr/106321?download=true> 30 accessed 24 August 2018.
[190] *State v Robinson* 2018 WL 3576802 No. 411A94-6 (NC 16 July 2018) (Appellate Brief).

4.3.4 The 2015 Universal Periodic Review and Racial Discrimination in the Death Penalty

The three main documents for the 2015 UPR indicated that racial discrimination in the criminal and capital systems continues to be a major issue. A key point that was reiterated throughout the reports related to France's 2010 recommendation on undertaking studies on racial disparities in the death penalty.[191] Although in the National Report, the US noted that '[t]he President has directed DOJ to conduct a review of how the death penalty is being applied in the [US]',[192] it failed to provide any further information about this study, and whether it was directly related to racial discrimination.

The Compilation Report noted that the High Commissioner had 'expressed concern at the disproportionate number of young African Americans who had died in encounters with police officers, or who were in prisons and on death row',[193] and that the High Commissioner 'urged the [US] authorities to conduct in-depth examinations into how race-related issues were affecting law enforcement and the administration of justice, both at the federal and [S]tate levels'.[194] Furthermore, the SRE was cited in the Compilation Report as it had noted that the US 'supported the UPR recommendation to determine the factors in the racial disparity in the application of the death penalty and to prepare strategies aimed at ending discriminatory practices, indicating that further statistical analysis and studies on sentencing disparities were highly anticipated'.[195] Also, in its individual submission, Joint Submission 17 ('JS17') 'called upon the US to identify the root causes of ethnic disparities in pertaining the death penalty and ethnically disparate sentencing, with the objective of developing means to eliminate ethnic or racial bias in the criminal justice system'.[196] During the UNHRC plenary session, HRW 'urged the [US] to specify how they plan to implement recommendations they supported on looking into racial disparities in the application of the death penalty'.[197] Furthermore, Germany also provided an advance question on this particular issue[198] and France recommended upon it again.[199] This is an example of good practice in the UPR, as all key actors came together to provide information and recommendations on the same issue in order to affirm its importance to the US, which in turn will put pressure on the US to implement France's recommendation. This can be used as a model for future UPRs on other issues.

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[191] Report of the Working Group 2010 (n 148) para 92.95.
[192] National Report 2015 (n 99) para 49.
[193] Compilation Report 2015 (n 150) para 20.
[194] Ibid para 12.
[195] Ibid para 18.
[196] Stakeholder Report 2015 (n 150) para 30. JS17 was comprised of Advocates for Human Rights, Minneapolis (USA); The Greater Caribbean for Life (Trinidad and Tobago); and The Puerto Rican Coalition Against the Death Penalty, San Juan (Puerto Rico).
[197] Report of the UNHRC Thirtieth Session (n 150) para 395.
[198] UNHRC, 'Advanced Questions to the United States of America Addendum 1' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> accessed 24 August 2018.
[199] Report of the Working Group 2015 (n 106) para 176.195.

Definition of Racial Discrimination

The Compilation Report cited the fact that 'special procedures mandate-holders called upon the Government to examine laws that could have a discriminatory impact on African Americans, and to ensure that such laws were in compliance with the country's international legal obligations'.[200] Just as it did in 2010, 'CERD reiterated its concern that the definition of racial discrimination used in federal and [S]tate legislation and in court practice was not in line with [ICERD]'.[201] Azerbaijan also provided an advance question on this, noting CERD's concerns and asking the US '[w]hich measures are envisaged by the Government in order to address the concerns of CERD'?[202] However, this was not addressed in the interactive dialogue by the US delegation, indicating that the role of the advance questions in the UPR needs to be reconsidered.[203]

Ghana provided a similar recommendation to that of China in 2010, recommending that the US '[b]ring in line the definition of racial discrimination in federal and [S]tate legislation' with ICERD,[204] which the US supported in part, noting that 'although we recognize there is always room for improvement, we believe that our law is consistent with our [I]CERD obligations'.[205] Albeit small, progress was made between the two UPRs, as the recommendation had progressed from being noted in 2010 to accepted in part in 2015, with the US acknowledging that the law could be improved. Stakeholders and UN member states now need to consider how they can approach this issue in 2020 to ensure it is accepted and implemented. Furthermore, cited in the Stakeholder Report, AA4RR suggested potential solutions to ensuring '[m]eaningful implementation of [I]CERD and ICCPR' stating that it 'requires a permanent institutional mechanism to monitor domestic compliance with the [I]CERD and ICCPR, conduct awareness-raising on it and ensure that treaty commitments are in fact being fulfilled by federal, [S]tate, and local authorities'.[206] All of these observations and recommendations were noted in the main documents in 2015, indicating that the key UPR actors were identifying the severe problem of racial disparities in the US.

Stakeholder Reports

Again in 2015, the race of the victim featured as a cause for concern for the Stakeholders. AI noted in its individual submission that '[s]tudies demonstrate that race, particularly race of [the]

[200] Compilation Report 2015 (n 150) para 12.
[201] Ibid para 13.
[202] UNHRC, 'Advanced Questions to the United States of America Addendum 4' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> 1 accessed 24 August 2018.
[203] *See,* chapter 7.3.1.
[204] Report of the Working Group 2015 (n 106) para 176.122.
[205] Report of the Working Group Addendum 1 2015 (n 107) 5-6.
[206] Africans in America for Restitution and Repatriation, 'Stakeholder Submission' (2015) (n 127) 6. *See,* chapter 7.2.1.

murder victim, plays a role in who is sentenced to death'.[207] Other Joint Submissions also considered this issue, including JS29, which highlighted that '[i]t is well-documented that the likelihood of receiving a death sentence increases exponentially if the victim is [w]hite'.[208] Joint Submission 41 ('JS41') also found that '[t]hose convicted of killing whites are more likely to be sentence to death than those convicted of killing blacks and black defendants are more likely to be sentenced to death regardless of the race of their victim'.[209] In fact, JS29 provided cogent recommendations to the US government on this issue in its individual submission:

> (a) DOJ should develop and implement training to reduce implicit and explicit racial bias, and encourage criminal justice agencies at the [S]tate level to collect and evaluate data on racial outcomes at key decision making points in the justice system;
> (b) The Obama [A]dministration should encourage [S]tates to repeal the death penalty;
> (c) The [A]dministration should also urge Congress to introduce federal legislation to eliminate capital murder from federal law.[210]

However, as already discussed, these recommendations are not measurable within the UPR, as they were made by a Stakeholder in its individual submission. As argued above, the Stakeholders should be permitted to submit advance questions to present such issues.[211] Alongside this, the Stakeholders should continue to lobby member states, specifically regarding the wording of their recommendations and should provide examples such as the recommendation from JS29 above. An ideal platform for this is during the UPR Pre-Sessions, organised by UPR Info to give more flexibility to the Stakeholders in the UPR process,[212] as the Pre-sessions attract wide attendance from both government and civil society.[213]

Advance Questions

There were four advance questions asked in 2015 on this issue from Azerbaijan, Belgium, China, and Germany, which is an improvement on the 2010 UPR when no questions were asked. Particularly relevant was Belgium's advance question asking the US 'to give an overview of:…[t]he evolution in the alleged overrepresentation of ethnic minorities on death

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[207] AI, 'Stakeholder Submission' (2015) (n 100) 3.
[208] Joint Submission 29, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> 4 accessed 24 August 2018. JS29 was comprised of The Leadership Conference Education Fund, The Leadership Conference on Civil and Human Rights with the Lawyers' Committee for Civil Rights Under Law, and the National Association for the Advancement of Colored People (NAACP).
[209] Joint Submission 41, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> 3 para 10 accessed 24 August 2018. USHRN was the main Stakeholder collating the data for JS41.
[210] JS29, 'Stakeholder Submission' (2015) (n 208) 5.
[211] *See,* chapter 7.2.1.
[212] UPR Info, 'Pre-Sessions' <www.upr-info.org/en/upr-process/pre-sessions> accessed 24 August 2018.
[213] Ibid.

row and the evolution of these numbers since the first UPR cycle'.[214] Furthermore, Germany asked 'how the [US] currently assesses the factors of racial disparity in the application of the death penalty'.[215] The US replied very broadly to these during the interactive dialogue, stating that '[i]n all cases where the death penalty is or can be applied, the [US] seeks to ensure the absence of racial discrimination and respect for legal and procedural safeguards'.[216] This does not directly answer the questions and it points to the need for clarification on the role of the advance questions. If they are to be a focal point of the UPR, as this thesis argues they should be, the troika should have a role in directing the state under review to the advance questions during the interactive dialogue to ensure they are acknowledged and answered.[217]

Recommendations

Racial discrimination was widely discussed throughout the interactive dialogue in the 2015 US UPR, and there was also a sharp rise in recommendations on this point. The US received fifty-seven recommendations on this area[218] compared with thirty in 2010. This indicates a link between the increase in general discussion in this area throughout the three main UPR documents and the amount of recommendations provided, highlighting the importance of the content of the documents.[219]

However, only three recommendations were made regarding the death penalty and race. Angola recommended that the US '[i]dentify the root causes of ethnic disparities concerning especially those sentenced to capital punishment in order to find ways [to] eliminate ethnic discrimination in the criminal justice system'.[220] Although Angola termed this 'ethnic' discrimination, it is synonymous with racial discrimination and the recommendation was accepted by the US.[221] France, again, asked the US to '[i]dentify the factors of racial disparity in the use of the death penalty and develop strategies to end possible discriminatory practices'.[222] As discussed above, the need for the repetition of this recommendation points to

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[214] UNHRC, 'Advanced Questions to the United States of America' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> accessed 24 August 2018.
[215] UNHRC, 'Advanced Questions Addendum 1' (2015) (n 198).
[216] Report of the Working Group 2015 (n 106) para 169.
[217] *See,* chapter 7.3.1.
[218] Report of the Working Group 2015 (n 106) paras 176.90 (Chile); 176.91 (Namibia); 176.92 (Cuba); 176.93 (Iran); 176.94 (South Africa); 176.95 (Cape Verde); 176.118 (Korea); 176.119 (Bangladesh); 176.120 (Lebanon); 176.121 (Kazakhstan); 176.122 (Ghana); 176.123 (Senegal); 176.124 (Serbia); 176.125 (Iran); 176.126 (Egypt); 176.130 (Namibia); 176.131 (Singapore); 176.132 (Nigeria); 176.133 (Israel); 176.134 (Singapore); 176.135 (Niger); 176.136 (Azerbaijan); 176.137 (Maldives); 176.140 (Algeria); 176.141 (France); 176.142 (Malaysia); 176.143 (Bolivia); 176.144 (Malaysia); 176.145 (Nigeria); 176.146 (Russia); 176.147 (Azerbaijan); 176.148 (Togo); 176.149 (Pakistan); 176.150 (Bangladesh); 176.151 (Brazil); 176.152 (Egypt); 176.153 (Holy See); 176.154 (Mexico); 176.155 (Pakistan); 176.156 (China); 176.157 (Croatia); 176.158 (Democratic People's Republic of Korea); 176.159 (Iran); 176.160 (Turkey); 176.161 (Indonesia); 176.195 (France); 176.198 (Belgium); 176.220 (Angola); 176.221 (Argentina); 176.222 (Australia); 176.224 (Democratic Republic of the Congo); 176.225 (Ireland); 176.226 (Cuba); 176.232 (Iceland); 176.276 (Ghana); 176.277 (Poland); 176.278 (Libya).
[219] *See,* chapter 7.1.1, 7.1.2.
[220] Report of the Working Group 2015 (n 106) para 176.194.
[221] Report of the Working Group Addendum 1 2015 (n 107) para 8.
222 Report of the Working Group 2015 (n 106) para 176.195.

a flaw in the follow-up to the review section of the UPR, which should be remedied.[223] Furthermore, as France provided a similar recommendation in 2010, it may be prudent for the French delegation to consider asking an advance question on how this has been implemented in the 2020 US UPR.[224] Raising it before the recommendations would allow for a discussion to take place in the interactive dialogue, whilst also making other recommending member states aware of the issue. This is particularly relevant given that the Trump Administration has taken office since the 2015 review, and will perhaps have different priorities regarding UPR recommendations.[225]

Belgium's recommendation was more pointed, asking the US to '[t]ake specific measures in follow-up to the recommendations of the…Committee to the [US] in 2014 with regards to capital punishment such as measures to avoid racial bias'.[226] This was also mentioned by Montenegro in the interactive dialogue, which 'noted the concerns of [the Committee] about racial disparities in the imposition of the death penalty'.[227] The US supported Belgium's recommendation in part, advising that '[w]e support consideration of these recommendations, noting that we may not agree with all of them'.[228] In the Appendix to the Addendum report provided by the US, the delegation explained further that '[w]e support this recommendation to the extent that it calls upon us to consider the non-binding 2014 recommendations from [the Committee]'.[229] However, no action has actually been taken regarding measures to ensure the avoidance of racial bias in the capital system. This indicates that the suggested changes to the UPR mechanism discussed in this section should be made to encourage action to be taken on the issue of race and the death penalty.

[223] *See,* chapter 7.5.
[224] *See,* chapter 7.3.2.
[225] The Trump Administration appears to be providing a further level of American exceptionalism to international law. For example, the Trump Administration has withdrawn from UNESCO, withdrawn from the Paris Agreement, and has withdrawn from the UNHRC. US Department of State, 'The United States Withdraws from UNESCO' (12 October 2017) <www.state.gov/r/pa/prs/ps/2017/10/274748.htm> accessed 24 August 2018; Associated Press 'China and California Sign Deal to Work on Climate Change without Trump' *The Guardian* (California, 7 June 2017) <www.theguardian.com/us-news/2017/jun/07/china-and-california-sign-deal-to-work-on-climate-change-without-trump> accessed 24 August 2018; BBC News, 'US Quits 'Biased' UN Human Rights Council' (20 June 2018) <www.bbc.co.uk/news/44537372> accessed 24 August 2018.
[226] Report of the Working Group 2015 (n 106) para 176.198.
[227] Ibid para 29.
[228] Report of the Working Group Addendum 1 2015 (n 107) para 9.
[229] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Appendix to the Addendum' (2015) 8 [hereinafter referred to as 'Report of the Working Group Appendix to the Addendum 2015'].

4.4 Wrongful Convictions

4.4.1 International Law

International protections guaranteeing the right to a fair trial are ultimately aimed at preventing wrongful convictions. Additionally, in capital cases, there are extra precautions in place to protect against executing the innocent. For example, Article 6(4) ICCPR states that '[a]nyone sentenced to death shall have the right to seek pardon, or commutation of sentence'.[230] Safeguard number 7 provides the same protection,[231] and this was strengthened by ECOSOC in 1989, which confirmed that there should be 'mandatory appeals or review with provisions for clemency or pardon in all cases of capital offense'.[232] Furthermore, Safeguard number 4 states that 'capital punishment may be imposed only when the guilt of the person charged is based on clear and convincing evidence leaving no room for an alternative explanation of the facts'.[233]

However, although there are protections in place at the international level to prevent wrongful convictions, there is currently no international law or remedy in place for those who want to claim actual innocence.[234] Brandon L. Garrett has argued that the right to pursue legal recourse for claims of actual innocence should be a form of customary international law.[235] This right to innocence claims could also be codified, potentially through additional Safeguards.

4.4.2 Domestic Law

The constitutional due process rights already discussed in this chapter are all in place to protect against wrongful convictions. Broadly, there are two 'types' of wrongful conviction: a claim of actual innocence, or a claim of a procedural wrongful conviction.[236] The Eighth Amendment's cruel and unusual punishment clause protects against the execution of an innocent person,[237] and the other constitutional safeguards are in place to ensure there are no procedural wrongful convictions. In the US, there is a lengthy appeals process following a death sentence, including an automatic direct appeal immediately following sentence.

[230] ICCPR (n 2) Article 6(4). Article 14(6) also provides for the right to compensation following a wrongful conviction.
[231] Safeguards 1984 (n 6) Number 7.
[232] Safeguards 1989 (n 7) para 1(b).
[233] Safeguards 1984 (n 6) Number 4.
[234] *See,* Brandon L Garrett, 'Towards an International Right to Claim Innocence' (2017) 105 Calif L Rev 1173.
[235] Ibid 1214-18.
[236] *See, Herrera v Collins* 506 US 390, 404 (1993), 'he does not seek excusal of a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but rather argues that he is entitled to habeas relief because newly discovered evidence shows that his conviction is factually incorrect'.
[237] The United States Constitution, Amendment VIII.

However, despite the protections in place to prevent wrongful convictions, a capital appellant cannot rely on a claim of actual innocence for a federal habeas appeal. This was set out in the 1993 decision of SCOTUS in *Herrera v. Collins*.[238] Chief Justice Rehnquist found that, because Herrera did 'not seek excusal of a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but rather argue[d] that he is entitled to habeas relief because newly discovered evidence shows that his conviction is factually incorrect', his claim of actual innocence must fail.[239] The opinion of the Court noted that, although actual innocence cannot form the basis of a federal habeas appeal, the clemency process is in place to hear claims of actual innocence.[240]

In the capital system, clemency is a granting of mercy from execution, giving it a significant role in the capital process with the aim of achieving finality. Despite this, there are numerous different frameworks regarding clemency in the US. For example, '[i]n [thirteen] American [S]tates the Governor has sole authority to grant clemency, in eight the Governor must have a recommendation from a Board, in a further nine the recommendation is non-binding, and in five a Board determines clemency'.[241] Furthermore, only POTUS may grant clemency to federal prisoners.[242] As the clemency frameworks differ from State to State, these differences lead to inconsistencies. Sarah L. Cooper and Daniel Gough noted that there are a further 'number of obstacles that may hinder innocents' abilities to successfully navigate the clemency process', and these include 'transparency issues, imbalanced administrative board compositions, and barriers to meaningful review'.[243] Perhaps the biggest issue with clemency in the US, particularly in capital cases, is that 'American executives primarily utilize the clemency power for political expedience rather than to remedy wrongful convictions'.[244] This was evidenced by the Illinois Governor, George Ryan, who, two days before he left office, placed a moratorium on the death penalty in Illinois and granted clemency to those who were on death row.[245] Whilst this appeared to be a positive step towards total abolition on behalf of the Republican Governor, it was still politicised. If Governor Ryan had been up for re-election it would be unlikely that he would have acted in the same manner. Furthermore, Governor Ryan's 'clemency did not focus on the morality of the death penalty as a punishment…[but] was largely rooted in a critique of its application and administration'.[246] Therefore, this act was

[238] *Herrera* (n 236).
[239] Ibid 404-05.
[240] Ibid 416.
[241] Hood & Hoyle (n 9) 318.
[242] Ibid.
[243] Sarah Lucy Cooper & Daniel Gough, 'The Controversy of Clemency and Innocence in America' (2014) 51 Cal W L Rev 55, 73.
[244] Ibid 109.
[245] Austin Sarat, *'Mercy on Trial: What It Means to Stop an Execution'* (PUP 2007) 1-2; Hood & Hoyle (n 9) 133.
[246] Sarat (n 245) 24.

not necessarily a nod towards complete abolition in the US, but more akin to the reasoning in *Furman v. Georgia*.[247]

The fundamental aim of due process is to prevent wrongful convictions. However, as Hood and Hoyle asserted, 'America's super due-process has not prevented innocent persons being sentenced to death',[248] and 162 people have been exonerated from death row since 1973.[249] Furthermore, due process cannot 'guarantee that some innocent people have not been executed'.[250] Hood and Hoyle contend 'that no safeguards can be devised that can absolutely rule out the incidence of wrongful conviction and execution'.[251] There are a number of reasons for wrongful convictions in the US, including, eyewitness misidentification,[252] false confessions,[253] government misconduct,[254] problems with crime laboratories,[255] and 'junk science'.[256] Given the irreversible finality of an execution, the concern of wrongful capital convictions was expected to feature within the US UPRs.

4.4.3 The 2010 Universal Periodic Review and Wrongful Capital Convictions

Despite expectations, in the 2010 US UPR, the issue of wrongful convictions and actual innocence featured minimally. Although it was raised by eight Stakeholders in their individual submissions,[257] there was no discussion in the National Report or Compilation Report and it was not directly referenced in the main Stakeholder Report. This was in spite of USHRN in its Death Penalty Annex to its individual submission clarifying that '[p]unishment of the innocent as a result of government-sanctioned misconduct or discrimination violates Article 7 of the ICCPR'.[258]

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[247] *Furman* (n 128).
[248] Hood & Hoyle (n 9) 267.
[249] Death Penalty Information Center, 'The Innocence List' (21 December 2017) <www.deathpenaltyinfo.org/innocence-list-those-freed-death-row/> accessed and correct as at 24 August 2018.
[250] Hood & Hoyle (n 9) 267.
[251] Ibid.
[252] Innocence Project, 'Eyewitness Misidentification' <www.innocenceproject.org/causes/eyewitness-misidentification/> accessed 24 August 2018; Innocence Project, 'Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification' <www.innocenceproject.org/reevaluating-lineups-why-witnesses-make-mistakes-and-how-to-reduce-the-chance-of-a-misidentification/> accessed 24 August 2018.
[253] *See e.g.,* Brandon L. Garrett, 'The Substance of False Confessions' (2010) 62 Stan L Rev 1051.
[254] *See e.g.,* Russell Covey, 'Police Misconduct as a Cause of Wrongful Convictions' (2013) 90 Wash U L Rev 1133; Kate McLelland, Comment, '"Somebody Help Me Understand This": The Supreme Court's Interpretation of Prosecutorial Immunity and Liability Under §1983' (2012) 102 J Crim L & Criminology 1323.
[255] *See,* Nat'l Research Council of Nat'l Academy., *Strengthening Forensic Science in the United States: A Path Forward* (2009) 6 [hereinafter referred to as 'NAS Report'].
[256] *See generally,* ibid.
[257] ABA, 'Stakeholder Report 2010' (n 56) para 15, 17(d); ABA, 'United States Universal Periodic Review Stakeholder Report Annex 6' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> accessed 24 August 2018; ACLU, 'Stakeholder Report 2010' (n 65) Part II(b); AHR, 'Stakeholder Report 2010' (n 166) para 4, 7; AI, 'Stakeholder Report 2010' (n 166) Part C(ii); NGO International CURE, 'Stakeholder Report 2010' (n 180) Section I, B; The Dui Hua Foundation, 'United States Universal Periodic Review Stakeholder Report' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> para 17 accessed 24 August 2018; USHRN, 'Stakeholder Report Annex 5 2010' (n 63) para 7; IACHR, 'Stakeholder Report Annex 2 2010' (n 69) para 42-45.
[258] USHRN, 'Stakeholder Report Annex 5 2010' (n 63) para 7.

Stakeholder Reports

The Stakeholder Report did indirectly note that the 'ABA indicated that post-conviction collateral review continues to be curtailed by [AEDPA]'.[259] For those who are not scholars or practitioners of US law, which most government delegates making recommendations in the UPR will not be, this required clearer explanation of the limits AEDPA has placed on post-conviction review in terms of uncovering potential wrongful convictions. The ACLU did this in its individual submission, noting that AEDPA and the USA PATRIOT Improvement and Reauthorization Act of 2005 'drastically limit the availability of federal habeas corpus relief for defendants sentenced to death'[260] and, as such, these laws potentially leave innocent people 'with no recourse' to establishing their innocence.[261] However, as this was not discussed in the Stakeholder Report, recommending states may have missed the significance of the ABA's comment cited in the main report, and in turn this may have prevented recommendations being formulated based upon this information.[262]

In its individual submission, AI noted that '[m]ore than 100 prisoners have been released from US death rows since 1977 on grounds of innocence [and in] numerous cases, prisoners have gone to their deaths despite serious doubts about their guilt'.[263] AHR provided that '[t]he death penalty in the [US] violates human rights regarding due process of law, right to liberty and security, and equal protection of law by subjecting innocent people to punishment',[264] and discussed the troubling case of Cameron Todd Willingham, a potentially innocent man executed in Texas in 2004.[265] Willingham was convicted and sentenced to death in 1992 for the murder of his three children through arson. However, leading up to his execution, his lawyers provided evidence through a 'nationally recognized arson expert' who testified that his conviction was based upon 'erroneous forensic analysis'.[266] This case continues to gain attention due to the fact there is the possibility that Willingham was innocent, despite the prosecutor in the case being cleared of misconduct in a trial in May 2017.[267] Furthermore, Willingham is not the only potentially innocent person to be executed, the DPIC lists fifteen cases with 'strong evidence of innocence' on its website.[268]

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[259] Stakeholder Report 2010 (n 52) para 30.
[260] ACLU, 'Stakeholder Report 2010' (n 65) Part II(b).
[261] Ibid.
[262] *See,* chapter 7.1.1, 7.1.2.
[263] AI, 'Stakeholder Report 2010' (n 166) para C(ii).
[264] AHR, 'Stakeholder Report 2010' (n 166) para 4.
[265] Ibid. *Glossip* (n 44) 2756 (Breyer J, dissenting).
[266] Innocence Project, 'Cameron Todd Willingham: Wrongfully Convicted and Executed in Texas' (13 September 2010) <www.innocenceproject.org/cameron-todd-willingham-wrongfully-convicted-and-executed-in-texas/> accessed 24 August 2018.
[267] The Marshall Project, 'Jury Clears the Prosecutor Who Sent Cameron Todd Willingham to Death Row' (11 May 2017) <www.themarshallproject.org/2017/05/11/jury-clears-the-prosecutor-who-sent-cameron-todd-willingham-to-death-row#.d4TOjxpQT> accessed 24 August 2018.
[268] *See,* Death Penalty Information Center, 'Executed but Possibly Innocent' <www.deathpenaltyinfo.org/executed-possibly-innocent> accessed and correct as at 24 August 2018.

Hood and Hoyle addressed the point of potential compensation for the family of Willingham, if it were found that he was actually innocent. They found that '[a]bout half the US [S]tates have enacted statutory compensation schemes to provide relief for those who have been wrongfully convicted and incarcerated' although they 'fail to take account of the harm of wrongful execution, and the families are not likely to receive compensation'.[269] USHRN briefly raised the issue of compensation in the Death Penalty Annex to its individual submission, noting that the US 'does not always compensate individuals who have been wrongly convicted and sentenced to death'.[270] However, this issue was not explored any further and was not included in the Stakeholder Report.

Although, again, this was not discussed in the Stakeholder Report, the IACHR submitted its case report on Medellín, Ramírez Cardenas, and Leal García in the 2010 UPR.[271] The issue of 'junk science' played a key part in the convictions. For example, Leal García's conviction was partially based upon bite-mark evidence which the petitioner argued 'allegedly result[s] in 63.5% false positives'.[272] The National Academy of Sciences in its 'Strengthening Forensic Science in the United States: A Path Forward' report, called bite mark evidence 'controversial',[273] noting that 'bite marks on the skin will change over time…[which] may severely limit the validity of forensic odontology'.[274]

Furthermore, in Leal García's case, it was alleged that the victim 'had been sexually assaulted by several men on the night she was killed but the prosecution never attempted to match their dental impressions with the marks found in her body'.[275] It was also stated that 'post-conviction counsel retained a forensic odontologist whose testimony shed serious doubt on the reliability of the bite mark analysis…because of the way in which the evidence was handled and explored',[276] highlighting a further issue of the handling of evidence in State crime laboratories. Although DNA testing is 'the most reliable approximation of individualized evidence that the science method can currently offer',[277] Leal García's post-conviction attorneys found a 'DNA expert who testified that the lab conducting the testing had not followed accepted protocols, had made mistakes handling the blood samples, and had failed to provide complete results'.[278] To date, 362 people in the US have been exonerated by postconviction DNA testing proving

[269] Hood & Hoyle (n 9) 333.
[270] USHRN, 'Stakeholder Report Annex 5' (2010) (n 63) para 7.
[271] IACHR, 'Stakeholder Report Annex 2' (2010) (n 69).
[272] Ibid para 43.
[273] NAS Report (n 255) 173.
[274] Ibid 174.
[275] IACHR, 'Stakeholder Report Annex 2' (2010) (n 69) para 43.
[276] Ibid.
[277] Sarah Lucy Cooper, 'Forensic Science Identification Evidence: Tensions Between Law and Science' (14 April 2016) The Journal of Philosophy, Science & Law Volume 16, pp 1-35, 3.
[278] IACHR, 'Stakeholder Report Annex 2' (2010) (n 69) para 44.

their innocence,[279] and twenty of those spent some time, if not all, on death row.[280] However, this does not prevent human error or tampering with DNA evidence.

The IACHR's case report also raised the ineffectiveness of the clemency procedure in the State of Texas, another curtailment to potential claims of innocence from those on death row. The petition stated that:

> [T]he Board of Pardons and Paroles does not advise condemned prisoners or their counsel of the date on which it will consider their clemency petition; it does not provide any opportunity for representations at the time it considers the petition; it does not allow applicants to view the evidence submitted in opposition to their clemency requests; and it does not afford them an opportunity for appeal or reconsideration of the Board's ruling.[281]

The IACHR found that the 'procedure in place falls short of establishing minimal safeguards to prevent arbitrary decisions concerning evidence submitted either in favour or in opposition of a clemency request pending the execution of a death sentence'.[282] However, whilst the IACHR submission raised important points regarding wrongful convictions, none of this information was transferred into the final Stakeholder Report, indicating that the OHCHR needs to be more transparent in its procedures for deciding upon the content of the Stakeholder Report.[283]

Advance Questions and Recommendations

The UK submitted an advance question about 'the continuing use of the death penalty in the US' and the 'inevitable risk of irreversible miscarriages of justice', asking '[c]ould you tell us what steps the Administration is taking to address these concerns?'[284] However, the US did not respond to this question during the interactive dialogue, further indicating that changes to the procedure for advance questions must be made.[285]

Moreover, following the minimal discussion in the three reports, it is unsurprising that there were no recommendations made by states regarding wrongful convictions in 2010. This was despite, as stated above, the eight Stakeholders all discussing the issue of wrongful

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[279] Innocence Project, 'DNA Exonerations in the United States' <www.innocenceproject.org/dna-exonerations-in-the-united-states/> accessed and correct as at 24 August 2018; The National Registry of Exonerations 'About' <www.law.umich.edu/special/exoneration/Pages/about.aspx> accessed 24 August 2018. This was also noted by CURE and The Dui Hua Foundation in their individual stakeholder submissions, NGO International CURE, 'Stakeholder Report' (2010) (n 180) Section I, B; The Dui Hua Foundation, 'Stakeholder Report' (2010) (n 257) para 17.
[280] Ibid.
[281] IACHR, 'Stakeholder Report Annex 2' (2010) (n 69) para 56.
[282] Ibid para 152.
[283] *See,* chapter 7.1.1.
[284] UNHRC, 'Advanced Questions to the United States of America Addendum 1' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> accessed 24 August 2018.
[285] *See*, chapter 7.3.1.

convictions and its causes and effect in their individual submissions. Again, this is further evidence that the recommending member states will not read the individual submissions, making it imperative that the main Stakeholder Report is thorough.[286]

4.4.4 The 2015 Universal Periodic Review and Wrongful Capital Convictions

In comparison with 2010, the 2015 US UPR provided more discussion on wrongful convictions, although the majority of this was focused upon compensation, as examined below. In terms of wrongful convictions in general, the Compilation Report provided that both the Committee and CERD had urged the US 'to strengthen safeguards against wrongful sentencing to death'.[287] However, just as in 2010, there was no discussion in the Stakeholder Report on wrongful convictions. This is particularly concerning considering the Stakeholders raised alarming statistics in their individual submissions.[288] AI reiterated that '[m]ore than 130 prisoners have been released from death row since 1977 on grounds of innocence [and i]n numerous cases, prisoners have gone to their deaths despite serious doubts about their guilt'.[289] Furthermore, Joint Submission 2 ('JS2') indicated that '[t]he findings of a study conducted by the American National Science Academy shows that more than 4% or 1 out of every 25 prisoners sentenced to death are innocent'.[290]

Compensation following Wrongful Convictions

The focal point of the 2015 US UPR under the heading of wrongful convictions was the right to compensation. Although the National Report was silent on this issue, the Compilation Report cited the Committee in particular, which 'recommended ensuring the retentionist states provide adequate compensation for persons who were wrongfully convicted'.[291] Obtaining compensation following a wrongful conviction, even from death row, is extremely rare. Alanna Trivelli notes the three main ways of gaining compensation following wrongful conviction: 'he can file a civil rights lawsuit, he can present a private bill to the legislature, or he can obtain relief through a [S]tate compensation statute if the incident occurred in one of the thirty states

[286] *See*, chapter 7.1.1, 7.1.2.
[287] Compilation Report 2015 (n 150) para 36.
[288] *See,* chapter 7.1.1, 7.1.2.
[289] AI, 'Stakeholder Report' (2015) (n 100) 3.
[290] Joint Submission 2, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> 7, para 46 accessed 24 August 2018. JS2 was comprised of The Organization for Defending Victims of Violence and Society for Supporting Victims of Domestic Violence. JS17 and JS29 also provided similar statistics, Joint Submission 17, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> para 4 accessed 24 August 2018, JS17 was comprised of Advocates for Human Rights, Minneapolis (USA); The Greater Caribbean for Life (Trinidad and Tobago); and The Puerto Rican Coalition Against the Death Penalty, San Juan (Puerto Rico); JS29, 'Stakeholder Report' (2015) (n 208) 4.
[291] Compilation Report 2015 (n 150) para 17.

with a statute enacted'.[292] However, twenty US States do not have a State compensation statute[293] and in many States, 'police and prosecutors are in most instances granted immunity from civil suits by the wrongfully convicted', meaning that it is very difficult to bring a suit for compensation.[294] In the 2015 UPR, Germany asked an advance question on 'whether adequate compensation for persons who were wrongfully convicted is provided on the national as well as subnational level'.[295] However, this advance question was not answered by the US during the interactive dialogue, indicating that the troika should play a role in ensuring the questions are addressed by the state under review.[296]

The most recent SCOTUS decision on this issue was in *Connick v. Thompson* in 2011.[297] After spending eighteen years in prison, including time spent on death row, John Thompson was awarded $14,000,000.[298] However, in a 5-4 decision, SCOTUS reversed the decision to award Thompson compensation on the grounds that a District Attorney's office cannot be liable under §1983 USC 'for failure to train [its prosecuting attorneys] based on a single *Brady* violation'.[299] The four dissenting justices, led by Justice Ginsburg, vehemently opposed this, stating that 'I would uphold the jury's verdict awarding damages to Thompson for the gross, deliberately indifferent, and long-continuing violation of his fair trial right'.[300] In its individual submission, JS17 noted that this decision 'effectively expanded prosecutors' immunities against lawsuits for their misconduct'.[301] The decision provides no deterrence for prosecutorial misconduct, particularly given that it is also a prevalent issue throughout the criminal justice system in the US.

Linked to the issue of government misconduct is false confessions, which are often brought about by harsh interrogations of those with mental health issues by law enforcement.[302] In its 'The State of the Modern Death Penalty' report compiled between 2006 and 2013, but not cited in the UPR, the ABA noted that some States '[d]o not require recording of the entirety of custodial interviews with suspects and witnesses in potential capital cases'.[303] This can lead

[292] Alanna Trivelli, 'Compensating the Wrongfully Convicted: A Proposal to Make Victims of Wrongful Incarceration Whole Again' (2016) 19 Rich JL & Pub Int 257, 258.
[293] These are: Alaska, Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Michigan, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming. *See* Innocence Project, 'Compensating the Wrongly Convicted' <www.innocenceproject.org/compensating-wrongly-convicted/> accessed 24 August 2018.
[294] Life After Exoneration Program 'Remedies' <www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88> accessed 24 August 2018.
[295] UNHRC, 'Advanced Questions Addendum 1' (2015) (n 198).
[296] *See,* chapter 7.3.1.
[297] *Connick v Thompson* 563 US 51 (2011).
[298] Ibid 54.
[299] Ibid.
[300] Ibid 109.
[301] JS17, 'Stakeholder Report' (2015) (n 290) para 15.
[302] *See,* Lauren Rogal, 'Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard' (2017) 47 NM L Rev 64.
[303] ABA, 'The State of the Modern Death Penalty in America' (n 60) 6.

to potential coercive behaviour including using the death penalty as a threat,[304] and, in turn, false confessions. In fact, 'according to the Innocence Project, innocent defendants made incriminating statements, delivered outright confessions, or pled guilty in about 25% of DNA exoneration cases in the [US]'.[305] In some States, the exoneree must not have 'contributed' to his or her arrest or conviction to be eligible for an award, which means that a false confession due to government misconduct can render the exonerated ineligible for compensation.

JS17 detailed more difficulties exonerees face in obtaining compensation:

> When exonerees are released, they face numerous challenges in reintegrating into society including social, economic, and legal hurdles. The right to compensation for wrongful imprisonment varies widely from [S]tate-to-[S]tate, so exonerees from different [S]tates are not guaranteed equivalent compensation. Sixteen retentionist [US] [S]tates do not have compensation laws for wrongfully convicted individuals. In [S]tates that do have compensation laws, exonerees often must overcome onerous procedural and eligibility barriers. If they succeed, the compensation they may receive can be meager and fall short of the corollary federal standards.[306]

JS17 went into further detail regarding the effect of a lack of or delay in compensation has on the exoneree. For example, '[a]lmost all exonerees possess no assets when released, one-third have lost child custody due to their wrongful imprisonment, and many face severe challenges in obtaining employment or housing'.[307] Furthermore, '[s]ecuring employment and appropriate housing is difficult for exonerees because expungement of the wrongful conviction from their criminal record is not automatic'.[308] Due to education programmes in prison not being available to most death row inmates, when an exoneree is released they will leave with little or no education.[309] There are also healthcare issues to consider particularly post-traumatic stress disorder and other mental illnesses,[310] and the fact that 'exonerees are not automatically eligible for Medicaid' meaning that particularly mental health issues often go untreated.[311] All of these factors put barriers in the way of the exoneree rebuilding their lives, and it is unsurprising that 38.1% of exonerees that were part of a study carried out on the post-release behaviour of a group of exonerees went on to commit criminal offences.[312]

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[304] Death Penalty Information Center, 'False Confessions and Threats of the Death Penalty' <www.deathpenaltyinfo.org/false-confessions-and-threats-death-penalty> accessed 24 August 2018.
[305] ABA, 'The State of the Modern Death Penalty in America' (n 60) 6.
[306] JS17, 'Stakeholder Report' (2015) (n 290) para 4.
[307] Ibid para 8.
[308] Ibid.
[309] Ibid para 9.
[310] Ibid para 10.
[311] Ibid.
[312] Amy Shlosberg, Evan J. Mandery, Valerie West, & Bennett Callaghan, 'Expungement and Post-Exoneration Offending' (2014) 104 J Crim L & Criminology 353, 373.

Even when compensation is awarded, JS17 noted that 'the money may be redirected toward basic needs and legal fees',[313] and still, 'the average amount of time to obtain State compensation is three years'.[314] Exonerees need the money when they are released, not only to start rebuilding their lives and paying family members back for legal fees, but also to prevent reoffending.

JS17 recommended that '[t]he [US] should adopt and promote procedures such as those recommended by the ABA and The Innocence Project designed to prevent or mitigate the negative effects of eyewitness misidentifications, including those resulting from cross-racial misidentifications' in order to curtail wrongful convictions.[315] The Innocence Project, an organisation that seeks to use DNA evidence to exonerate the wrongfully convicted, cites eyewitness misidentification as 'the greatest contributing factor to wrongful convictions'.[316] There are a number of reasons for eyewitness misidentification, such as, 'the distance of the eyewitness from the crime, the lighting in the area, the race of the perpetrator, any trauma to the witness, and the method used by the police to obtain identifications'.[317] Furthermore, often a witness will feel certain that they have identified the correct person, for example in the case of Steven Avery, made famous by the documentary 'Making a Murderer'. In Avery's case, the victim, Penny Ann Beernsten, misidentified Avery as her attacker, who was eventually exonerated by DNA evidence after twenty-two years in prison.[318] Nicole Megale contended that, '[w]ith so many variables affecting the validity of eyewitness identifications and the high percentage of wrongful convictions based on these identifications, a death penalty sentence should not be allowed to hinge on an eyewitness identification alone'.[319]

The Innocence Project's report 'Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation' provided a number of recommendations on the issue of compensation, and these were cited by JS17 in its individual submission. The recommendations included:

> Require [US] [S]tates to adopt compensation legislation that provides at least $100,000 per year on death row…Require [US] [S]tates to adopt legislation that provides exonerees with adequate and appropriate services, including housing, transportation,

[313] JS17, 'Stakeholder Report' (2015) (n 290) para 11.
[314] Ibid para 14.
[315] JS17, 'Stakeholder Report' (2015) (n 290) 18. *See,* chapter 7.2.1.
[316] Innocence Project, 'Eyewitness Misidentification' <www.innocenceproject.org/causes/eyewitness-misidentification/> accessed 24 August 2018; Innocence Project, 'Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification' (n 252).
[317] Nicole Megale, 'Executing the Innocent: How to Remedy a State's Wrong' (2016) 28 J Civ Rts & Econ Dev 373, 388.
[318] Innocence Project, 'Steven Avery' <www.innocenceproject.org/cases/steven-avery/> accessed 24 August 2018; American Psychology-Law Society 'Actual Innocence Research: Eyewitness Identification is not 20/20' (October 2013) <www.apadivisions.org/division-41/publications/newsletters/news/2013/10/eyewitness.aspx> accessed 24 August 2018.
[319] Megale, 'Executing the Innocent' (n 317) 388.

> education, physical and mental care, employment assistance, and other services to assist with reintegration…Where official immunity presents barriers to accountability, the [US] should ensure there are adequate and alternate mechanisms to hold prosecutors, judges, and law enforcement accountable when their conduct leads to wrongful convictions.[320]

If these recommendations from Stakeholders could be made readily available to UN member states, they may be transformed into measurable recommendations during the US UPR. This could be done through Stakeholders, such as JS17, being able to provide advance questions,[321] or the Innocence Project itself providing a thematic Stakeholder submission and an advance question on wrongful convictions, given its expertise in this area. JS17 was the main Stakeholder reporting on wrongful convictions in 2015, highlighting the potential positive impact thematic Stakeholder submissions could have.[322] However, to ensure this information is then transferred to the main report, the OHCHR also needs to be clearer on how it decides on the content of the final report.[323]

Recommendations

Compared to the 2010 UPR, wherein no countries made recommendations regarding innocence or wrongful convictions, 2015 saw three such recommendations. Again, this suggests that the fact these issues were raised in the main reports had an effect on the recommending states.[324] Belgium recommended that the US '[t]ake specific measures in follow-up to the recommendations of [the Committee] to the [US] in 2014 with regards to…avoid[ing] wrongful sentencing to death and to provide adequate compensation if wrongful sentencing happens'.[325] The US supported this part of the recommendation, stating that 'we support the measures to avoid…wrongful sentencing to death, and to provide adequate compensation in the event of wrongful sentencing'.[326] However, in practice, this recommendation is not being implemented, particularly in light of the SCOTUS decision in *Connick v. Thompson*.[327]

The Democratic Republic of Congo recommended the US '[s]trengthen[s] the justice sector in order to avoid imposing the death penalty on those persons wrongly convicted'.[328] Poland also recommended that the US should '[s]trengthen safeguards against wrongful sentencing to

[320] JS17, 'Stakeholder Report' (2015) (n 290) 18-19.
[321] *See,* chapter 7.2.1.
[322] *See*, chapter 7.2.2.
[323] *See,* chapter 7.1.1.
[324] Ibid.
[325] Report of the Working Group 2015 (n 106) para 176.198.
[326] Report of the Working Group Appendix to the Addendum 2015 (n 229) 8.
[327] *Connick* (n 297).
[328] Report of the Working Group 2015 (n 106) para 176.199.

death and subsequent wrongful execution by ensuring, *inter alia*, effective legal representation for defendants in death penalty cases, including at the postconviction stage'.[329] These recommendations were also supported by the US without comment.[330]

It is clearly a positive step that these recommendations have been supported by the US; it indicates that the US is taking wrongful convictions seriously and aims to do something about it. However, the recommendations make no mention of *how* the US should go about implementing them and, to date, no clear progress appears to have been made by the US on implementation. Instead, as discussed above, states should be required to advise during the UNHRC plenary session how it will go about implementing accepted recommendations, as this would allow Stakeholders and other member states to prepare accordingly for the next UPR and for domestic work in between reviews.[331]

Furthermore, member states should consider the intended audience of their recommendations.[332] Usually, in the case of the US, they would be made to the federal government. However, thought should be given to making recommendations directly to the US States on issues relating to the death penalty. The US States are carrying out a punishment that is regulated by the ICCPR and, as such, the often-used reliance upon federalism as a barrier to abolition should be challenged through the UPR. The practice of UN member states working with individual US States has been successful in other areas of international relations, such as the California governor, Jerry Brown, making a deal directly with China regarding climate change following the Trump Administration's withdrawal from the Paris Agreement.[333] Alongside aiming recommendations at the individual US States, they could also be targeted towards SCOTUS. Firstly, this could lead to domestic US courts citing the UPR, most likely through practitioners citing the UPR and its recommendations in briefs, as, to date, no US court has made reference to the mechanism.[334] This would also increase the publicity of the UPR, whilst seeking to ensure that the US adheres to international human rights when carrying out the death penalty.[335] Secondly, these recommendations could have a positive impact upon the potential abolition of the death penalty, by gathering evidence to further the two prongs of the Steikers' blueprint of abolition. They would raise awareness of

[329] Ibid para 176.200. Emphasis added.
[330] Report of the Working Group Addendum 1 2015 (n 107) para 8.
[331] *See,* chapter 7.5.1.
[332] *See,* chapter 7.4.3.
[333] Associated Press 'China and California Sign Deal to Work on Climate Change without Trump' *The Guardian* (California, 7 June 2017) <www.theguardian.com/us-news/2017/jun/07/china-and-california-sign-deal-to-work-on-climate-change-without-trump> accessed 24 August 2018.
[334] Correct as at 24 August 2018.
[335] *See,* chapter 7.6.

the issues within the capital system, which can be cited by SCOTUS justices under the Court's own judgment prong of the blueprint for abolition.[336]

4.5 Foreign Nationals on Death Row and the Vienna Convention on Consular Relations

Another key due process protection in capital cases is the right of foreign nationals to be advised of their right to consular assistance under the Vienna Conviction on Consular Relations (1963).[337] Generally, the VCCR is uncontroversial in defining the terms of consular relations between states. However, US non-compliance with Article 36 has caused problems internationally. At the centre of the issue is Article 36(1)(b), which gives detained foreign nationals the right to be informed of their right to consular assistance without delay.[338] For those detained in a foreign country where there may be language barriers and almost certainly detainees will have little or no knowledge of the criminal procedures, state adherence to the VCCR is essential. It is in place to ensure that foreign consuls are granted access to nationals detained abroad and that detainees are made aware of their right to consular assistance with their defence. The right to consular assistance is now widely considered to be a fundamental due process right. Although it is not included under Article 14, the IACHR and the Committee considers that it should be, particularly for death penalty cases.[339]

The US became a signatory to the VCCR on 24 April 1963 and President Nixon ratified the treaty on 24 November 1969.[340] The State Department then issued guidance on the VCCR for law enforcement personnel, within which it stated that '[i]mplementing legislation is not necessary'.[341] This implied that the US considered the VCCR to be self-executing, adding that '[a]lthough the obligations of consular notification and access are not codified in any federal statute, they are binding on [S]tates and local governments as well as the federal government, by virtue of international law and the Supremacy Clause'.[342]

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[336] Carol S Steiker & Jordan M Steiker, *Courting Death: The Supreme Court and Capital Punishment* (HUP 2016) 284.
[337] Whilst this thesis discusses the VCCR only, it is important to note that alongside the obligations arising under the VCCR, 'there are bilateral arrangements between the US and at least 57 countries that impose even more stringent notification rules, mandating notice to the consulate of an arrest even where the prisoner has not asked for it', Reprieve, 'Honored in the Breach: The United States' Failure to Observe its Legal Obligations under the Vienna Convention on Consular Relations (VCCR) in Capital Cases' (November 2012) 4 <www.reprieve.org.uk/wp-content/uploads/2015/01/2013_02_26_PUB-VCCR-Report-WEB-VERSION-KEY-DOC.pdf> accessed 24 August 2018.
[338] Vienna Convention on Consular Relations (adopted 22 April 1963, entered into force 19 March 1967) 596 U.N.T.S. 8638-40, 262-512 Art.36(1)(b) [hereinafter referred to as 'VCCR'].
[339] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* Advisory Opinion OC 16/99 (1 October 1999) Inter Am Ct HR (Ser A) No 16 (1999) para 24; General Comment 36 2015 (n 120) para 44; General Comment 36 2017 (n 5) para 46.
[340] VCCR (n 338).
[341] US Department of State, 'Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them' 44 (4th edn, 2016) <https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_September_2017.pdf> accessed 24 August 2018.
[342] Ibid.

Despite this action taken by the State Department to encourage compliance with the VCCR, Schabas has noted that 'many if not most foreign nationals condemned to death within the [US] have not benefited from this information'.[343] In support of this, a study by Reprieve carried out between 2009 and 2012 found that 95.1% of foreign nationals on US death row had not been afforded their Article 36 rights.[344] This is particularly concerning given that 'effective consular assistance at an early stage' can prevent a death sentence being imposed in the first instance, avoiding the lengthy and mandatory appeals process in the US.[345] The final part of this chapter will consider the key international and domestic VCCR cases, the US' purported withdrawal from the VCCR's Optional Protocol, and the role of the UPR in ensuring this due process right is adhered to.

4.5.1 International Court of Justice Cases

The ICJ is 'the principal judicial organ' of the UN,[346] and its function is to rule upon disputes between member states.[347] To date, three countries have initiated proceedings against the US in the ICJ regarding a breach of the VCCR in death penalty cases: Paraguay, Germany, and Mexico.

4.5.1.1 Breard Case (Paraguay v. United States)

The Breard case involved Angel Francisco Breard, a Paraguayan national[348] who was convicted in the Commonwealth of Virginia of attempted rape and capital murder in 1993, and was sentenced to death without being afforded his Article 36 rights.[349] Conall Mallory asserted that 'acute damage' was caused by the lack of consular assistance in Breard's case, as he refused to take a pre-trial plea bargain to spare his life and spend his life in prison without the possibility of parole.[350]

When Breard became aware of his Article 36 rights in 1996, he filed for habeas relief in the federal courts citing, for the first time, that his rights under Article 36 VCCR had been breached.[351] However, the federal courts denied his claim on the grounds it was procedurally barred.[352] The rule of procedural default has caused insurmountable problems for foreign

[343] Schabas, *The Abolition of the Death Penalty in International Law* (n 3) 13.
[344] Reprieve, 'Honored in the Breach' (n 337) 3. This data was taken from the 102 foreign nationals on US death row where there was undisputed data.
[345] Conall Mallory, 'Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty' (2016) 17 Melb J Intl L 51, 59.
[346] Charter of the United Nations 1945, 1 UNTS XVI, Article 92.
[347] Statute of the International Court of Justice 59 Stat 1055 (24 October 1945) Article 36.
[348] Case Concerning Convention on Consular Relations *(Paraguay v US)* 1998 ICJ 248 (Interim Protection Order of 9 April 1998).
[349] *Breard v Greene* 523 US 371, 372-73 (1998).
[350] Mallory, 'Abolitionists at Home and Abroad' (n 345) 9.
[351] *Breard* (n 349) 373.
[352] Ibid 372-73.

nationals on US death row attempting to appeal on the grounds of a breach of Article 36. It is defined as 'a federal rule that, before a [S]tate criminal defendant can obtain relief in federal court, the claim must be presented to a [S]tate court'.[353] However, this relies upon effective assistance of counsel, namely that counsel is aware of the foreign nationals' VCCR rights, which is not always the case.

After Paraguay's case was struck out in the domestic US courts,[354] Paraguay then issued proceedings against the US in the ICJ on 3 April 1998.[355] From the alleged breaches of the VCCR, Paraguay argued that it was entitled to *restitutio in integrum* insofar as any criminal liability against Breard be voided and a new trial granted with Breard now being aware of his Article 36 rights.[356] Due to Breard's execution date being imminent, on 9 April 1998 the ICJ ordered provisional measures, in line with Article 41 of the Statute of the International Court of Justice,[357] that the US should ensure it does not execute Breard pending the outcome of the proceedings before the ICJ.[358]

Subsequently, both Breard and Paraguay petitioned for a writ of cert to SCOTUS. On the day of Breard's execution, SCOTUS denied to grant cert and held, *per curiam*, that '[i]t is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the [S]tate court'.[359] Both Breard and Paraguay had argued that procedural default did not apply in this case, given that the VCCR was the 'supreme law of the land' according to the Supremacy Clause of the US Constitution.[360] However, the *per curiam* opinion held that was 'plainly incorrect' because, firstly, 'the procedural rules of the forum State govern the implementation of the treaty in that State' and, secondly, that whilst treaties may be the supreme law of the land, they must be consistent with the Constitution, which is where the procedural default rule originates.[361] Further, SCOTUS held that even if the claim was not procedurally defaulted, 'it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial'.[362] Harold Hongju Koh, former Assistant Secretary of Democracy Human Rights and Labor, stated that 'it seems incredible that the Court did not delay the execution,

[353] *LaGrand Case (FRG v US)* 2001 ICJ ¶ 1 ¶ 13 (27 June 2001) para 23 [hereinafter referred to as 'LaGrand Judgment'], '[i]f a state defendant attempts to raise a new issue in a federal habeas corpus proceeding, the defendant can only do so by showing cause and prejudice. Cause is an external impediment that prevents a defendant from raising a claim and prejudice must be obvious on its face. One important purpose of this rule is to ensure that the state courts have an opportunity to address issues going to the validity of state convictions before the federal courts intervene'.
[354] *Republic of Paraguay v Allen* 134 F 3d 622 (4th Cir 1998).
[355] Application of the Republic of Paraguay *(Paraguay v US)* (3 April 1998).
[356] Ibid para 25.
[357] Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. US)* Request for the Indication of Provisional Measures (9 April 1998).
[358] Ibid para 41.
[359] *Breard* (n 349) 375. Justices Stevens, Breyer, and Ginsburg dissented.
[360] Ibid.
[361] Ibid 375-77.
[362] Ibid 377.

grant certiorari, and hear plenary briefing and argument, if only out of simple comity to the ICJ'.[363]

Following this decision, the Secretary of State, Madeleine Albright, sent a letter to the Governor requesting a stay of execution for Breard.[364] However, the Governor of Virginia denied the request from the Secretary of State and Angel Breard was executed on 14 April 1998.[365] Thereafter, Paraguay filed a notice of discontinuance with the ICJ,[366] and so the court did not rule upon whether the US had breached international law by executing Breard.

4.5.1.2 LaGrand Case (Germany v. United States)

The second case to come before the ICJ on this issue involved two brothers of German nationality – Karl and Walter LaGrand – who were on Arizona's death row and had not been advised of their Article 36 rights.[367] When Germany became aware that two of its nationals had been sentenced to death abroad, and following failed diplomatic attempts to stay the executions,[368] it took the case to the ICJ to rule upon, arguing that the US was in breach of international law. By the time Germany issued proceedings, Karl had already been executed and Walter's execution date was set for 3 March 1999, one day after Germany filed its application with the ICJ.[369]

The ICJ, again, ordered provisional measures that the execution of Walter should be stayed.[370] Thereafter, Germany filed a motion with SCOTUS 'for leave to file a bill of complaint…[and] for preliminary injunction' against the US and the Governor of Arizona, due to Walter's execution being scheduled for that evening.[371] SCOTUS denied the motion through a *per curiam* opinion, citing the decision in *Breard*.[372] The Court also criticised Germany for filing the action 'within only two hours of a scheduled execution that was ordered on January 15, 1999,

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[363] Harold Hongju Koh, 'Paying "Decent Respect" to the World Opinion on the Death Penalty' (2002) 35 UC Davis L Rev 1085, 1113.
[364] Ibid.
[365] Valerie Epps, 'Violations of the Vienna Convention on Consular Relations: Time for Remedies' (2004) 11 Willamette J Intl L & Disp Resol 1, 4.
[366] Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. US)* Order of 10 November 1998.
[367] LaGrand Judgment (n 353) para 14-15.
[368] Ibid para 26.
[369] Ibid para 29-30.
[370] *LaGrand Case (FRG v US)* Request for the Indication of Provisional Measures (3 March 1999) para 29. President Schwebel issued a separate opinion as he was troubled mostly with the fact the Order was granted ex parte and, whilst not opposing the substance of the order, he stated he had 'profound reservations about the procedures followed both by the Applicant and the Court' and noted that 'Germany could have brought its Application years ago, months ago, weeks ago, or days ago'. After Germany was made aware of the execution dates, a number of letters were sent from Germany to the US including from the President of the Federation of Germany to the President of the United States. However, '[t]hese letters referred to German opposition to capital punishment generally, but did not raise the issue of the absence of consular notification in the case of the LaGrands'. Whilst the specific issue of the LaGrand's case was later approached in a further letter just 'two days before the scheduled date of execution of Karl LaGrand it would have made much more diplomatic sense to approach this issue immediately. It would have given the US more time to consider the issue of the LaGrand's impending executions, and the denial of the right to consular assistance, and could have potentially avoided the case before the ICJ. This action – or inaction – by Germany legitimises the admonishment from President Schwebel.
[371] *The Federal Republic of Germany et al v United States* 526 US 111, 111 (1999).
[372] Ibid.

based upon a sentence imposed by Arizona in 1984, about which the Federal Republic of Germany learned in 1992'.[373] However, in his dissenting opinion, Justice Breyer stated he would have granted a stay of execution to give the Court 'time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved'.[374] Justice Breyer is one of the SCOTUS justices that acknowledges international law when interpreting the US Constitution,[375] adding weight to the consideration that recommending states in the US UPR should consider the audience of its recommendations, including directly targeting SCOTUS and other courts.[376]

Following SCOTUS' denial of Germany's motion, and the Governor of Arizona's refusal to grant clemency, Walter LaGrand was executed on 3 March 1999.[377] However, Germany did not withdraw its application before the ICJ, and public hearings took place between 13-17 November 2000, with judgment being handed down in 2001.[378] The ICJ held that by executing Walter LaGrand, the US had breached international law and a binding provisional measures order,[379] the VCCR gives rise to an individual right to consular assistance,[380] and that similar cases in future should be reviewed and reconsidered by a domestic US court.[381]

Furthermore, the ICJ did not just rule upon the breaches of international law, but also on the application of the domestic US rule of procedural default. Germany contended in its application to the ICJ that the doctrine of procedural default prejudiced the LaGrand brothers in their applications for federal habeas relief.[382] The LaGrand brothers had previously petitioned the District Court of Arizona for habeas relief based in part on the breach of their rights under the VCCR, but, as in Breard's federal appeals, the appeal was denied on the grounds of procedural default, and the Ninth Circuit upheld this decision.[383] The ICJ adjudicated on this point, agreeing with Germany that the application of the procedural default rule in this case prevented the LaGrand brothers from exercising their Article 36 rights and, as such, this was a breach of the US' obligation to Germany under Article 36(2).[384] This decision was in direct

[373] Ibid.
[374] Ibid 1018.
[375] Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage Books 2015) 83. *See,* chapter 2.4.3.
[376] *See,* chapter 7.4.3.
[377] Epps, 'Violations of the Vienna Convention on Consular Relations' (n 365) 4.
[378] LaGrand Judgment (n 353).
[379] In *LaGrand,* the ICJ held for the first time that a Provisional Measures Order is binding, ibid para 102. The Restatement provides that '[u]nder international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury', but this would be of little comfort to Walter LaGrand who had been executed two years previously. There is no sanction to make the US take this seriously. American Law Institute, *Restatement of the Law (Third) Foreign Relations Law of the United States* (American Law Institute Publishers 1987) §901.
[380] LaGrand Judgment (n 353) para 77.
[381] Ibid para 128(7).
[382] Ibid para 71.
[383] *LaGrand v Stewart* 133 F 3d 1253 (9th Cir 1998).
[384] LaGrand Judgment (n 353) para 91.

conflict with SCOTUS' denial of cert in *Breard v. Greene,* wherein it was found that procedural default does still apply in these circumstances.[385] However, the ICJ found that in effect this meant the LaGrands were never able to benefit from their right to consular assistance.[386]

4.5.1.3 Avena and Other Mexican Nationals Case (Mexico v. United States)

Despite assurances from the US government that it was doing all it could to ensure foreign nationals were being advised of their right to consular assistance, two years after the *LaGrand* judgment, Mexico initiated the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)* ('*Avena*') in the ICJ.[387] This case involved fifty-two Mexican nationals on death row across the US whom Mexico claimed had not been afforded their Article 36 rights and, as such, argued that the principle of *restitutio in integrum* should be applied.[388]

In its judgment handed down on 31 March 2004, the ICJ denied Mexico's appeal for *restitutio in integrum*, but ordered that the US should review and reconsider the convictions and sentences of fifty-one of the fifty-two Mexican nationals named in the application.[389] The ICJ ruled that the review of the fifty-one cases 'should occur within the overall judicial proceedings relating to the individual defendant concerned'[390] and that the procedural default rule should not be used to prevent the individuals relying on their Article 36 right.[391] Furthermore, the ICJ held that, on its own, 'the clemency process, as currently practised within the [US] criminal justice system, does not appear to meet the requirements' to satisfy the ICJ judgment.[392]

Texas – the State that has carried out the most executions in the US and has a high number of Mexican nationals on death row – was less than accepting of the *Avena* judgment. The Texas Attorney-General, Greg Abbott 'indicated that, absent recommendations from the federal government, his office had no plans to ask for new trials, new sentencing, or stays of execution'.[393] The federal government did that through President Bush's Memorandum sent to the US Attorney-General ordering that the State courts must comply with the *Avena* judgment.[394] However, this did little to move the Texan Attorney-General's stance and Abbott's

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[385] *Breard* (n 349) 375-77.
[386] LaGrand Judgment (n 353) para 91.
[387] Case Concerning Avena and Other Mexican Nationals *(Mexico v US)* Judgment of 31 March 2004 [hereinafter referred to as 'Avena Judgment'].
[388] Ibid para 12, para 16.
[389] Ibid para 153(3). In the case of Mr Salcido, the US proved to the ICJ's satisfaction 'that he told the arresting officers he was a US citizen and there was no clear evidence that he was also of Mexican nationality'. Therefore, the ICJ found that the US had not breached its duty under Article 36 with regards to Mr Salcido. However, the Court did rule that the US had breached its international obligation with respect to Article 36 in the other 51 individual cases.
[390] Avena Judgment (n 387) para 140-41.
[391] Ibid para 111-13.
[392] Ibid para 143.
[393] Reynaldo Anaya Valencia, Craig L. Jackson, Leticia Van de Putte & Rodney Ellis, 'Avena and the World Court's Death Penalty Jurisdiction: Addressing the Odd Notions of Texas's Independence from the World' (2015) 23 Yale L & Poly Rev 455, 456.
[394] Memorandum for the Attorney General (28 February 2005), App to Pet for Cert 187a [hereinafter referred to as 'President's Memorandum']; Adam Liptak, 'Texas Court Ruling Rebuffs Bush and World Court' *New York Times* (16 November 2006) <www.nytimes.com/2006/11/16/washington/16death.html?_r=1&oref=slogin> accessed 24 August 2018.

office stated that '[w]e respectfully believe the executive determination exceeds the constitutional bounds for federal authority'.[395] This response shows 'a very "American" suspicion of outside involvement in national sovereign functions' says Valencia et al.[396] It also highlights both the American exceptionalist approach to the influence of international law on the US criminal justice system, and also a more specific 'Texas exceptionalism' towards international law.[397]

4.5.2 Domestic Cases

4.5.2.1 Medellin v. Texas*: The US Supreme Court's View on* Avena

It was not until 2008 that SCOTUS heard a case concerning a foreign national named in the ICJ's decision in *Avena.* This was the case of *Medellín v. Texas,* involving José Ernesto Medellín ('Medellín'), a death row inmate in Texas who was not afforded his Article 36 rights.[398]

Based upon the decision of the ICJ in *Avena*, Medellín was working his way through the federal appeals process[399] when President Bush sent his Memorandum to the US Attorney-General on 28 February 2005, advising that State courts should enforce the *Avena* decision.[400] Medellín then, adhering to the procedural rules of appeal in the US, petitioned the Texas Court of Criminal Appeals relying upon the President's Memorandum.[401] However, the Texas Court was unmoved by the President's Memorandum and the ICJ's judgment in *Avena* regarding procedural default, and rejected his appeal.[402] Accordingly, Medellín petitioned SCOTUS for a further writ of cert, which was granted.

Chief Justice Roberts delivered the opinion of the Court and noted that '[a]s a signatory to the Optional Protocol, the [US] agreed to submit disputes arising out of the [VCCR] to the ICJ'.[403] However, the Chief Justice went on to state that Article 94 of the UN Charter provides that states will '*undertake*' to comply with ICJ judgments and, as such, Article 94 'is not a directive to domestic courts' as it 'does not provide that the [US] "shall" or "must" comply with an ICJ decision'.[404] Through this ruling on the technical wording of the Charter, the Court 'has made

[395] Adam Liptak, 'U.S. Say It Has Withdrawn from World Judicial Body' *New York Times* (10 March 2005) <https://www.nytimes.com/2005/03/10/politics/us-says-it-has-withdrawn-from-world-judicial-body.html> accessed 24 August 2018.
[396] Valencia et al (n 393) 465.
[397] *Glossip* (n 44) 2760-62 (Breyer J, dissenting). Carol S Steiker, 'Capital Punishment and American Exceptionalism' in Michael Igantieff (ed), *American Exceptionalism and Human Rights* (PUP 2005) 85-86.
[398] *Medellin v Texas* 552 US 491, 498 (2008).
[399] The Fifth Circuit had denied his initial appeal and SCOTUS had just granted cert, *Medellín v Dretke* 544 US 660 (2005).
[400] President's Memorandum (n 394).
[401] *Ex parte Medellín* 223 S W 3d 315 (2006).
[402] Ibid.
[403] *Medellín* (n 398) 507.
[404] Ibid 508. Emphasis added.

[US] compliance [with ICJ decisions on the VCCR] not mandatory but optional'.[405] It has also arguably made compliance with the VCCR in general optional; if the remedy for a breach is not binding, there is nothing to prevent further noncompliance with the VCCR. Regarding the issue of the application of the procedural default rule, the Court referenced its judgment in *Sanchez-Llamas v. Oregon*.[406] Handed down after the *Avena* judgment, but not involving a Mexican national named in the *Avena* case, SCOTUS held in *Sanchez-Llamas* that 'contrary to the ICJ's determination, the [VCCR] did not preclude the application of [S]tate default rules'.[407] The reliance on its judgment in *Sanchez-Llamas* reinforced SCOTUS' finding that judicial review was not necessary and that the procedural default rule should still apply.

The Court also noted that President Bush had issued a Memorandum to the Attorney-General, stating 'that the [US] would "discharge its international obligations" under Avena "by having State courts give effect to the decision"'.[408] Despite the Restatement's view that 'Courts give particular weight to the position taken by the [US] Government on questions of international law',[409] much like the Texas Attorney-General, SCOTUS was unmoved by the President's intervention. The majority held that 'neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions'.[410] The Court went further and held that the President went beyond his constitutional powers; the majority opinion stated that he 'has an array of political and diplomatic means available…but unilaterally converting a non-self-executing treaty into a self-executing one is not among them'.[411] This confirmed that SCOTUS finds the VCCR to be non-self-executing, despite the guidance provided by the federal government indicating otherwise.[412]

4.5.2.2 Torres v. Oklahoma *and* Gutierrez v. Nevada*: The State Court View on* Avena

Notwithstanding the SCOTUS decision in *Medellín,* some State courts have followed the ICJ's judgment in *Avena* and considered it to be binding. The two key cases this thesis considers have been handed down by State courts in Oklahoma and Nevada.

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[405] David S Corbett, 'From Breard to Medellin II: The Vienna Convention on Consular Relations in Perspective' (2008) 5 U St Thomas L J 808, 822.
[406] *Sanchez-Llamas v Oregon* 548 US 331 (2006).
[407] *Medellín* (n 398) 498.
[408] Ibid 498. At least in theory, the Executive branch of government is promoting adherence with international human rights. *See* President's Memorandum (n 394). This Memorandum clearly came with foreign policy ramifications in mind. Compare this to when George W. Bush was Governor of Texas and he refused a stay of execution for Joseph Faulder, a Canadian national deprived of his Article 36 rights – *see* Koh, 'Paying "Decent Respect" to the World Opinion on the Death Penalty' (n 363) 1114.
[409] Restatement (n 379) §111 Comment (c).
[410] *Medellín* (n 398) 498-99. In coming to this conclusion, the Court relied upon Justice Jackson's tripartite scheme in *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952). Emphasis added.
[411] *Medellín* (n 398) 525.
[412] US Department of State, 'Consular Notification and Access' (n 341) 44.

Torres v. Oklahoma

The first case to come before a domestic US court involving a Mexican national from the *Avena* case was that of Osbaldo Torres Aguilera ('Torres'), who was due to be executed six weeks after the *Avena* judgment was handed down.[413] In April 2004, one month after the ICJ's decision in *Avena,* Torres issued a second application for post-conviction relief with the Oklahoma Court of Criminal Appeals and appealed for clemency to the Governor of Oklahoma, Brad Henry.[414] The Governor and the Parole Board received letters from the EU and the Legal Advisor to the State Department, William Taft.[415] The EU referred to the *Avena* decision as being binding[416] and, while Taft was not as explicit, his letter strongly suggested that the decision should be followed.[417] Thereafter, Governor Henry commuted Torres' death sentence to life without the possibility of parole.[418]

On the same day as the commutation of sentence, the Oklahoma Court of Criminal Appeals stayed Torres' execution and remanded the case for an evidentiary hearing.[419] In a special unpublished concurrence, Judge Chapel held that '[t]here is no question that this [c]ourt is bound by the [VCCR] and Optional Protocol' and '[a]s this [c]ourt is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision'.[420] Furthermore, Judge Chapel found that '[t]he [US] voluntarily and legally entered into a treaty, a contract with over 100 other countries. The [US] is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty'.[421] Judge Chapel also made reference to treaties being international 'contract[s] between states',[422] substantiating the role of comity not only in the federal-State relationship but between US State courts and international courts. This was considered to be a nuanced, and generally unexpected, approach to international law from a US State court.[423]

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[413] John Quigley, 'Avena and Other Mexican Nationals (Mexico v United States of America): Must Courts Block Executions Because of a Treaty?' (2004) 5 Melb J Intl L 450, 460.
[414] *Torres v State* 120 P 3d 1184, 1186 (Okla 2005). Torres' initial appeal for habeas review on the grounds of a breach of his Article 36 rights had failed. *See,* Heather L. Finstuen, 'From the World Court to Oklahoma Court: The Significance of Torres v. State for International Court of Justice Authority, Individual Rights, and the Availability of Remedy in Vienna Convention Disputes' (2005) 58 Okla L Rev 255, 269-70, citing *Torres v Mullin* 540 US 1035, 1038 (2003) (Breyer, J, dissenting) (referring to *Torres v Gibson* No CIV-99-155-R, 73 (W D Oklahoma 23 Aug 2000) (Unpublished Mem Op and Order)).
[415] Valencia et al (n 393) 491.
[416] John Quigley, 'Avena and Other Mexican Nationals (Mexico v United States of America)' (n 413) 460.
[417] Valencia et al (n 393) 491.
[418] *Torres v State* (n 414) 1186.
[419] *Torres v State* No PCD-04-442, 2004 WL 3711623 (Okla Crim App 13 May 2004).
[420] Ibid at 2-3.
[421] Ibid at 2.
[422] Ibid.
[423] Prior to the *Avena* decision, the Oklahoma Court of Criminal Appeals had denied a claim from a capital Mexican Petitioner on the grounds of a violation of his Article 36 rights on the grounds it was procedurally defaulted, *see Valdez v Oklahoma* 46 P 3d 703 (Okla Crim App 2002).

Gutierrez v. Nevada

Another important State court decision came through the 2012 case of *Gutierrez v. Nevada,*[424] which involved another Mexican national named in *Avena*. The Supreme Court of Nevada remanded the case for an evidentiary hearing on the grounds of Gutierrez's Article 36 rights being breached and to allow him the opportunity to show he had been actually prejudiced by not being afforded consular assistance.[425] By way of avoiding the SCOTUS precedent, the court in *Gutierrez* distinguished the facts in that case from those in *Medellín v. Texas* and likened them to *Torres v. Oklahoma*, by holding that '[u]nlike *Medellín*…but like *Torres*, Gutierrez arguably suffered actual prejudice due to the lack of consular assistance'.[426] This indicates that the courts consider there to be two 'types' of Article 36 appeal cases: cases where the lack of consular assistance prejudiced the Petitioner, and cases where it did not. However, the *Gutierrez* court also held that 'without an evidentiary hearing, it is not possible to say what assistance the consulate might have provided'.[427] Arguably this would have been the same in the *Medellín* case. Although the facts of the case were different, there would be no way of knowing what assistance would have been provided to Medellín had he been afforded his Article 36 rights, and whether he was therefore prejudiced, thus warranting an evidentiary hearing. Moreover, scholars have taken issue with the requirement for 'prejudice' to be shown before the courts will judicially review and reconsider a case. Shank & Quigley have argued that the requirement of prejudice is 'too strict to comply with Article 36' as the right to consular access is 'an absolute right'.[428] It is clear from the decision in *Avena* that this is not what the ICJ ordered; this requirement for prejudice also forms part of the 'procedural default' rules, which the ICJ held should not be used to prevent the review and reconsideration of the cases of the fifty-one Mexican nationals.[429]

4.5.3 The Validity of the US' Withdrawal from the VCCR's Optional Protocol

4.5.3.1 The US' 'Withdrawal' from the VCCR's Optional Protocol

To add to the confusion surrounding Article 36, in 2005 the US purported to withdraw from the VCCR's Optional Protocol. Article I of the Optional Protocol gives compulsory jurisdiction to the ICJ to rule upon disputes between parties specifically regarding the 'interpretation or

[424] *Gutierrez v Nevada* No 53506 2012 WL 4355518.
[425] Ibid 1.
[426] Ibid 2. Emphasis added.
[427] Ibid 3.
[428] S. Adele Shank & John Quigley, 'Foreigners on Texas's Death Row and the Right of Access to a Consul' (1995) 26 St Mary's L J 719, 751, citing VCCR (n 338) Article 36.
[429] Avena Judgment (n 387) para 134.

application' of the VCCR.[430] In fact it was the US that 'proposed the Optional Protocol in 1963 and [thereafter] ratified it with the rest of the VCCR in 1969'.[431]

However, in 2005 following the outcome of the *Avena* case, the US purported to withdraw from the Optional Protocol by way of a letter from the Secretary of State, Condoleeza Rice, to the UN Secretary-General. It stated that:

> This letter constitutes notification by the United States of America that it hereby withdraws from the [Optional] Protocol. As a consequence of this withdrawal, the [US] will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.[432]

Therefore, the US claimed that it would no longer be subject to the jurisdiction of the ICJ regarding the interpretation and application of the VCCR. A US State Department spokesperson commented, after the withdrawal, that the ICJ had 'interpreted the [VCCR] in ways that we had not anticipated that involved [S]tate criminal prosecutions and the death penalty, effectively asking the court to supervise our domestic criminal system'.[433] This was a clear indication from the State Department that the withdrawal is a direct retaliation to the three ICJ cases, and that the US is not willing to forego its sovereignty regarding the imposition of the death penalty, fuelling the accusations that the US acts unilaterally on the international stage due to American exceptionalism.[434]

4.5.3.2 Was the US' 'Withdrawal' from the Optional Protocol Valid?

It is of course correct that the Optional Protocol is, by its name, optional. However, it does not include a 'denunciation clause' giving an express right to withdrawal.[435] This therefore leads to the question of whether a state is legally able to withdraw from the Optional Protocol, as the US has intended to do.

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[430] Optional Protocol to Vienna Convention on Consular Relations (adopted 24 April 1963,entered into force 19 March 1967) 596 UNTS 487.
[431] Corbett, 'From Breard to Medellin II: The Vienna Convention on Consular Relations in Perspective' (n 405) 812.
[432] Letter from US Secretary of State to UN Secretary-General (7 March 2005) <www.state.gov/documents/organization/87288.pdf> accessed 24 August 2018.
[433] Charles Lane, 'U.S. Quits Pact Used in Capital Cases' *Washington Post* (10 March 2005) <www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html> accessed 24 August 2018.
[434] Laurence R. Helfer, 'Exiting Treaties' (2005) 91 Va L Rev 1579, 1624 '[b]y remaining outside these treaties through non-entry or exit, the United States has, according to many observers, cast doubt on its commitment to multilateral cooperation. A significant part of the negative reaction to the United States' non-participation in these treaty regimes can be attributed to resentment of its unique status as a world hegemon and the disproportionate military and economic power it possesses relative to other nations. But another component of the dissatisfaction relates to the perception that the United States, by failing to participate in treaty after treaty, is reaping the benefits of cooperation by others without incurring any corresponding burdens'.
[435] John Quigley, 'The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases' (2009) 19 Duke J Comp & Intl L 263, 264.

No state party other than the US has purported to withdraw from the Optional Protocol, so there is no precedent as to its validity.[436] To muddy the waters further, in 2008 when Mexico requested that the ICJ provide an interpretation on its judgment in *Avena*, it did not provide its view on the validity of the US' purported withdrawal from the Optional Protocol.[437]

Therefore, what must initially be considered is how a state withdraws from a treaty when there is no denunciation clause. By their very nature, 'exit clauses create a lawful, public mechanism for a state to terminate its treaty obligations'.[438] While the omission of a denunciation clause can 'rais[e] the possibility that exit may be implicitly precluded as a matter of international law',[439] it does not automatically mean there is no right to withdraw. Instead, the VCLT must be consulted.[440]

Article 56 VCLT provides as follows:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
   (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) A right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice.[441]

In terms of Article 56(1)(a), Quigley noted that the *travaux préparatoires* of the Optional Protocol made no mention of a denunciation clause during the drafting.[442] In fact, the US itself 'viewed [compulsory dispute settlement] as central to the entire enterprise of concluding a consular treaty',[443] suggesting that the parties, and especially the US, did not intend for a withdrawal from the Optional Protocol. This indicates that Article 56(1)(a) is not satisfied. In terms of Article 56(1)(b), the VCCR protects the right to access consular assistance and protection, which does not imply that there would be a right to denunciation as a way of avoiding ensuring consular protection for a detained foreign national. Furthermore, Reisman and Arsanjani have noted that 'there are now problems with the denunciation of treaty

[436] John Quigley, William J. Aceves & S. Adele Shank, *The Law of Consular Access: A Documentary Guide* (Routledge 2010) 207.
[437] Request for an Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals *(Mexico* v. *United States of America)*.
[438] Helfer, 'Exiting Treaties' (n 434) 1582.
[439] Ibid.
[440] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331; 8 ILM 679 (1969).
[441] Ibid Article 56.
[442] Quigley, 'The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases' (n 435) 298.
[443] Ibid 294.

provisions on jurisdiction where substantive rights have been provided for individuals'.[444] It is widely considered that the VCCR confers individual rights, the ICJ held as such in *LaGrand* and *Avena*,[445] as has the IACHR,[446] the Committee,[447] and even in *Breard v. Greene* SCOTUS held that the VCCR 'arguably confers on an individual the right to consular assistance following arrest',[448] although SCOTUS overruled this decision in *Medellín*.[449] This suggests that Article 56(1)(b) is not satisfied either.

However, Anthony Aust has argued that '[i]t will usually be possible to withdraw from a general treaty for the settlement of disputes between the parties even when it has no withdrawal provision' on the basis that states must consent to be subject to an international jurisdiction.[450] Aust cited the US withdrawal from the VCCR Optional Protocol when asserting that 'states have withdrawn from such optional protocols on dispute settlement to several UN treaties without (at least legal) objection, even when they contain no provision for this'.[451] However, as Quigley noted in 2009 and this thesis has found in 2018, there have been no other withdrawals from similar treaties, meaning that Aust could rely on no other examples to substantiate this assertion and, further, 'there is no established procedure for reacting to a denunciation by another state party'.[452]

Another issue to consider was raised by Reisman and Arsanjani, who found that:

> It appears likely that the [US] felt that states, and, increasingly, non-governmental organizations committed to abolitionism, would be able to continue to bring cases allegedly arising under Article 36 of the VCCR to an international tribunal that could well prove to be increasingly abolitionist in its orientation.[453]

However, as Quigley correctly stated, this is 'no excuse for failing to comply with a treaty obligation'.[454] Quigley went on to argue that '[e]ven if Reisman and Arsanjani are correct in their assessment that the ICJ is abolitionist in orientation, the ICJ would have no jurisdiction to deal with capital punishment as such'.[455] Indeed, the death penalty is not the issue at hand in the VCCR cases adjudicated upon by the ICJ, the key issue was whether or not there had

[444] W Michael Reisman & Mahnoush H Arsanjani, 'No Exit? A Preliminary Examination of the Legal Consequences of United States' Notification of Withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations' in Marcelo G. Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Brill 2007) 904.
[445] LaGrand Judgment (n 353) para 77; Avena Judgment (n 387) para 40.
[446] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of* Law Advisory Opinion OC 16/99 (n 339) para 24.
[447] General Comment 36 2015 (n 120) para 44.
[448] *Breard* (n 349) 376.
[449] *Medellín* (n 398) FN3.
[450] Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 291.
[451] Ibid.
[452] Quigley, 'The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases' (n 435) 296, 297.
[453] Reisman & Arsanjani, 'No Exit' (n 444) 925.
[454] Quigley, 'The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases' (n 435) 288-89.
[455] Ibid 289.

been a breach of a multilateral treaty, with the case being expedited due to the finality an imminent execution presents.

If the US' withdrawal is invalid, the US will still be bound by the Optional Protocol, and will therefore remain under the ICJ's jurisdiction. Alternatively, if the withdrawal from the Optional Protocol is valid and, given that the US withdrew from the ICJ's general compulsory jurisdiction in 1986,[456] this indicates that regarding consular disputes the US cannot sue or be sued. There are severe implications from this. Foreign nationals on death row across the US will be further negatively impacted as the scope for ensuring their Article 36 rights are afforded to them will be narrowed substantially. Moreover, from the US government's perspective, it lessens the consular protections that can be afforded to its own citizens. For example, in 'the well-known cases of the three American hikers…arrested in 2009 on charges of spying in Iran, or Amanda Knox, who was arrested and tried for murder in Italy'.[457]

Quigley concluded that the US' 'position that the VCCR Optional Protocol can be freely denounced is difficult to sustain on the basis of VCLT Article 56 and international practice'.[458] Given that there is no denunciation clause in the Optional Protocol, and considering the finding that the requirements of Article 56 have not been satisfied, this thesis takes Quigley's assertions further, and directly argues that the US' purported withdrawal from the Optional Protocol was invalid.[459] Therefore, although the US is not a party to the ICJ's compulsory jurisdiction, from the analysis above, the US continues to be under the ICJ's VCCR jurisdiction, notwithstanding the purported withdrawal by the US Secretary of State. To substantiate this point, in the 2010 UPR, the OHCHR was cited in the Compilation Report as having concerns about the execution of Medellín 'despite an order to the contrary by the International Court of Justice',[460] particularly as the '*OHCHR recalled that the [US] has a legal obligation to comply with decisions of the International Court of Justice*'.[461] This assertion from the OHCHR that the US' legal obligation under the VCCR is still in place came three years after the US purported to withdraw from the Optional Protocol, indicating that its belief is also that the withdrawal was invalid.

However, in order to test the argument that the US' purported withdrawal from the VCCR's Optional Protocol is invalid, another state must initiate proceedings against the US under the

[456] When Nicaragua brought a case against the US before the ICJ in 1985, the US invoked the 'right' under a reservation it had lodged to withdraw from the Statute of the Court, hence removing itself from the compulsory jurisdiction of the ICJ, Restatement (n 379) §903 Reporters Note 3.
[457] Cindy Galway Buys, 'Reflections on the 50th Anniversary of the Vienna Convention on Consular Relations' (2013) 38 S Ill U L J 57, 63.
[458] Quigley, 'The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases' (n 435) 298.
[459] Ibid.
[460] Compilation Report 2010 (n 145) para 25.
[461] Ibid para 26. Emphasis added.

Optional Protocol. The ICJ, by way of Article 36(6) of the Statute of the International Court of Justice, deems itself to be the deciding body when determining a dispute over whether the ICJ has jurisdiction.[462] Therefore, should a state wish to bring action against the US over a breach of the VCCR, an application should be made to the ICJ invoking Article 36(6) and relying upon the lack of a denunciation clause and no grounds under Article 56 VCLT, to prove that the US has not withdrawn from the Optional Protocol. The ICJ would then be able to adjudicate on the validity of the withdrawal through its decision on whether it had jurisdiction or not. This has yet to be carried out, despite the withdrawal being thirteen years ago, there being 136 foreign nationals on US death row, made up of thirty-five nationalities,[463] and there being twelve executions of foreign nationals since the purported withdrawal in 2005.[464] This is likely due to the potentially negative diplomatic repercussions from initiating proceedings against the US in the ICJ, particularly when the US has purported to withdraw from the ICJ's jurisdiction. However, this thesis has concluded that the withdrawal is invalid and suggests this theory should be tested by a state party with a sound diplomatic relationship with the US, and the means to bring a case before the ICJ. A prime candidate to do this would be the UK using the case of Linda Carty. Carty holds dual US and UK citizenship and has been on death row since 2002 after being convicted of the kidnap and murder of her neighbour in Texas in 2001.[465] Carty was not afforded her Article 36 rights and, as such, raised this in her State habeas appeal in 2003, which was denied.[466] This would be of particular interest to the UK as it is one of the few member states that has raised the issue of consular assistance in both US UPRs,[467] indicating that the UK considers it to be a serious human rights issue.

Additionally, this issue can be further considered through the UPR. To date, the UPR has not been utilised to consider the US' withdrawal from the Optional Protocol, but it would provide a more diplomatic, and possibly effective, platform for doing so. Through the UPR, UN member states could raise the purported withdrawal as an issue and put forward their views on its validity during the advance questions and interactive dialogue, then provide recommendations as to the best way forward for the US to protect and promote the consular rights of both foreign nationals in the US and US nationals abroad. This would be particularly relevant for those states with nationals on US death row and abolitionist states. To encourage member states to

[462] Statute of the International Court of Justice (n 347) Article 36(6).
[463] Mark Warren, 'Foreign National and the Death Penalty in the US' (*Death Penalty Information Center* updated 29 June 2018) <www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW> accessed 24 August 2018.
[464] Mark Warren, 'Confirmed Foreign Nationals Executed Since 1976' (n 93). Correct as at 24 August 2018.
[465] *Carty v Thaler* 583 F 3d 244, 246 (5th Cir La 2010).
[466] Ibid 251.
[467] UNHRC, 'Advance Questions to the United States of America Addendum 1' (2010) (n 284); Report of the Working Group 2010 (n 148) paras 92.223; UNHRC, 'Advance Questions to the United States of America Addendum 1' (2015) (n 198); Report of the Working Group 2015 (n 106) paras 176.237.

provide recommendations on this, Stakeholders should, at the very least, provide information in their individual submissions for member states to consult.[468]

4.5.4 The Universal Periodic Review and the VCCR

The 2010 US Universal Periodic Review

Subsequent to the decision in *Medellín* came the first US UPR in 2010, and the US government tackled this issue head on in the National Report, noting that '[t]he Administration is also committed to ensuring that the [US] complies with its international obligations to provide consular notification and access for foreign nationals in [US] custody, including the obligations arising from the *Avena* decision of the [ICJ]'.[469] However, this commitment provided by the federal government during the UPR is in direct conflict with the SCOTUS decision on the *Avena* judgment in *Medellín* from 2008, and USHRN was cited in the Compilation Report lamenting the US for its 'the lack of compliance' with *Avena*.[470] A number of other Stakeholders also discussed this issue in their individual submissions.[471]

Furthermore, the UK and Mexico asked advance questions and provided recommendations urging the US to comply with the *Avena* decision, and Brazil provided a recommendation for the US to generally ensure consular access for migrants,[472] all three of which were accepted by the US.[473] However, the US did not provide any detail about *how* it would go about implementing the recommendations, and AI's 2015 individual submission noted that 'US support for Mexico's recommendation to implement the [ICJ's] 2004 *Avena* judgment and to prevent the execution of those it covers has led to no change and has failed to prevent three more such executions in the interim'.[474] This indicates the need for reform in the follow-up to the review, and adds weight to the argument that the UPR should require the state under review to briefly address how it will implement accepted recommendations, which would have allowed these accepted recommendations on the VCCR to be measurable by states and Stakeholders.[475] The mid-term review should also become a core part of the UPR,[476] to

[468] *See,* chapter 7.2.3.
[469] National Report 2010 (n 50) para 54. Emphasis added.
[470] Stakeholder Report 2010 (n 52) para 30.
[471] NGO International CURE, 'Stakeholder Report 2010' (n 180) Section I, B; USHRN, 'Stakeholder Report Annex 5 2010' (n 63) para 10; IACHR, 'Stakeholder Report Annex 2 2010' (n 69) para 21.
[472] UNHRC, 'Advanced Questions to the United States of America Addendum 1' (2010) (n 284); UNHRC, 'Advanced Questions to the United States of America Addendum 2' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> accessed 24 August 2018; Report of the Working Group 2010 (n 148) paras 92.54, 92.213, 92.223.
[473] Report of the Working Group Addendum 2010 (n 157) paras 16, 28.
[474] AI, 'Stakeholder Submission 2015' (n 100) 1, emphasis added; HRW also noted this, Human Rights Watch, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> para 17 accessed 24 August 2018.
[475] *See,* chapter 7.5.1.
[476] *See,* chapter 7.5.2.

encourage the US to submit a mid-term report to provide an update on its progress in implementing accepted recommendations, including those related to consular assistance and the VCCR.

The 2015 US Universal Periodic Review

In the 2015 National Report, the US advised that it had 'made significant efforts to meet the goal of across-the-board compliance with its consular notification and access obligations under the [VCCR].[477] The US provided examples of this, such as its amendment of the Federal Rules of Criminal Procedure, and stated that:

> [T]o facilitate compliance with our consular notification and access obligations, requiring judges to notify all defendants at their initial appearance in a federal case that non-[US] citizens may request that a consular officer from the defendant's country of nationality be notified of the arrest, but that even without a defendant's request, a treaty or other international agreement may require consular notification.[478]

However, this is just for federal cases, whereas most foreign national death penalty cases are State-based. The US delegation went on to advise that it had 'distributed more than 200,000 manuals on consular notification and access'[479] to law enforcement and had posted online other 'free consular notification and access training materials'.[480] Although this is a positive move made by the US government, it still does not ensure compliance with the *Avena* judgment as the recommendations stated.

The key issue highlighted by the US in its National Report in 2015, was that '[l]egislation supported by the Administration that would bring us into compliance with the ICJ's judgment in *Avena* has previously been introduced in the Senate, but has not been enacted into law'.[481] This was in reference to the Consular Notification Compliance Act ('CNCA'), proposed by Senator Patrick Leahy in 2011. If passed by Congress, this legislation would bring the US 'into compliance with the ICJ's judgment in *Avena'*,[482] and it 'would give federal courts jurisdiction to entertain a habeas corpus petition from a foreign national who is under death sentence and claims a violation of the obligation of consular notification'.[483] In its 2015 Stakeholder submission, HRW recommended that the US '[c]ontinue to encourage passage of the

[477] National Report 2015 (n 99) para 73.
[478] Ibid.
[479] Ibid.
[480] Ibid.
[481] Ibid. Emphasis added.
[482] United States Department of State, *Digest of United States Practice in International Law,* CarrieLyn D. Guymon ed (2013) 26-7; Consular Notification Compliance Act of 2011, S 1194, 112th Con (2011) [hereinafter referred to as 'Consular Notification Compliance Act'] para 73. Emphasis added.
[483] John Quigley, 'Vienna Convention on Consular Relations: In Retrospect and into the Future' (2013) 38 S. Ill U LJ 1, 7, citing Consular Notification Compliance Act (n 482).

[CNCA]'.[484] Furthermore, the Obama Administration intervened in the case of Leal Garcia in 2011, asking that his execution be stayed until Congress had decided upon whether the CNCA will be passed,[485] although SCOTUS declined to stay Leal Garcia's execution.

Again, in the 2015 UPR, the UK and Mexico asked advance questions on this issue,[486] and the UK and Greece made recommendations that the US should ensure the right to consular notification and enact related legislation.[487] These recommendations were accepted by the US,[488] yet in 2018 there has still been no significant progress in Congress to pass the CNCA as law, and appeals from death row inmates on the grounds of an Article 36 breach continue to be denied.[489]

Clearly, consular assistance for foreign nationals on death row in the US is still an issue that requires further attention and improvement. A diplomatic way of encouraging the US to comply with its consular obligations is through foreign governmental intervention. For example, similar to the objections received from states regarding the ICCPR reservations, states have objected to the US treatment of the VCCR in various different ways. There have been diplomatic protests, foreign diplomats approaching US State governors, and states submitting Amicus Curiae briefs in death penalty cases involving foreign nationals, which Quigley says 'is not done lightly, as it implies criticism of the receiving state'.[490] The UPR can be an addition to this, in particular to add pressure to passing the CNCA, which would be a significant step towards ensuring foreign nationals are afforded the right to a fair trial.

4.6 Conclusion

This chapter has analysed the UPR through the lens of the right to a fair trial in death penalty cases. In order to do this, four key areas were examined as to how they are dealt with within the 2010 and 2015 US UPRs: the right to counsel, racial discrimination, wrongful convictions, and foreign nationals' right to consular assistance. From this analysis, positives and negatives of the UPR mechanism have been identified, and this chapter has argued for a number of ways to improve the UPR, whilst also encouraging US adherence to international law, and

[484] HRW, 'Stakeholder Submission 2015' (n 474) 3.
[485] *Leal Garcia v United States* 564 US 490 (2011).
[486] UNHRC, 'Advanced Questions to the United States of America Addendum 1' (2015) (n 198) 7, United Kingdom: '[w]hat steps are the US taking to ensure the enforcement of consular notification is consistent at Federal, State and County level, and to support the passage of State and Federal legislation relating to consular notification, including addressing cases where there has been failure to notify?'; UNHRC, 'Advanced Questions to the United States of America Addendum 2' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> 1 accessed 24 August 2018, Mexico: "[w]hat actions have been taken to resolve the obstacles that prevent the full implementation of the Avena Judgment of the International Court of Justice? After 3 of the individuals covered by that judgment have been executed, what measures are been taken to avoid the execution of the rest of the individuals covered by the judgment?'
[487] Report of the Working Group 2015 (n 106) paras 176.237, 176.238.
[488] Report of the Working Group Addendum 1 2015 (n 107) para 20.
[489] *See, Archanian v State* 419 P 3d 701 (Table) (Nev 2018). *See,* chapter 7.5.
[490] Quigley, 'The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases' (n 435) 275.

collating evidence to assist in the facilitation of the abolition of the death penalty in the US. Chapter five takes on the same format, this time analysing the categorical exemption for those with intellectual disabilities, and the proposed categorical exemption for those with all severe mental illnesses.

CHAPTER FIVE

THE US DEATH PENALTY, MENTAL HEALTH, AND THE UNIVERSAL PERIODIC REVIEW

5.1 Categorical Exemptions to the Death Penalty in the US

The Eighth Amendment of the US Constitution provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'.[1] The interpretation of this protection has developed over time, with the pivotal 1958 SCOTUS decision in *Trop v. Dulles*[2] famously stating that the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'.[3] The Eighth Amendment is often relied upon when challenging a particular aspect of capital punishment, and one example of this is the growing list of categorical exemptions to the death penalty.

There are two types of categorical exemptions: first, punishment exemptions which exempt persons from being executed when they have committed particular crimes,[4] and, second, person exemptions that prevent certain classes of people being sentenced to death.[5] This chapter firstly focuses on the current exemption for those with an intellectual disability, including both the international standards and domestic US standards, and an analysis of how it is dealt with throughout the UPR. Secondly, this chapter examines why there is no exemption for severe mental illnesses, and how this has been approached within the UPR. The focus is on these issues and not the other categorical exemptions, because they are topical concerns for capital punishment in the US,[6] and have been considered throughout the US UPRs.

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[1] The United States Constitution, Amendment VIII.
[2] *Trop v Dulles* 356 US 86 (1958).
[3] Ibid 101.
[4] *See, Coker v Georgia* 433 U.S. 584 (1977), wherein the Court held that a death sentence for the crime of rape of an adult woman was cruel and unusual punishment; *Enmund v Florida* 458 US 782 (1982), wherein the Court struck down a punishment of death for a felony murder crime; and *Kennedy v Louisiana* 554 US 407 (2008), which extended the decision in *Coker* exempt the crime of the rape of a child from the death penalty.
[5] *See, Ford v Wainwright* 477 US 399 (1986), which exempted persons who are 'insane' from a death sentence; *Atkins v Virginia* 536 US 304 (2002), which held that executing the mentally retarded – or intellectually disabled as it is now termed by the American Psychiatric Association – is cruel and unusual punishment contrary to the Eighth Amendment; and *Roper v Simmons* 543 US 551 (2005), which held that executions of those who were under the age of eighteen at the time of the offense are unconstitutional contrary to the Eighth Amendment.
[6] Missouri lawmakers heard testimony on a Bill to exempt persons with severe mental illnesses from the death penalty in the state on 11 April 2018, Provides a Procedure by which a Defendant May be Found to be not Eligible for the Death Penalty Due to Serious Mental Illness, SB 1081 (Missouri 2018); Death Penalty Information Center, 'Montana Prosecutors Drop Death Penalty Against Mentally Ill Defendant' <https://deathpenaltyinfo.org/node/7159?utm_source=WeeklyUpdate&utm_campaign=f1ff468b07-weekly_update_2017_w41_COPY_01&utm_medium=email&utm_term=0_37cc7e4461-f1ff468b07-711068465> accessed 24 August 2018.

5.2 Intellectual Disabilities

5.2.1 International Law

There is a categorical exemption from the death penalty in the US for persons with intellectual disabilities. At the international level, the ICCPR does not explicitly provide for such an exemption. However, Article 6(1) provides that '[n]o one shall be arbitrarily deprived of his right to life'[7] and Article 7 protects against 'cruel, inhuman and degrading treatment'.[8] Both provisions would be breached by sentencing to death or executing an intellectually disabled person.[9] Furthermore, the ECOSOC Safeguards explicitly make reference to mental illness and the death penalty, with the 1984 Safeguards protecting those who have 'become insane' from execution.[10] The 1989 Additional Safeguards also provide that states should 'eliminat[e] the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution'.[11]

Intellectual disability was previously termed mental retardation.[12] The World Health Organisation ('WHO') defined mental retardation in 1996 as 'a condition of arrested or incomplete development of the mind, which is especially characterized by impairment of skills manifested during the developmental period, which contribute to the overall level of intelligence'.[13] The American Psychiatric Association ('APA') also provided a definition and criterion of mental retardation in its Diagnostic and Statistical Manual of Mental Disorders, version 4 ('DSM-IV').[14] The DSM is 'the standard classification of mental disorders used by mental health professionals in the [US]'[15] and, in 2013, the APA published its Diagnostic and Statistical Manual of Mental Disorders, version 5 ('DSM-V'), which is the latest version.[16] Notably, the term 'mental retardation' was replaced with 'intellectual disability'. The APA advised that this was to align the terminology with the WHO's definition of intellectual

[7] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 6(1) [hereinafter referred to as 'ICCPR']. Those suffering from a mental illness would also benefit from the move towards abolition of the death penalty as identified in ICCPR Article 6(6).
[8] Ibid Article 7.
[9] UN Human Rights Committee, 'Draft General Comment 36' on 'Article 6 Right to Life' (2017) para 53 [hereinafter referred to as 'General Comment 36 2017'].
[10] ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1984/50 (25 May 1984) Number 3 [hereinafter referred to as 'Safeguards 1984'].
[11] ECOSOC 'Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1989/64 (24 May 1989) para 1(d) [hereinafter referred to as 'Safeguards 1989'].
[12] Previously termed 'mental retardation'. This thesis refers to the term 'intellectual disabilities' unless in a direct quote.
[13] World Health Organisation 'ICD-10 Guide for Mental Retardation' WHO Doc WHO/MNH/96.3 (1996) 1 <www.who.int/mental_health/media/en/69.pdf> accessed 24 August 2018.
[14] 'The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C)', American Psychiatric Association, *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* xxix, 41 (4th edn, 2000) [hereinafter referred to as 'DSM-IV'].
[15] American Psychiatric Association, 'About DSM-5' <www.dsm5.org/about/pages/default.aspx> accessed 24 August 2018.
[16] American Psychiatric Association, *DSM-V-TR: The Diagnostic and Statistical Manual of Mental Disorders* (5th edn, 2013) [hereinafter referred to as 'DSM-V'].

disabilities.[17] The WHO defines intellectual disability as 'a significantly reduced ability to understand new or complex information and to learn and apply new skills (impaired intelligence). This results in a reduced ability to cope independently (impaired social functioning), and begins before adulthood, with a lasting effect on development'.[18] The DSM-V definition is slightly different to DSM-IV, defining intellectual disability as:

> The essential features of intellectual disability (intellectual developmental disorder) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally matched peers (Criterion B). Onset is during the developmental period (Criterion C). The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions.[19]

A key difference is that the APA has moved away from a heavy reliance upon a specific IQ score in the diagnostic criterion, noting that an IQ test should still be included in the overall assessment, but it should not be overemphasised in the diagnosis.[20] In concluding that there should be a categorical exemption for those who are intellectually disabled, and in regulating State application of this exemption, the US has relied upon the DSM.

5.2.2 Domestic Law

In 1996, Daryl Atkins and William Jones abducted, robbed at gunpoint, and then murdered Eric Nesbitt in Virginia.[21] Subsequently, Atkins was sentenced to death. His defence attorneys introduced one expert witness at trial, a clinical psychologist named Dr Evan Nelson, who testified that Daryl Atkins 'was "mildly mentally retarded"'.[22] In fact, Atkins had an IQ score of 59, well below the national average of 100. Atkins' appeal to the Supreme Court of Virginia was unsuccessful, although Justice Koontz's dissenting opinion noted that he had 'a limited capacity for adaptive behaviour [and] the cognitive ability or mental age of a child between 9 and 12 years of age'.[23] His dissent went on to note that '[t]his [c]ourt has never approved of

[17] American Psychiatric Association 'Intellectual Disability' (2013).
[18] World Health Organisation, 'Definition: Intellectual Disablity' <www.euro.who.int/en/health-topics/noncommunicable-diseases/mental-health/news/news/2010/15/childrens-right-to-family-life/definition-intellectual-disability> accessed 24 August 2018.
[19] DSM-V (n 16).
[20] American Psychiatric Association 'Intellectual Disability' (n 17). The American Association on Intellectual and Developmental Disabilities ('AAIDD') also provides a similar definition of intellectual disabilities, that it 'is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18'. The AAIDD definition still relies upon an IQ score of generally around 70 to 75 and below. AAIDD, 'Definition of Intellectual Disability' <aaidd.org/intellectual-disability/definition#.WD_rHrKLTIU> accessed 24 August 2018. Emphasis omitted.
[21] *See, Atkins* (n 5) 307.
[22] Ibid 308.
[23] *Atkins v. Commonwealth* 260 Va 375, 394 (Va 2000).

the imposition of the death penalty upon a defendant who is mentally retarded *and* has an IQ as low as 59'.[24]

Two years later, Atkins' case was heard by SCOTUS, and *Atkins v. Virginia* became the landmark ruling on intellectual disabilities and the death penalty.[25] SCOTUS held that executing those who are intellectually disabled is a cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments of the US Constitution.[26]

However, *Atkins* left the role of implementing its decision to the States, which has led to further litigation on this issue. In *Hall v. Florida*, a 5-4 SCOTUS majority held that a Florida death penalty statute requiring an IQ of 70 or below to prove an intellectual disability must be struck down, as it could potentially lead to the unconstitutional execution of defendants with intellectual disabilities.[27] Furthermore, in *Moore v. Texas*,[28] SCOTUS heard another case concerning the State application of the *Atkins* decision, this time relating to Texas and the case of Bobby James Moore. SCOTUS found that the Texas Court of Criminal Appeals had applied an outdated criterion and definition when it concluded that Moore was not intellectually disabled and could be sentenced to death.[29] SCOTUS vacated the holding of the Texas court and remanded the case back to the lower court for a sentencing rehearing.[30]

As identified in *Hall* and *Moore*, there continues to be a number of problems in the US with intellectual disabilities and the death penalty. In particular, despite the international and domestic safeguards, the 2010 and 2015 UPRs saw a number of NGOs allege that the US is continuing to execute those with intellectual disabilities.[31] Sections 5.2.3 and 5.2.4 will analyse how the 2010 and 2015 UPRs approached intellectual disabilities in the US death penalty.

5.2.3 The 2010 Universal Periodic Review and Intellectual Disabilities

In the 2010 US UPR, the issue of the death penalty and intellectual disabilities was raised in all three reports. In its National Report, the US referred to the exclusion of those who have intellectual disabilities from being executed as a positive factor regarding the decline in the

[24] Ibid 394.
[25] *Atkins* (n 5).
[26] Ibid 321. *Atkins* abrogated the previous decision of SCOTUS in *Penry v. Lynaugh* in 1989, wherein the Court had held that '[t]he Eighth Amendment does not categorically prohibit the execution of mentally retarded capital murderers', *see, Penry v Lynaugh* 492 US 302, 305 (1989).
[27] *Hall v Florida* 134 S Ct 1986, 1990 (2014). Florida Statute § 921.137(1) (2013).
[28] *Moore v Texas* 137 S Ct 1039 (2017).
[29] Ibid 1053.
[30] Ibid.
[31] *See, e.g.,* UNHRC, 'Summary of Stakeholders Information – United States of America' (14 October 2010) UN Doc A/HRC/WG.6/9/USA/3/Rev1 para 30 [hereinafter referred to as 'Stakeholder Report 2010]; UNHRC, 'Summary of Stakeholders Information – United States of America' (16 February 2015) UN Doc A/HRC/WG.6/22/USA/3 para 37 [hereinafter referred to as 'Stakeholder Report 2015'].

use of capital punishment in the US, citing the *Atkins* case.[32] Furthermore, the Committee was referenced in the Compilation Report as welcoming 'the 2002 Supreme Court decision that executions of mentally retarded criminals are cruel and unusual punishments'.[33]

Atkins v. Virginia

In ruling that executing those with intellectual disabilities is unconstitutional in *Atkins,* the majority opinion derived the definition of mental retardation (as it was termed in 2002) from the APA's DSM-IV. In fact, the DSM-IV – the current version when *Atkins* was heard – had three 'categories' of mental retardation based around an individual's IQ score. Between 50-55 and 70 was considered 'mild mental retardation', between 35-40 and 50-55 was 'moderate mental retardation', between 20-25 and 35-40 was considered 'severe mental retardation', and below 20 or 25 was 'profound mental retardation'.[34] From this categorisation, it is understandable why Dr Nelson testified at trial that Daryl Atkins was 'mildly mentally retarded' as his IQ score was 59.[35]

SCOTUS ruled that it was unconstitutional to execute the intellectually disabled, reversed the decision of the lower court, and remanded Daryl Atkins' case back to the Virginia courts to reconsider. However, despite this decision from SCOTUS and the evidence of Daryl Atkins' intellectual disability, his life was eventually spared not due to this ruling, but due to proof of prosecutorial misconduct.[36] Although generally the decision in *Atkins* was celebrated, the most prevalent criticism of the judgment was that the Court left to the individual States 'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences'.[37] The ABA in its 'The State of the Modern Death Penalty' report highlighted the issue that the *Atkins* decision 'does not guarantee that persons with mental retardation will not be executed as each [S]tate may promulgate its own procedures for determining whether a capital defendant has mental retardation'.[38]

Is the US Continuing to Execute the Intellectually Disabled?

The issue of the US continuing to execute the intellectually disabled, in spite of the *Atkins* decision, was raised during the 2010 UPR. In its Death Penalty Annex to its individual

[32] UNHRC, 'National Report of the United States of America' (23 August 2010) UN Doc A/HRC/WG.6/9/USA/1 para 63 [hereinafter referred to as 'National Report 2010'].
[33] UNHRC, 'Compilation of UN Information – United States of America' (12 August 2010) UN Doc A/HRC/WG6/9/USA/2 para 25 [hereinafter referred to as 'Compilation Report 2010'].
[34] DSM-IV (n 14) xxix, 40.
[35] *See, Atkins* (n 5) 308.
[36] *See, In re Commonwealth of Virginia* 677 S E 2d 236, 245 (Va 2009).
[37] *Atkins* (n 5) 317.
[38] American Bar Association, 'The State of the Modern Death Penalty in America' <www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/aba_state_of_modern_death_penalty_web_file.authcheckdam.pdf> 11 accessed 24 August 2018.

submission, USHRN provided the example of Bobby Wayne Woods who was executed in 2009 'despite compelling evidence of mental retardation'.[39] USHRN noted that 'Woods had had difficulty completing even the most basic tasks' to the point that he 'was never able to live by himself and was functionally illiterate as an adult' as well as having an IQ score of around 70, which is considered to be a mild mental retardation.[40] This was also raised by AI in its individual submission, which noted that '[d]espite the 2002 [SCOTUS] ruling that people with "mental retardation" be exempt from the death penalty, the absence of a single national standard has led to arbitrariness and less than full protection in relation to this category of offender'.[41] However, these key points were not raised in the main Stakeholder Report, meaning that the recommending states are unlikely to have read about them. As argued in chapter four, to avoid key information being omitted from the main reports, such as the continued execution of the intellectually disabled in violation of both international and domestic standards, the OHCHR needs to be more transparent in how it compiles its Stakeholder Report.[42] This change would further benefit the Stakeholders in all UPRs regarding all human rights issues when compiling their individual submissions.

Moreover, during the interactive dialogue 'Ireland welcomed the [US'] exclusion of the death penalty for crimes committed by minors and persons with an intellectual disability',[43] and 'New Zealand…noted with appreciation that the [US] had excluded the death penalty for…those with intellectual disabilities'.[44] If Ireland and New Zealand had been made aware that this categorical exemption was not being adhered to consistently in some US States, they may have raised this during the interactive dialogue. Furthermore, no recommendations were made on this point, and so the US was not held to account for executing intellectually disabled inmates, in breach of both international and domestic laws. To remedy this, the recommending states need to be made aware of this issue, potentially through future Stakeholder Reports as discussed above. Then, from this information, the member states should provide specific recommendations on what the US is doing to ensure intellectually disabled people are not sentenced to death or executed.[45] This could also include the member states making

[39] USHRN, 'United States Universal Periodic Review Stakeholder Submission Annex 5 Death Penalty' (2010) <http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/USHRN_UPR_USA_S09_2010_Annex5_Death%20Penalty%20Joint%20Report%20USA.pdf> para 15 accessed 24 August 2018.
[40] Ibid.
[41] Amnesty International, 'United States Universal Periodic Review Stakeholder Submission' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> part C(ii) accessed 24 August 2018.
[42] *See,* chapter 7.1.1.
[43] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (4 January 2011) UN Doc A/HRC/16/11 para 48 [hereinafter referred to as 'Report of the Working Group 2010'].
[44] Ibid para 77.
[45] *See,* chapter 7.4.2.

recommendations on this issue directly to the US State governments and judiciaries, in order to have as much impact as possible.[46]

5.2.4 The 2015 Universal Periodic Review and Intellectual Disabilities

Between the 2010 and 2015 UPRs, there was a critical development in the US regarding intellectual disabilities and the death penalty through the decision in *Hall v. Florida.*[47] Despite the importance of this case, the US made no reference to it in the 2015 National Report, although the US stated that capital punishment 'is barred…for individuals found by a court to have a significant intellectual disability'.[48] However, the categorical exemption in the US is for all persons with any intellectual disability,[49] not a 'significant' intellectual disability, meaning that the federal government has provided an incorrect fact on this to the key UPR actors.

Hall v. Florida

The practical repercussions of *Atkins* were dealt with by SCOTUS in *Hall*. In this case, Freddie Lee Hall had been sentenced to death for the 1978 murders of Karol Hurst and Lonnie Coburn.[50] Hall fit into all three categories under the DSM-V's definition of intellectual disabilities: there was a deficit in his mental ability as identified by medical professionals (and Hall's counsel had compared Hall to his daughter who was four years old at the time),[51] his functioning was well below what it should have been as described by Hall's siblings and teachers,[52] and this developed when he was below the age of 18.[53] However, according to the Florida death penalty statute, as upheld by the Florida Supreme Court in 2012, a person would only be considered intellectually disabled if their IQ score was 70 or below.[54] As SCOTUS noted, 'Hall had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80', although the only scores considered by the sentencing court were between 71 and 80, thus putting his IQ score above the Florida threshold.[55]

On the basis that the Florida law 'create[d] an unacceptable risk that persons with intellectual disability will be executed', SCOTUS struck down the statute as unconstitutional.[56] The

[46] *See*, chapter 7.4.3.
[47] *Hall* (n 27).
[48] UNHRC, 'National Report of the United States of America' (13 February 2015) UN Doc A/HRC/WG.6/22/USA/1 para 49 [hereinafter referred to as 'National Report 2015'].
[49] *See, Atkins* (n 5).
[50] *Hall* (n 27) 1990.
[51] Ibid 1991
[52] Ibid.
[53] Ibid.
[54] Ibid 1992; *Hall v State* 109 So 3d 704, 707-08 (Fla 2012).
[55] *Hall* (n 27) 1992. The other IQ tests were dismissed by the Florida court due to evidentiary issues.
[56] Ibid 1990.

majority opinion provided four reasons for this decision, utilising the same proportionality doctrine adopted by the Steikers' blueprint for abolition.

First, the Court considered established medical practice, predominantly relying upon the DSM-V's definition of intellectual disability.[57] The majority found that the Florida statute 'disregards established medical practice' on the basis that '[i]t takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence' and, furthermore, it 'relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise'.[58] The Court detailed that it is well-established within the medical community that every IQ test has a 'standard error of measurement' or 'SEM', wherein medical professionals calculate the 'range' within which a person's IQ will fall following an IQ test.[59] This is because a person's IQ score 'may fluctuate for a variety of reasons' including 'the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing'.[60] The example the Court gave is that, just as with Hall's IQ test, '[a] score of 71…is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence'.[61] The Florida statute used a fixed score of 70, which did not take into account the SEM, and also did not allow for other evidence of an intellectual disability to be considered.[62]

Second, the Court found that 'a significant majority of [S]tates' do not have a strict cut off limit of an IQ score of 70 like Florida, and take the SEM into account.[63] This consideration of a 'national consensus' is often used in death penalty cases, particularly regarding categorical exemptions, just as it was used by SCOTUS in *Atkins*.[64] Third, the Court pointed to the decision in *Atkins* and that the opinion 'itself acknowledges the inherent error in IQ testing',[65] on the basis that '[t]he *Atkins* Court twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70'.[66] Fourth, the Court acknowledged that its 'judicial duty' is to 'exercise…judicial judgment'.[67] In doing so, the majority found that '[i]n this Court's independent judgment, the Florida statute, as interpreted

[57] Ibid 1993-94.
[58] Ibid 1995
[59] Ibid.
[60] Ibid.
[61] Ibid, citing DSM-V 37.
[62] *Hall* (n 27) 1996.
[63] Ibid.
[64] *Atkins* (n 5) 316-17.
[65] *Hall* (n 27) 1998, citing *Atkins* 308-09.
[66] Ibid.
[67] *Hall* (n 27) 2000.

by its courts, is unconstitutional',[68] particularly considering the 'inherent error in IQ tests'.[69] In coming to its conclusion, the majority added that '[i]n addition to the views of the States and the Court's precedent, this determination is informed by the views of medical experts'.[70]

Furthermore, in delivering the majority opinion of the Court, Justice Kennedy stated that 'Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world'.[71] Justice Kennedy, and other SCOTUS justices,[72] believed that the US has a duty to teach the world about 'human decency'. However, the US can also learn from the world community, and the UPR is an example of the world teaching the US about human rights and decency. Through the UPR, the international community is advising the US that they are not following the correct procedures when sentencing people to death and subsequently executing them. Adding to this was the majority opinion's holding that '[t]he States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects'.[73] Just as the US States are laboratories within the US federal system, the US can be likened to a laboratory within the international field. Following Justice Kennedy's reasoning, although the US is a laboratory of international experimentation, this must not deny the basic dignity that international standards set for states administering the death penalty. As some Justices have been receptive to international standards assisting in the interpretation of the Constitution,[74] the UPR should be utilised to ensure the US is aware of its limits as a laboratory, in that its application of the death penalty is curtailed by international standards. This can be achieved through member states targeting the judiciary when formulating its recommendations, to have as much impact as possible upon future interpretations of the Constitution.[75]

Is the US Continuing to Execute the Intellectually Disabled?

Concerns regarding the execution of those with intellectual disabilities were raised again throughout the 2015 UPR. In particular, the Organisation for Security and Co-operation in Europe ('OSCE') discussed the problem in Georgia in its background paper on 'The Death Penalty in the OSCE Area' in 2013.[76] The OSCE noted that '[o]n 22 May 2013, lawyers of Georgian death row inmate Warren Hill filed a petition to [SCOTUS…stating] that all seven mental health experts who have examined Hill now agree that he is "mentally retarded"'.[77]

[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid 2001.
[72] *See*, *e.g.*, Justice Ginsburg in oral arguments during *Roper* (n 5).
[73] Ibid.
[74] For example, Justice Stevens in *Atkins* (n 5) FN21. and Justice Ginsburg in oral arguments during *Roper, see, Roper* (n 5).
[75] *See,* chapter 7.4.3.
[76] OSCE 'The Death Penalty in the OSCE Area' (2013) <www.osce.org/odihr/106321?download=true> accessed 24 August 2018.
[77] Ibid 29.

However, despite this, 'Hill ha[d] been denied a hearing to determine whether the new evidence precludes the application of the death penalty in his case by [c]ourts of the State of Georgia, the Georgian Board of Pardons and Parole and the Eleventh Circuit Federal Court'.[78] This report provided an important example of the unfairness of the Georgia statute, similar to the Florida and Texas laws as examined by SCOTUS, but was not cited in the Stakeholder Report. In fact the OSCE only made very brief reference to the report under its 'Other assessments and recommendations' heading at the end of its individual submission.[79] Therefore, it is very unlikely that recommending states would have read this information, again highlighting the positive effect thematic individual Stakeholder submissions could have on the UPR, as a themed submission on intellectual disabilities could have raised the troubling case of Warren Hill.[80]

In its individual submission, JS8 discussed the *Hall* case, noting that the decision 'might open the doors to allowing the [S]tates to override the federal minimum standard' on the basis that each State will have to 'redefine the intellectual minimum standard used for sentencing in capital punishment cases' which could lead to those with intellectual disabilities facing execution.[81] However, the wording of this point in the Stakeholder submission was clumsy and difficult to decipher. The OHCHR cannot paraphrase a Stakeholder's submission as the final report is 'made up of a collection of direct quotes extracted from NGOs' contributions'.[82] Therefore, if a Stakeholder submission is illogical or ill-worded, it will not be included, and this is a key point for the Stakeholders to consider when compiling their reports to improve the chances of their work being included in the final Stakeholder Report.[83]

The US received one recommendation on the issue of executing those with intellectual disabilities. Spain recommended that '[w]hen continuing to implement the death penalty, do not apply it to persons with intellectual disabilities'.[84] The US supported this in part, noting that it was supported 'with respect to measures required to comply with [US] obligations, and with respect to persons with certain intellectual disabilities, but not all persons with any mental illness'.[85] The US delegation clarified in the Annex to the Addendum Report that it follows the decision of SCOTUS in *Atkins,* specifically stating that '[w]e do not support this

[78] Ibid.
[79] Ibid.
[80] *See,* chapter 7.2.2.
[81] Joint Submission 8, 'United States Universal Periodic Review Stakeholder Submission' (2015) para 8 <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> accessed 24 August 2018. Medical Whistleblower Advocacy Network was the main Stakeholder collating the data for JS8.
[82] Julie Billaud, 'Keepers of the Truth: Producing 'Transparent' Documents for the Universal Periodic Review' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015) 75.
[83] *See,* chapter 7.2.3.
[84] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (20 July 2015) UN Doc A/HRC/30/12 paras 176.196 [hereinafter referred to as 'Report of the Working Group 2015'].
[85] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (14 September 2015) A/HRC/30/12/Add1, para 9 [hereinafter referred to as 'Report of the Working Group Addendum 1 2015'].

recommendation to the extent it is interpreted differently'.[86] This would have been an ideal opportunity for the US to discuss the *Hall* case, to demonstrate that some progression is being made regarding the exemption for those with intellectual disabilities. To encourage the US to discuss these developments, Stakeholders and UN member states should highlight the *Hall* case in the US UPR 2020.

***Looking to the 2020 US UPR:* Moore v. Texas**

Since the 2015 UPR, there has been a further development in this area through *Moore v. Texas*, which should also be further explored by the key actors in the 2020 US UPR. In 1980, Moore shot and killed a store clerk in Texas, for which he was convicted of murder and thereafter sentenced to death.[87] Following a re-trial due to his first conviction being vacated as a result of ineffective assistance of counsel, in 2014, Moore's timely State habeas claim that he has an intellectual disability was heard. After following the DSM-V and the American Association on Intellectual and Developmental Disabilities ('AAIDD') definitions of intellectual disability, and the *Atkins* and *Hall* decisions, and after Moore showed an average IQ score of 70.66, the State habeas court 'recommended that the [Texas Court of Criminal Appeals] reduce Moore's sentence to life in prison or grant him a new trial on intellectual disability'.[88] However, the Court of Criminal Appeals declined to follow the State court's recommendation, instead relying on an outdated version of the AAIDD, which was written in 1992, referred to 'mental retardation', and followed the decision of the 2004 case of *Ex parte Briseno*.[89] In following the outdated criterion, and in finding that Moore had an IQ of 74, the Court of Criminal Appeals ruled that Moore was not intellectually disabled and therefore his death sentence was constitutional.[90]

However, when Justice Ginsburg delivered the opinion of the Court in *Moore v. Texas*, she correctly noted that 'Moore's score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79' and, as such, the Court of Criminal Appeals 'had to move on to consider Moore's adaptive functioning'.[91] Justice Ginsburg also made it clear that the Court should not 'end the intellectual-disability inquiry, one way or the other, based on Moore's IQ score', as, following *Hall*, it is required 'that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits'.[92]

[86] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Appendix to the Addendum' (2015) 8 [hereinafter referred to as 'Report of the Working Group Appendix to the Addendum 2015'].
[87] *Moore* (n 28) 1044.
[88] Ibid 1045.
[89] Ibid 1046; *Ex parte Briseno* 135 S W 3d 1 (Tex Crim App 2004).
[90] *Moore* (n 28) 1049.
[91] Ibid.
[92] Ibid 1050.

Due to the Texas court disregarding current medical practice by following an outdated criterion and definition, SCOTUS vacated the holding of the Court of Criminal Appeals and remanded the case back to the lower court.[93]

Despite this decision from SCOTUS, on 6 June 2018, the Texas Court of Criminal Appeals in a 5-3 decision again affirmed Moore's death sentence, after applying the current medical standards set out in the DSM-V, and finding that Moore is not intellectually disabled.[94] This issue needs to be addressed by the Stakeholders and UN member states within the 2020 US UPR, with a particular focus on targeting recommendations at the judicial branch of government, to provide information on the international opinion on executing the intellectually disabled.[95]

5.3 Mental Illness as a Categorical Exemption

The 1989 ECOSOC Additional Safeguards explicitly provide that states should 'eliminat[e] the death penalty for persons suffering from mental retardation or **extremely limited mental competence,** whether at the stage of sentence or execution'.[96] However, in the US, there is no categorical exemption for the severely mentally ill, meaning that domestic US law does not conform with international standards. This was raised throughout the US UPRs, and the final sections of this chapter consider how the UPR has dealt with this to date, suggesting improvements to the mechanism to assist in achieving a categorical exemption for the severely mentally ill. These improvements to the UPR mechanism will encourage US adherence to international death penalty standards whilst it retains the death penalty, and also assist in gathering evidence to further the Steikers' blueprint for abolition.[97]

5.3.1 The 2010 Universal Periodic Review and Mental Illness as a Categorical Exemption

Compilation Report

As noted in section 5.2.3 above, in the 2010 Compilation Report, the Committee was cited as welcoming 'the 2002 Supreme Court decision that executions of mentally retarded criminals are cruel and unusual punishments'.[98] Despite the wealth of information available to be included in the Compilation Report, it can be no more than ten pages in length.[99] For many

[93] Ibid 1053.
[94] *Ex parte Bobby James Moore* No WR-13, 374-05 (Tex Crim App 6 June 2018).
[95] *See,* chapter 7.4.3.
[96] Safeguards 1989 (n 11) para 1(d).
[97] Carol S. Steiker & Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment*, 284 (HUP 2016).
[98] Compilation Report 2010 (n 33) para 25.
[99] UNGA Res 5/1 (18 June 2007) para 15(b). Emphasis added.

states, including the US, there is a plethora of documents to consider and summarise in an attempt to ensure all important information is included. Due to the scale of this task, it is unsurprising that important observations, comments, and recommendations are sometimes overlooked. The UPR's function is not solely to criticise human rights standards – human rights achievements and improvements should be celebrated too.[100] Therefore, it is understandable from consulting only the Compilation Report that the Committee would congratulate the decision of SCOTUS in *Atkins v. Virginia.*[101] However, upon reading the report of the Committee, it becomes clear that this was not the full extent of its comments on this issue, as it had stated that:

> The Committee welcomes [SCOTUS'] decision in *Atkins v. Virginia* (2002), which held that executions of mentally retarded criminals are cruel and unusual punishments, *and encourages the [s]tate party to ensure that persons suffering from severe forms of mental illness not amounting to mental retardation are equally protected*.[102]

This final section of the paragraph is arguably the most important, as the Committee is encouraging an expansion of the *Atkins* decision to cover all serious mental illnesses, in order to bring the US in line with international law. However, this was omitted from the Compilation Report and, as there is currently very little literature on how the OHCHR decides on the content of the document, there is no answer as to why this was not included. Furthermore, Olivier de Frouville has criticised the report for being 'brief and selective'.[103] This presents the question of the effectiveness of the Compilation Report: is it a necessary tool to collate UN human rights advice and recommendations, or is it just a non-exhaustive replication of work? One of the principles of the UPR is to complement but not duplicate the work of the other human rights bodies,[104] which would potentially be a waste of resources for all involved. However, for the Compilation Report, and the UPR process as a whole, to be fully effective, this thesis argues that some duplication is necessary. This is particularly important when considering the issue of the death penalty, as the Compilation Report presents an opportunity to collate the corpus of UN recommendations on capital punishment in the US.

However, as evidenced above, the report is not exhaustive, and vital information has been overlooked. It appears that it is the strict page limit preventing the document from being

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[100] *See,* Elvira Domínguez Redondo, 'The Universal Periodic Review – Is There Life beyond Naming and Shaming in Human Rights Implementation?' (2012) 4 NZ L Rev 673.
[101] *Atkins* (n 5).
[102] Emphasis added. UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee – United States of America' (18 December 2006) UN Doc CCPR/C/USA/CO/3/Rev1 para 7.
[103] Olivier de Frouville, 'Building a Universal System for the Protection of Human Rights: The Way Forward' in M Cherif Bassiouni and William Schabas (eds) *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 251.
[104] UNGA Res 5/1 (n 99) para 3(f).

comprehensive, and this thesis argues that the page limits should be more flexible.[105] Although the UPR should '[n]ot be overly burdensome to the concerned [s]tate or to the agenda of the [UNHRC]',[106] there must also be enough information provided for the UPR to be influential on human rights on the ground. Adding weight to this argument, Chauville found that the material in the Compilation Report 'has been extensively used by countries making recommendations to the state under review'.[107] Many states do not have the resources to look through all UN documents for every state under review. Therefore, as the Compilation Report is being relied upon so heavily, and given that the UPR is designed to be a universal mechanism, it is vital that the document is thorough, even if this involves some duplication with other human rights mechanisms.

Stakeholder Reports

The Stakeholders also identified the issue of the execution of those with severe mental illnesses in the 2010 UPR. In the Stakeholder Report, it was noted that USHRN 'referred to…the execution of persons with mental disabilities'[108] and 'AI noted that people with serious mental illness continue to be subjected to the death penalty, despite the 2002 [SCOTUS] ruling that people with "mental retardation" be exempt'.[109] The 1989 ECOSOC Safeguards provide that member states should '[e]liminat[e] the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution'.[110] However, in 2003, the Commission on Human Rights called upon member states '[n]ot to impose the death penalty on a person suffering from **any form of mental disorder** or to execute any such person'.[111] Despite this, other than those who are diagnosed as insane or intellectually disabled, those suffering from any other mental disorders will not be exempt from the death penalty in the US.

In the Death Penalty Annex to its individual Stakeholder submission, USHRN highlighted this differentiation between mental retardation and other mental illnesses, finding that the US 'defines [intellectual disabilities] narrowly, and continues to apply the death penalty to individuals who suffer from severe mental illnesses, brain damage, and other mental

[105] *See,* chapter 7.1.2.
[106] UNGA Res 5/1 (n 99) para 3(h).
[107] Roland Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015) 92. Elvira Domínguez Redondo also noted that 'conclusions of special procedures and treaty bodies were broadly used as a basis for the questions and comments made during the interactive dialogue', Elvira Domínguez Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) Chinese Journal of International Law, Vol.7, No. 3, 721-734, 730.
[108] Stakeholder Report 2010 (n 31) para 30.
[109] Ibid.
[110] Safeguards 1989 (n 11) para 1(d).
[111] Emphasis added. UNCHR Res 2003/67 (24 April 2003) para 4(g).

disabilities'.[112] USHRN clarified that '[i]n the last ten years, the [US] has put to death dozens of prisoners suffering from schizophrenia, bipolar disorder, and other incapacitating mental disabilities',[113] which USHRN argued is in contravention of the Convention Against Torture and Article 7 ICCPR.[114] Furthermore, USHRN cited AI's finding that 'one in every ten individuals executed in the [US] suffered from a serious mental disorder other than mental retardation'.[115] USHRN recommended that the US 'revise its laws to prohibit the imposition of the death penalty against those with mental disabilities'.[116] This is the kind of recommendation or advance question the US would have benefited from receiving, adding weight to the argument in this thesis that Stakeholders should be allowed to provide advance questions.[117]

Recommendations

The US received three recommendations on the execution of those with mental illnesses. Cuba recommended that the US should '[e]nd the prosecution and execution of mentally-ill persons and minors',[118] and Ireland made a similar recommendation asking that the US '[e]xtend the exclusion of death penalty to all crimes committed by persons with mental illness'.[119] The US supported these in part, stating that:

> We cannot support [Cuba's recommendation] with respect to prosecution. We support both recommendations with respect to executions regarding minors and persons with certain intellectual disabilities, but not regarding all persons with any mental illness.[120]

The wording of these recommendations allowed the US to provide a stock answer and not identify *why* the exemption does not extend to all mental illnesses. This exact question could also have been asked during the advance questions. Sweden provided an advance question expressing its concern regarding 'the continued incidence of death sentences against and executions of persons in cases in which concerns have been raised over circumstances affecting the proceedings, including with regard to the mental health of defendants'.[121] However, a specific question should have been asked to query *why* the US will not extend the categorical exemption to all those suffering from mental illnesses. Even if the reply is simply because SCOTUS has not ruled that the execution of all those with severe mental illnesses

[112] USHRN, 'Stakeholder Submission Annex 5' (2010) (n 39) para 13.
[113] Ibid para 12.
[114] Ibid.
[115] Ibid para 14.
[116] Ibid para 35. *See,* chapter 7.2.1.
[117] *See,* chapter 7.2.1.
[118] Report of the Working Group 2010 (n 43) para 92.134.
[119] Ibid para 92.135.
[120] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (8 March 2011) UN Doc A/HRC/16/11/Add1 para 8 [hereinafter referred to as 'Report of the Working Group Addendum 2010'].
[121] UNHRC, 'Advanced Questions to the United States of America Addendum 1' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> accessed 24 August 2018.

violates the Eighth Amendment, it would have allowed the member states to formulate more specific recommendations in subsequent UPRs.[122]

Furthermore, as the recommendation from Venezuela was actually regarding total abolition of capital punishment – '[a]bolish the death penalty, which is also applied to persons with mental disabilities and commute those which have already been imposed'[123] – the US 'noted' this recommendation.[124] From the analysis of the 2010 and 2015 UPR, this thesis has identified that the US will not accept recommendations asking it to abolish the death penalty or put a moratorium in place.[125] Instead, states should make specific recommendations regarding particular aspects of concern within the US capital system, including the execution of those with a severe mental illness.[126] If Venezuela had recommended that the US should exempt persons with any mental illness from the death penalty, and if the US had been expected to provide a response as to why it accepted or noted this recommendation,[127] it would have been explained within the 2010 UPR why the categorical exemption has not been expanded. This would have also strengthened the international aspect of the Steikers' blueprint for abolition.

5.3.2 The 2015 Universal Periodic Review and Mental Illness as a Categorical Exemption

Compilation Report

The 2015 Compilation Report directly cited the SRE and SRT on the execution of the mentally ill in the US, which is an improvement on the 2010 UPR when there was no reference to this in the main report. The SRE 'called on the federal and [S]tate administrations to ensure that the death penalty was not imposed on the mentally ill'.[128] Both SRs in 2014 'stated that imposing capital punishment on individuals suffering from psychosocial disabilities was a violation of death penalty [S]afeguards'.[129] Upon further inspection, this was regarding the execution of Scott Panetti in Texas,[130] whom the SRs reported was 'a prisoner with proven psychosocial disabilities'.[131] Both SRs advised this execution would be a violation of

[122] *See,* chapter 7.3.2.
[123] Report of the Working Group 2010 (n 43) para 92.133.
[124] Report of the Working Group Addendum 2010 (n 120) para 9.
[125] *See,* chapter 3.2.3.1 and Appendix.
[126] *See,* chapter 7.4.2.
[127] *See,* chapter 7.5.1.
[128] UNHRC, 'Compilation of UN Information – United States of America' (2 March 2015) UN Doc A/HRC/WG.6/22/USA/2 para 19 [hereinafter referred to as 'Compilation Report 2015'].
[129] Ibid.
[130] *See, also, Panetti v Quarterman* 551 US 930 (2007).
[131] OHCHR, 'Death Row: UN Experts Urge US Authorities to Stop Execution of Scott Panetti, A Mentally Ill Prisoner' (2 December 2014) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15369&LangID=E#sthash.TbqBpVEZ.dpuf> accessed 24 August 2018.

international law,[132] but despite this, Panetti's petition for writ of cert was denied and he was executed on 3 December 2014.[133] This reinforced the fact that domestic US law is not in line with international standards on this issue of executing mentally ill inmates.

Stakeholder Reports

The execution of those with a mental illness was raised in the individual Stakeholder submissions by AI and JS8, although only AI's statement that '[p]eople with mental illness continue to be subjected to the death penalty'[134] made it into the final Stakeholder Report. However, JS8 had provided more detail, discussing mental illness and the ruling in *Atkins* and *Hall*.[135] A categorical exemption for persons with a mental illness is an issue that needs to be explored further in the 2020 UPR. It may be beneficial for a thematic Stakeholder submission to be prepared, as it would allow one Stakeholder the opportunity to fully examine the issue of people with mental illnesses facing execution in the US.[136]

Advance Questions and Recommendations

The US was asked about how it was preventing the execution of those with mental illnesses in the advance questions by Belgium, Germany, Norway, Sweden, and Switzerland,[137] which was an improvement on Sweden's question in 2010. During the interactive dialogue, the US responded to this by stating that '[n]o defendant found by a court to have significant intellectual and adaptive disabilities may be subject to capital punishment, either at the [S]tate or federal levels'.[138] However, this does not answer the question of how the US is going to prevent the execution of the mentally ill, or even simply why it will not extend the categorical exemption. This thesis argues that the member states (and potentially the Stakeholders) need to be clearer when asking advance questions, and the way advance questions are addressed needs further consideration. There is currently no guidance as to how a state should respond to the advance questions, which is something that should be improved, particularly through strengthening the troika's role in the process.[139]

Two recommendations were made on this point in 2015. As part of a wider recommendation on the death penalty, Sweden asked the US to '[e]xempt persons with mental illness from execution'.[140] France also provided a concise recommendation to '[e]nsure that no person with

[132] Ibid.
[133] *Panetti v Texas* No 14-7312, 2015 WL 133411 (US 12 June 2015).
[134] Stakeholder Report 2015 (n 31) para 37.
[135] JS8, 'Stakeholder Submission' (2015) (n 81) para 31.
[136] *See,* chapter 7.2.2.
[137] UNHRC, 'Advanced Questions to the United States of America' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> accessed 24 August 2018
[138] Report of the Working Group 2015 (n 84) para 64.
[139] *See,* chapter 7.3.1.
[140] Report of the Working Group 2015 (n 84) para 176.180.

a mental disability is executed'.[141] The US supported these recommendations in part, but provided a similarly vague response as it did in 2010, advising that '[w]e support these recommendations with respect to measures required to comply with [US] obligations, and with respect to persons with certain intellectual disabilities, but not all persons with any mental illness'.[142] In the Appendix to the Addendum Report, the US sought to clarify its position further regarding Sweden and France's recommendations, stating that '[w]e support the part of this recommendation asking us to ensure that our implementation of capital punishment complies with international human rights obligations and commitments'.[143] However, this is misleading, as its international human rights obligations and commitments would see the US exempting persons with all mental illnesses from the death penalty.[144] In order to elicit a better response from the US, the recommending states need to reconsider the content of their recommendations.[145] For example, the member states should consider recommending on how the US can go about exempting persons with all mental illnesses from the death penalty, including conducting studies led by the DOJ in consultation with medical professionals and Stakeholders, or propose changes to federal and State laws. In particular, questions should be asked regarding what is it that makes insanity and intellectual disabilities different to mental illnesses such as paranoid schizophrenia or personality disorders? No clear answer was given by the US in its previous UPRs and this should be explored in the 2020 UPR.

5.4 Conclusion

This chapter has identified that it is widely considered that the intellectual disability categorical exemption is not broad enough, as it should also encompass those with severe mental illnesses. Both international law and the world community, as identified by the analysis of the US UPRs, are in support of a categorical exemption from the death penalty for those with severe mental illnesses. In order to use the UPR to facilitate such a categorical exemption, the changes to the mechanism that are argued for in this chapter and are explored further in chapter seven need to be made. It is likely that this categorical exemption would come from SCOTUS, using the proportionality doctrine as it has done in *Atkins* and *Roper*, and, as identified by the Steikers, this may also be used to further the blueprint for complete abolition of the death penalty in the US.[146]

[141] Ibid para 176.197.
[142] Report of the Working Group Addendum 1 2015 (n 85) para 9.
[143] Report of the Working Group Appendix to the Addendum 2015 (n 86) 8.
[144] Safeguards 1989 (n 11) para 1(d); UNCHR Res 2003/67 (n 110).
[145] *See,* chapter 7.4.2.
[146] Steiker & Steiker, *Courting Death* (n 97) 284.

CHAPTER SIX

THE IMPLEMENTATION OF DEATH: DEATH ROW, EXECUTIONS, AND THE UNIVERSAL PERIODIC REVIEW

The two most challenged aspects of the implementation of a death sentence within the 2010 and 2015 US UPRs were the time spent on death row and the actual execution. Through an analysis of the UPR and international law, this chapter firstly considers the conditions on death row, including the use of solitary confinement and the death row phenomenon. Secondly, this chapter examines the execution itself, through the methods of execution utilised and the related alleged breaches of international and domestic US laws.

6.1 Conditions on Death Row in the US

The conditions on death row across the US are notoriously harsh.[1] This chapter categorises the conditions as follows: general conditions on death row, solitary confinement, and the death row phenomenon. Examples of the conditions on death row in the US are plentiful, and some death rows are considered to be worse than others. For example, in Louisiana, '[d]eath row inmates are automatically segregated from the general prison population and live in permanent solitary confinement, with one hour out per day to exercise, shower, and make phone calls'.[2]

Moreover, in Mississippi, the Fifth Circuit ruled that some conditions on death row were so bad that they violated the inmates' Eighth Amendment rights.[3] This was following the case the ACLU's National Prison Project brought in 2002, which alleged 'profound isolation, lack of exercise, stench and filth, malfunctioning plumbing, high temperatures, uncontrolled mosquito and insect infestations, a lack of sufficient mental health care, and exposure to psychotic inmates in adjoining cells'.[4]

A further example is Oklahoma's H-Unit, which houses the State's death row prisoners. The facility is underground, made of concrete lacking natural light and air, and 'is an electronically

[1] *See,* Marah S McLeod, 'Does the Death Penalty Require Death Row? The Harm of Legislative Silence' (2016) 77 Ohio St LJ 525, 537-39, for a recent assessment of the conditions on death row across the US. *See, also,* William A Schabas, *The Death Penalty as Cruel Treatment and Torture* (Northeastern University Press 1996) 96, 150; *Soering v United Kingdom* (1989) 11 EHRR 439; *Gates v Cook* 376 F 3d 323 (5th Cir 2004); *Prieto v Clarke* No 1:12-cv-01199 (LMB/IDD) 2013 WL 6019215 (E D Va 12 Nov 2013).
[2] Elizabeth Compa, Cecelia Trenticosta Kappel & Mercedes Montagnes, 'Litigating Civil Rights on Death Row: A Louisiana Perspective' (2014) 15 Loy J Pub Int L 293, 300-01.
[3] *Gates* (n 1).
[4] Ibid 327.

controlled facility designed to minimize contact between inmates and prison staff'.[5] The inmates are kept in solitary confinement, with no work or activities provided.[6] Amnesty International wrote a damning report on the H-Unit in 1994, arguing that its conditions breached international and domestic standards.[7]

6.1.1 International Law

Harsh conditions on death row potentially breach a number of international standards. Article 5 UDHR provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment',[8] and Article 7 ICCPR provides the same protection.[9] Case law of the Committee, IACHR, and the ECtHR has also held that these protections will be violated by harsh conditions on death row.[10]

Article 10(1) ICCPR further provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.[11] Moreover, the Standard Minimum Rules for the Treatment of Prisoners were first adopted by the UN in 1955[12] and, more recently in 2015, these rules were updated and termed the 'Mandela Rules'.[13] The Mandela Rules provide for the basic conditions a prisoner should live in, including 'due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation',[14] access to basic sanitation,[15] and shower facilities.[16] The 1996 Safeguards also provide that states should 'effectively apply the Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering'.[17]

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[5] Amnesty International, 'Conditions for Death Row Prisoners in H-Unit, Oklahoma State Penitentiary, USA' (30 April 1994) 1 <www.amnesty.org/download/Documents/180000/amr510341994en.pdf> accessed 24 August 2018.
[6] Ibid.
[7] Ibid 28-29.
[8] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), Article 5 [hereinafter referred to as 'UDHR'].
[9] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 7 [hereinafter referred to as 'ICCPR'].
[10] *See, e.g., Hilaire, Constantine, Benjamin et al v Trinidad and Tobago* Judgement of 21 June 2002 UN Doc A/67/279 para 42; Inter-American Commission on Human Rights, Report No 44/14, Case 12.873 para 182; *Soering* (n 1); *Kuznetsov v Ukraine* Application No 39042/97 (29 April 2003); *Nazarenko v Ukraine* Application No 39483/98 (29 April 2003); *Dankevich v Ukraine* (2004) EHRR 25; *Aliev v Ukraine* Application No 41220/98 (29 April 2003); *Khokhlich v Ukraine* Application No 41707/98 (29 April 2003); OHCHR, General Comment 20(44): Article 7 (10 March 1994) UN Doc CCPR/C/21/Rev1/Add3 para 6 [hereinafter referred to as 'General Comment 20(44) 1994'].
[11] ICCPR (n 9) Article 10(1).
[12] ECOSOC Resolution 663 C (XXIV) of 31 July 1957 and ECOSOC Resolution 2076 (LXII) of 13 May 1977.
[13] United Nations Standard Minimum Rules for the Treatment of Prisoners, UNGA Resolution 70/175, Annex, adopted on 17 December 2015 [hereinafter referred to as 'Mandela Rules'].
[14] Ibid Rule 13.
[15] Ibid Rule 15.
[16] Ibid Rules 16 and 18.
[17] ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1996/15 (23 July 1996) para 7 [hereinafter referred to as 'Safeguards 1996'].

6.1.2 Domestic Law

Harsh conditions on death row in the US arguably breach the Eighth Amendment's prohibition of cruel and unusual punishment, although this has not been confirmed by SCOTUS. Therefore, the UPR has a specific role to play in holding the US to account to its international obligations with regards to the conditions on death row, whilst it continues to retain the death penalty.

6.1.3 The 2010 Universal Periodic Review and Conditions on Death Row

Stakeholder Report

There was no specific reference made to the conditions on death row in the US in the 2010 National Report or Compilation Report. However, there were two references in the Stakeholder Report from USHRN and AI. USHRN referred to 'the inhumane and degrading conditions of death row facilities'.[18] Notably, the USHRN individual submission mirrored the language of Article 7 ICCPR, rather than the Eighth Amendment. This was potentially because the UPR is based upon international law, but also because Article 7's scope reaches to protect against harsh conditions on death row, whereas the Eighth Amendment's does not.[19]

The Stakeholder Report further stated that 'AI also referred to the harsh conditions on death rows in many [S]tates'[20] but, even in its individual submission, AI did not provide any further detail regarding which States and what the conditions are.[21] AI is a large, influential NGO that covers a breadth of human rights issues in its submission to the US UPR, which is why it is more widely cited in the Stakeholder Report than smaller NGOs who also make salient points.[22] However, AI had not provided the requisite detail in its individual submission, and this is an example of where thematic Stakeholder submissions would be appropriate.[23] For instance, AI could have focused solely on the conditions on death row under its capital punishment heading, which would have allowed a full paragraph of information to be included, without impeding on the other important human rights issues AI reported on.

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[18] UNHRC, 'Summary of Stakeholders Information – United States of America' (14 October 2010) UN Doc A/HRC/WG.6/9/USA/3/Rev1 para 30 [hereinafter referred to as 'Stakeholder Report 2010].
[19] *See,* sections 6.1.1 and 6.1.2 above.
[20] Ibid.
[21] Although AI did provide information on the harsh conditions within 'supermaximum' security prisons, Amnesty International, 'United States Universal Periodic Review Stakeholder Submission' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> para C(ii) accessed 24 August 2018.
[22] Lawrence C Moss, 'Opportunities for Nongovernmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council' (2010) Journal of Human Rights Practice Vol 2, Number 1, 122 –150, 132.
[23] *See,* chapter 7.2.2.

Other Stakeholders, which were not referenced in the main report, also provided more detail on the harsh conditions on US death row. For example, in its individual submission, HRA noted that death row inmates 'are subjected to…unsanitary conditions, insect and rodent infestations, extreme temperatures and exposure to deafening volumes of noise, including the screams of mentally insane inmates who are not separated from other death row inmates'.[24] Furthermore, although litigation was successful in the Fifth Circuit,[25] this is not commonplace. As noted by ACLU in its individual submission:

> Prisoners…seeking the protection of the courts against dangerous or unhealthy conditions of confinement, also have been denied any remedy and have had their cases thrown out of court due to federal legislation that created numerous burdens and restrictions on lawsuits brought by prisoners in the federal courts.[26]

The IACHR, in its submitted report on the cases of Medellín, Cardenas, and García, noted that the petitioner had described the Polunsky Unit in Texas as having:

> [S]mall cells with a sink, a toilet and a narrow bed, where [the inmates] spend 23 hours of isolation per day, segregated from other prisoners in every aspect of their lives. They are allowed no physical contact with loved ones or even their attorneys…[and] receive no educational or occupational training…[U]nlike any other death row in the US, Texas death row does not offer access to television. Radio is the primary source of stimulation for semi literate inmates.[27]

These examples from the IACHR, ACLU, and HRA highlighted a plethora of issues regarding conditions on death row. However, this information was not cited in the final Stakeholder Report, supporting the argument in this thesis that the OHCHR needs to be more transparent in how it compiles the report.[28] Even if thematic Stakeholder submissions are adopted, as suggested above, the OHCHR still must provide a briefing document on its method to collate the report in order to inform Stakeholders when they are compiling their individual submissions.

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[24] Human Rights Advocates, 'United States Universal Periodic Review Stakeholder Submission' (2010) para 7 <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> accessed 24 August 2018.
[25] *See, Gates* (n 1).
[26] American Civil Liberties Union, 'United States Universal Periodic Review Stakeholder Submission' (2010) 1 <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> accessed 24 August 2018.
[27] Inter-American Commission on Human Rights, 'United States Universal Periodic Review Stakeholder Submission Annex 2' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> para 60 accessed 24 August 2018.
[28] *See,* chapter 7.1.1.

Conditions on California's Death Row

HRA and USHRN highlighted the conditions on California's death row. Located in San Quentin, California has the largest death row population – currently 746 – but has not carried out an execution since 2006.[29] Despite this, in 2016, California's electorate voted to retain the death penalty and to expedite executions.[30]

As HRA outlined, 'condemned prisoners wait four to five years for appellate counsel to be appointed' and upwards of 150 'death-row prisoners in the [S]tate have been there for over 20 years'.[31] Furthermore, Matthew C. Altman has described the conditions in San Quentin, noting that the '[c]ells in California's death row are about four feet across, nine feet long, and seven feet from floor to ceiling'[32] and '[m]ost death row inmates must remain in their cells for twenty-three hours a day or more, and recreational activities for death row inmates have decreased recently, as they have been denied materials for pursuing hobbies'.[33]

USHRN also cited a monitoring report on San Quentin, carried out by an expert on behalf of the California courts, which was visited 'to assess the treatment of mentally ill prisoners'.[34] The report found that the conditions were:

> [S]ubstandard and included filthy and badly lit cells, with many inmates in poor, unsanitary conditions. Several inmates were symptomatically psychotic on sight; inmates complained of harassment by other inmates and staff and being compelled to make choices between going to health and mental health appointments, visits or yard.[35]

Furthermore, USHRN noted that, '[p]risoners who are not among the most severely ill, but who nevertheless have been diagnosed with a major mental illness, are not offered therapeutic mental health counseling, which is available to non-condemned prisoners'.[36] This also contravenes Rule 24 of the Mandela Rules regarding access to healthcare, which advises that those who are incarcerated 'should enjoy the same standards of health care that are available in the community'.[37] Again, this vital information was not included in the final Stakeholder

[29] Death Penalty Information Center, 'Death-Row Prisoners by State' (1 July 2017) <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> accessed 24 August 2018. Correct as at 1 July 2017.
[30] Kim Bellware, 'California Votes to Speed Up Death Penalty, rather than Abolish It' *Huffington Post* (14 November 2016) <www.huffingtonpost.com/entry/california-death-penalty-results_us_581f62bce4b0e80b02caa779> accessed 24 August 2018.
[31] HRA, 'Stakeholder Submission' (2010) (n 24) para 8.
[32] Matthew C. Altman, 'Arbitrariness and the California Death Penalty' (2016) 14 Ohio St J Crim L 217, 228.
[33] Ibid.
[34] *See, Coleman v Wilson* 912 F Supp 1282 (ED Cal 1995).
[35] Ibid para 23, citing Special Master's 20th Monitoring Report, 107, reflecting October 2007 visits, *Coleman v Schwarzenegger* ED Cal No Civ S-90-0520 LKK JFM.
[36] Ibid para 24.
[37] Mandela Rules (n 13) Rule 24.

Report, furthering the argument in this thesis that it is imperative that the OHCHR provides material on how it collates the final reports.[38]

Recommendations

Despite the concerning information provided throughout the 2010 UPR, no specific recommendations were made in 2010 regarding the conditions on death row. However, four recommendations were made referring to prison conditions generally, which also relate to conditions on death row. The Islamic Republic of Iran recommended that the US should '[g]uarantee the complete prohibition of torture in all prisons under its control'.[39] The US supported this recommendation, noting that '[US] law prohibits torture in all prisons and detention facilities under its control'.[40] However, this was an example of the US accepting a recommendation that it believed would require no further action by the federal government or States to implement, regardless of what international law prescribes. It would perhaps have led to more meaningful implementation by the US if Iran had provided a more specific recommendation, detailing how the US might ensure the prohibition of torture in its prisons in line with its international obligations.[41]

Furthermore, Austria recommended that the US should '[t]ake appropriate legislative and practical measures to improve living conditions through its prison systems, in particular with regard to access to health care and education',[42] which the US accepted but made no comment on.[43] Belgium also recommended that the US should '[r]educe overcrowding in prisons by enlarging existing facilities or building new ones and/or making more use of alternative penalties'.[44] This was supported by the US although no comment was made.[45] Furthermore, Sweden recommended that the US should '[e]nsure the full enjoyment of human rights by persons deprived of their liberty, including by way of ensuring treatment in maximum security prisons in conformity with international law'.[46] This was also supported and no comment was made.[47] Three recommendations were made that the US accepted and provided no comment on. To remedy this problem, this thesis argues that in future UPRs, the US should provide an explanation as to how it intends to implement its accepted recommendations in the Annex to the Working Group Report, allowing a discussion to take

[38] *See,* chapter 7.1.1.
[39] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (4 January 2011) UN Doc A/HRC/16/11 paras 92.145 [hereinafter referred to as 'Report of the Working Group 2010'].
[40] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum' (8 March 2011) UN Doc A/HRC/16/11/Add1, para 7 [hereinafter referred to as 'Report of the Working Group Addendum 2010'].
[41] *See,* chapter 7.4.2.
[42] Report of the Working Group 2010 (n 39) para 92.70.
[43] Report of the Working Group Addendum 2010 (n 40) para 7.
[44] Report of the Working Group 2010 (n 39) para 92.163.
[45] Report of the Working Group Addendum 2010 (n 40) para 7.
[46] Report of the Working Group 2010 (n 39) para 92.177.
[47] Report of the Working Group Addendum 2010 (n 40) para 8.

place during the UNHRC plenary session about this between the US, Stakeholders, and UN member states.[48] This would also allow the US' progress on implementation to be more easily measured, meaning it could be readily held to account at the next UPR.

6.1.4 The 2015 Universal Periodic Review and Conditions on Death Row

National Report

In response to the recommendations made in 2010, the US noted in the 2015 National Report that it 'continues to strive to improve living conditions throughout its confinement facilities'.[49] The delegation made a comity differentiation between federal and State prisons, noting that 'we ensure that all offenders housed in federal custody have access to medical care on-site, and in the community if needed'.[50] Furthermore, with regard to US State facilities, it noted that:

> States must certify that all facilities under their operational control, including facilities run by private entities on behalf of the [S]tate, fully comply with these regulations; if they do not, they lose certain federal funding unless they pledge to devote that funding to compliance. Six [S]tates and one [US] territory have been subjected to a five percent reduction in federal funding after declining to provide an assurance or certification of compliance.[51]

However, in terms of death rows across the US States, it appears these minimum standards for State facilities are not being adhered to. As discussed above, there are death rows across the US that fall below the required standard of Article 7 ICCPR. AI also further highlighted this point in its individual submission, noting that the '[h]arsh conditions on death rows in many [S]tates add to the inherent cruelty of the death sentence'.[52] Furthermore, the US delegation's assertions should have been directly addressed within the 2015 UPR.

Recommendations

During the interactive dialogue and prior to the recommendations being made, Ireland stated that it 'was concerned by harsh death row conditions'.[53] However, Ireland did not follow up its concern by providing a recommendation and the US did not respond to it during the interactive

[48] *See,* chapter 7.5.1.
[49] UNHRC, 'National Report of the United States of America' (13 February 2015) UN Doc A/HRC/WG.6/22/USA/1 para 43 [hereinafter referred to as 'National Report 2015'].
[50] Ibid.
[51] Ibid para 45.
[52] Amnesty International, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> 3 accessed 24 August 2018.
[53] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (20 July 2015) UN Doc A/HRC/30/12 para 152 [hereinafter referred to as 'Report of the Working Group 2015'].

dialogue. This thesis argues that there are two ways to elicit a response from the US, and other states, in future UPRs. First, states should use the advance questions to ask the US delegation specific questions on conditions on death row,[54] and second, they should follow that up with specific recommendations on ways to remedy the harsh conditions.[55] In fact, no recommendations were made in 2015 specifically regarding conditions on death row, although a general recommendation was made regarding prison conditions, which encompasses death row. Japan recommended that the US '[t]ake further steps to improve the current conditions of its prisons'.[56] The US supported this recommendation,[57] and during the consideration of the Outcome Report made sure to note that it had 'supported recommendations to improve conditions in prisons and places of detention'.[58] However, there was no discussion of how this would be implemented. The acceptance of this recommendation must lead to implementation on the ground and, to date, there is no evidence to suggest any action has been taken. Therefore, this thesis argues that the follow-up to the review part of the UPR requires improvement. This can be carried out in three ways: one, through ensuring states explain why they accepted or noted a recommendation, two, making the mid-term reports a pivotal part of the UPR, and, three, considering the creation of a specific, thematic mandate for a UPR special procedure.[59]

6.2 Solitary Confinement

Solitary confinement is defined by the US DOJ as 'a highly restrictive, high-custody housing unit within a secure facility, or an entire secure facility, that isolates inmates from the general prison population and from each other', with inmates being locked up for 22-24 hours per day.[60] Solitary confinement became a popular method of controlling inmates in the 1980s and 90s 'as prison populations skyrocketed' and 'supermax' prisons were built that were 'designed for isolated confinement'.[61] There is no official US governmental record of how many inmates are in isolation at any given time. However, the UK government estimated in 2013 that over 80,000 US prisoners were in some kind of solitary confinement,[62] and a collaborative report

[54] *See,* chapter 7.3.2.
[55] *See,* chapter 7.4.2.
[56] Report of the Working Group 2015 (n 53) para 176.236.
[57] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (14 September 2015) A/HRC/30/12/Add1, para 8 [hereinafter referred to as 'Report of the Working Group Addendum 1 2015'].
[58] UNHRC, 'Report of the Human Rights Council on its Thirtieth Session' (10 May 2016) UN Doc A/HRC/30/2, para 354 [hereinafter referred to as 'Report of the UNHRC Thirtieth Session'].
[59] *See* chapter 7.5.
[60] Chase Riveland, Supermax Prisons: Overview and General Considerations (US Department of Justice National Institute of Corrections 1999) 12. Emphasis removed.
[61] Elizabeth Alexander, '"This Experiment, So Fatal": Some Initial Thoughts on Strategic Choices in the Campaign against Solitary Confinement' (2015) 5 UC Irvine L Rev 1, 10.
[62] Ministry of Justice, Monthly Bulletin-November 2013 (November 2013) <www.gov.uk/government/publications/prison-population-figures> accessed 24 August 2018.

between the Association of State Correctional Administrators and Yale Law School estimated that '80,000 to 100,000 people were, in 2014, in segregation', and that figure was not including 'people in local jails, juvenile facilities, or in military and immigration detention'.[63] There are a number of reasons for a person to be placed in solitary confinement in the US, including because of a death sentence.[64]

6.2.1 International Law

This use of solitary confinement on death row exacerbates claims of cruel, inhuman, and degrading treatment under Article 7 ICCPR and Article 5 UDHR. In its General Comment 20, the Committee found that 'prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by [A]rticle 7'.[65] It can also lead to a breach of the Convention Against Torture, as explicitly stated by the SRT.[66]

Furthermore, when the Mandela Rules were revised in 2015, rule 43(1) was added, providing that '[t]he following practices…shall be prohibited: (a) Indefinite solitary confinement; (b) Prolonged solitary confinement; (c) Placement of a prisoner in a dark or constantly lit cell'.[67] In fact, rule 43(1) also states that, '[i]n no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment'.[68] This suggests that if this rule is breached – as it often is by the US – it will amount to torture and a breach of international law.

The Mandela Rules also clarify that 'solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact' and that '[p]rolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days'.[69] Furthermore, the rules state that it should only be used 'in exceptional cases as a last resort' and should 'not be imposed by virtue of a prisoner's sentence'.[70] The US is in clear breach of these rules, as prisoners often find themselves in prolonged and indefinite solitary confinement, solely on the basis that have been sentenced to death.[71]

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[63] The Liman Program Yale Law School & Association of State Correctional Administrators, 'Time in Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison' (August 2015) ii <https://law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf> accessed 24 August 2018.
[64] Alexander (n 61) 11.
[65] General Comment 20(44) 1994 (n 10) para 6.
[66] UNHRC, 'Compilation of UN Information – United States of America' (2 March 2015) UN Doc A/HRC/WG.6/22/USA/2 para 26 [hereinafter referred to as 'Compilation Report 2015'], citing OHCHR, Press release, "California jails: Solitary confinement can amount to cruel punishment, even torture" – UN rights expert" (23 August 2013) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13655&LangID=E> accessed 24 August 2018.
[67] Mandela Rules (n 13) rule 43(1).
[68] Ibid.
[69] Ibid rule 44.
[70] Ibid rule 45(1).
[71] Alexander (n 61) 11.

6.2.2 Domestic Law

The ACLU, in its report on solitary confinement on US death rows, stated that '[m]ost death row prisoners in the [US] are locked alone in small cells for 22 to 24 hours a day with little human contact or interaction; reduced or no natural light; and severe constraints on visitation, including the inability to ever touch friends or loved ones'.[72] The prolonged use of solitary confinement is potentially a breach of the Eighth Amendment's prohibition of cruel and unusual punishment, and the due process clause of the Fifth and Fourteenth Amendments. However, in 1995 in *Sandin v. Conner*, SCOTUS found that the use of solitary confinement in Hawaii did not give rise to a liberty interest.[73] Despite this, in 2005, SCOTUS ruled in *Wilkinson v. Austin* that the use of 'supermax' prisons, which involve very similar conditions to solitary confinement, *did* give rise to a liberty interest under the due process clause of the Fourteenth Amendment.[74] Though SCOTUS distinguished the facts in *Wilkinson* from *Sandin* on the basis that, in *Sandin*, the solitary confinement was limited to 30 days, and did not affect the issue of parole,[75] the harsh conditions in supermax were likened to the harsh conditions of solitary confinement by the majority opinion, delivered by Justice Kennedy.[76]

Furthermore, the ABA has provided a 'Standards for the Treatment of Prisoners', with a specific section on death row, noting in standard 23-2.4(b) that:

> A prisoner should not be separated from the general population or denied programmatic opportunities based solely on the prisoner's offense or sentence, except that separate housing areas should be permissible for prisoners under sentence of death. If convicted capital offenders are separately housed based solely on their sentence, conditions should be comparable to those provided to the general population.[77]

In the majority of death row facilities in the US, the conditions are much more severe than in general population prisons, as highlighted in cases such as *Prieto v. Clarke*.[78] This suggests the Standards set by the ABA are not being met in the US. In fact, the conditions on death row are often so unbearable that some inmates waive their right to appeal on the basis that death is a better option compared with a prolonged stay on death row.[79] Since the death penalty was

[72] American Civil Liberties Union, *A Death Before Dying: Solitary Confinement on Death Row* (July 2013).
[73] *Sandin v Conner* 515 US 472, 486 (1995).
[74] *Wilkinson v Austin* 545 US 209, 220-21 (2005).
[75] Ibid 224.
[76] Ibid 223-24.
[77] American Bar Association, *ABA Standards for Criminal Justice: Treatment of Prisoners* (3rd edn, ABA 2011).
[78] *Prieto* (n 1).
[79] *See,* Amy Smith, 'Not "Waiving" but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution' (2008) 17 B U Pub Int L J 237.

reinstated in 1976, 147 people executed have been volunteers.[80] For example, in November 2016, Steven Spears waived his right to further appeals and was executed in Georgia, because he said he would rather die than continue living on death row.[81] Although a competency hearing must take place before someone can be voluntarily executed, the bar for proving competency has been set very low.[82]

In 2015 in a speech to the NAACP, President Obama said that he had asked the 'Attorney General to start a review of the overuse of solitary confinement across American prisons'.[83] He added that, '[t]he social science shows that an environment like that is often more likely to make inmates more alienated, more hostile, potentially more violent'.[84] However, there is no evidence of this study being carried out, perhaps due to the Trump Administration taking office in 2017, which has different priorities to the Obama Administration.

6.2.3 The 2010 Universal Periodic Review and Solitary Confinement

Stakeholder Reports

The issue of solitary confinement on death row has been discussed throughout the US UPR. However, in the 2010 main Stakeholder Report, AI was cited only in reference to the conditions of the supermaximum prisons in the US,[85] and USHRN was cited regarding its reference to 'prisoners who endure solitary confinement' generally in the criminal justice system.[86]

However, in the Death Penalty Annex to its individual submission, USHRN provided further detail about what solitary confinement on Texas' death row entails. It asserted that inmates at the Polunsky Unit 'eat alone, exercise alone and worship alone', noting that the only form of '[c]ommunication between prisoners on death row [is] accomplished by yelling between cells [which] is extremely difficult'.[87] Furthermore, it stated that '[t]he conditions on Texas' death row are harsher than those found in many of the nation's highest security prisons and segregation

[80] Death Penalty Information Center, 'Searchable Execution Database' <https://deathpenaltyinfo.org/views-executions?exec_name_1=&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=y> accessed 24 August 2018.
[81] Rhonda Cook, 'Georgia Inmate Steven Spears is Executed Willingly' *The Atlanta Journal-Constitution* (Atlanta, GA, 16 November 2016) <www.myajc.com/news/news/local/condemned-man-explains-why-he-wants-to-die/ns84n/> accessed 24 August 2018.
[82] J C Oleson, 'Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution' (2006) 63 Wash & Lee L Rev 147, 226.
[83] The White House of President Barack Obama, 'Remarks by the President at the NAACP Conference' (14 July 2015) <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> accessed 24 August 2018.
[84] Ibid.
[85] Stakeholder Report 2010 (n 18) para 35.
[86] Ibid para 45.
[87] United States Human Rights Network, 'United States Universal Periodic Review Stakeholder Submission Annex 5 Death Penalty' (2010) <http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/USHRN_UPR_USA_S09_2010_Annex5_Death%20Penalty%20Joint%20Report%20USA.pdf> para 17 accessed 24 August 2018.

units',[88] and only the 'best behaved' inmates get to spend two hours outside of their cell a day, where they 'are ordinarily given access to small indoor or outdoor "cages"'.[89] For those inmates considered to be badly behaved, usually those with mental health issues, they 'are allowed outside of their cells only three to four hours per week.'[90] USHRN had provided evidence of solitary confinement on death row in the US, but, as it was an Annex document to the USHRN's individual submission, it was not cited in the final report and it is very unlikely that member states would have read this individual document. This is further evidence of the beneficial impact thematic Stakeholder submissions could have, as one Stakeholder could have used its individual submission to provide detailed information on solitary confinement within the death penalty, increasing the chance of this issue being referenced in the main Stakeholder Report.[91]

In the 2010 UPR, all other references to solitary confinement were in relation to prisons generally, and not to death row specifically. However, a number of important points were raised that are also relevant to death row. For example, HRW focused on mental illnesses and solitary confinement. It noted in its individual submission that 'in recent years, prison officials have increasingly turned to solitary confinement (or segregation or supermaximum security confinement) as a way to manage prisoners deemed difficult or dangerous, including many with mental illness'.[92] In fact, HRW found that, generally across the prison system, '25 percent of men in solitary confinement in Washington State have a serious mental illness; in Georgia 33 percent of men and 67 percent of women in solitary confinement have a serious mental illness, and in Colorado 30-35 percent of all prisoners have a serious mental illness'.[93]

This further links to the conditions on death row and access to healthcare. HRW noted in its individual submission that '[t]he conditions of social isolation, high security controls, abnormal environmental stimulus, and extremely limited recreational or educational opportunities that characterize solitary confinement can exacerbate mental illness or prevent recovery'.[94] Adding to this, studies have shown that 'the indefinite use of solitary confinement to hold prisoners exacerbates or in some cases generate mental illness in men living under those conditions for long stretches of time'.[95] In relation to this, HRW provided a recommendation:

[88] Ibid para 20.
[89] Ibid para 19
[90] Ibid
[91] *See,* chapter 7.2.2.
[92] Human Rights Watch, 'United States Universal Periodic Review Stakeholder Submission' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> para 7 accessed 24 August 2018.
[93] Ibid.
[94] Ibid para 7(a).
[95] Compa et al (n 2) 306-07.

> The US should not hold any prisoner who has or develops symptoms of a serious mental illness under conditions of solitary confinement for more than a brief period of time; and should carefully monitor the mental health of all prisoners in solitary confinement to detect any deterioration in mental health [and the US] should ratify ICESCR and CRPD.[96]

No similar recommendation was made by the UN member states at the UPR, meaning that no response to this was required from the US. If the Stakeholders could ask advance questions, as this thesis argues they should, this may have been addressed by the US, allowing follow-up work to be carried out according to the response received.[97]

Advance Questions and Recommendations

During the 2010 UPR, Sweden provided an advance question, asking the US to 'elaborate on the measures it is taking to ensure the full enjoyment of human rights persons deprived of their liberty, including by way of ensuring treatment in maximum security prisons in conformity with international law?'[98] Furthermore, during the interactive dialogue, 'Algeria noted that prison overcrowding was the norm and that prisons housed 60 per cent more inmates than they had been designed for'.[99] Moreover, 'Belgium noted with regret that the death penalty was still applied by some 35 states [and] expressed concern at the situation in the prison system, including violence against detainees; prison overpopulation and overrepresentation of some ethnic groups'.[100] The US did respond to these questions and comments during the interactive dialogue, stating that it 'is committed to meeting its obligations under both international and domestic law for proper treatment of persons detained or incarcerated in the criminal justice system, including those in maximum security facilities'.[101] However, from the consideration of solitary confinement on death row in section 6.2, it is clear that the US falls short of its obligations under international law. The US should have been held to account through a specific follow-up recommendation by Sweden, Algeria, or Belgium, but this did not happen, and there were no recommendations made in 2010 on solitary confinement.[102]

[96] HRW, 'Stakeholder Submission' (2010) (n 92) para 7(c).
[97] *See* chapter 7.2.1.
[98] UNHRC, 'Advanced Questions to the United States of America – Addendum 1' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> accessed 24 August 2018.
[99] Report of the Working Group 2010 (n 39) para 17.
[100] Ibid para 43.
[101] Ibid para 72.
[102] *See,* chapter 7.3.2.

6.2.4 The 2015 Universal Periodic Review and Solitary Confinement

Compilation Report

In 2015, the Compilation Report cited three different UN bodies that had discussed the concerns surrounding solitary confinement, which is positive compared to in 2010 where there was no mention of it. The report cited the SRT, which had 'urged the Government to ensure that solitary confinement was only imposed, if at all, in very exceptional circumstances, and indicated that keeping a person in solitary confinement for more than four decades clearly amounted to torture'.[103] Furthermore, the Report cited that both the Committee Against Torture ('CAT') and the Human Rights Committee 'were concerned about the practice of prolonged solitary confinement, and recommended, *inter alia*, that solitary confinement regimes be banned'.[104]

Stakeholder Reports

There was more discussion of solitary confinement cited in the Stakeholder Report, which is another positive step compared to 2010. First, the report noted that 'JS41 and JS24 recommended banning prolonged solitary confinement'.[105] Second, in relation to the US supporting Sweden's recommendation from 2010 regarding the full enjoyment of human rights for prisoners,[106] 'PHR recommend[ed] ceasing the use of solitary confinement as a disciplinary tool and allow independent organizations to visit inmates'.[107] This provided a more specific recommendation, compared to Sweden's broad recommendation from 2010.

The further discussions in the individual submissions from JS2, JS24, and JS41 were predominantly regarding solitary confinement generally, not specifically related to those sentenced to death, although much of the information provided also relates to death row. In particular, the Stakeholders noted the psychological damage solitary confinement can cause or exacerbate, which leads on to the death row phenomenon discussed in section 6.3 below. JS2 stated that, '[a]ccording to psychologists familiar with the subject, solitary confinement leads to "isolation panic," "long-term depression and hopelessness," the slow decline of "cognitive ability, as the prisoners' intellectual skills begin to decay," and often ultimately "a complete break-down"'.[108] JS2 recommended that the US '[t]ake appropriate legislative and

[103] Compilation Report 2015 (n 66) para 26.
[104] Ibid para 26. Emphasis added.
[105] UNHRC, 'Summary of Stakeholders Information – United States of America' (16 February 2015) UN Doc A/HRC/WG.6/22/USA/3 para 40 [hereinafter referred to as 'Stakeholder Report 2015'].
[106] Report of the Working Group 2010 (n 39) para 92.177.
[107] Stakeholder Report 2015 (n 105) para 40.
[108] Joint Submission 2, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> para 48 accessed 24 August 2018. JS2 was comprised of The Organization for Defending Victims of Violence and Society for Supporting Victims of Domestic Violence.

practical measures to improve living conditions through its prisons systems, in particular with regard to access to health care and education'.[109] This was identical to the recommendation from Austria in the 2010 UPR, showing that the Stakeholders take note of the previous UPRs and respond accordingly.

JS41 noted in its individual submission that '[s]olitary confinement is well-known to result in severe psychological and physical harm and it is disproportionately used against prisoners of color, and other vulnerable incarcerated populations like the mentally ill'.[110] JS41 also raised the fact that 'no specific recommendation was made regarding solitary confinement during the 2010 UPR', but did identify that 'the [US] government accepted recommendation 177 to "ensure the full enjoyment of human rights by persons deprived of their liberty…"'.[111] This is further evidence showing that broad recommendations will not be fully implemented, and this thesis argues that the specificity of recommendations needs to be increased in future UPRs.[112]

Furthermore, JS41 also provided a cogent recommendation to the US on the issue of solitary confinement in its Annex to its individual submission, that '[p]rolonged solitary confinement (in excess of 15 days) in US prisons, jails, and detention centers should be banned, except under exceptional circumstances'.[113] This mirrors Mandela Rules 44 and 45(1), and is an important point raised by JS41. However, it is unlikely that many, if any, member states will have read this individual document. Instead, in order for the Stakeholders to achieve their full potential impact, this thesis argues that they should be allowed to submit this type of recommendation in the form of advance questions.[114]

However, it appears that Joint Submission 24 ('JS24'), provided the key Stakeholder submission with regards to solitary confinement. JS24 found that:

> The extensive use of solitary confinement in US prisons, jails, and detention centers implicates concerns about torture or cruel, inhuman or degrading treatment or punishment, abuses in the criminal justice system, due process violations, racial discrimination, and discrimination on the basis of gender identity and sexual orientation.[115]

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[109] Ibid para 93.
[110] Joint Submission 41, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> para 11 accessed 24 August 2018. USHRN was the main Stakeholder collating the data for JS41.
[111] Ibid para 11.
[112] *See,* chapter 7.4.2.
[113] JS41, 'Stakeholder Submission' (2015) (n 110) para 7.
[114] *See,* chapter 7.2.2.
[115] Joint Submission 24, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> 1 accessed 24 August 2018. JS24 was comprised of Center for Constitutional Rights, Legal Services for Prisoners with Children, and California Prison Focus.

It also provided important evidence regarding the psychological harm solitary confinement provokes. This includes a 'persistent and heightened state of anxiety, and paranoid and persecutory fears, as well as hallucinations, headaches, ruminations and irrational anger, violent fantasies, oversensitivity to stimuli, extreme lethargy, and insomnia'.[116] Notably, JS24 also found that '[t]hese are also the psychological issues that are often found in death row inmates who spend their time in solitary confinement'.[117]

JS24 went on to describe the conditions those in solitary confinement face, which are very similar to death row. The '[c]ells often contain a toilet and a shower, and a slot in the door only large enough for a guard to slip a food tray through',[118] ensuring that there needs to be no movement from the cell to use the bathroom or to eat. The time out of their cell usually 'involves being escorted, frequently in handcuffs and shackles, to another solitary cell where prisoners can pace alone for an hour before being returned to their cell'.[119] Moreover, those in solitary 'are frequently deprived of meaningful access to visits and telephone calls home, furthering their isolation and despair and preventing them from maintaining the family and community ties pivotal to their ability to successfully reintegrate into society upon release'.[120] Although those on death row are very unlikely to be reintegrated into society, the lack of human contact leads to the effects of the death row phenomenon being exacerbated, as discussed in section 6.3 below.

JS24 provided four well-reasoned recommendations on the issue of solitary confinement:

> 1. Prolonged solitary confinement (i.e. in excess of 15 days) in US prisons, jails, and detention centers should be banned, except under exceptional circumstances. Where solitary confinement is used, its duration must be as short as possible and for a definite term that is properly announced and communicated. The practice of solitary confinement in pre-trial detention should also end.
>
> 2. The US Government must ensure that those prisoners who are sent to solitary confinement are only sent for the most serious disciplinary infractions, where no other less restrictive alternatives exist, and receive meaningful process prior to such confinement.
>
> 3. The US Government must develop standards to ensure that actual or perceived race, political affiliation, religion, association, vulnerability to sexual abuse, and challenging

[116] Ibid 3.
[117] Ibid 1.
[118] Ibid 2.
[119] Ibid.
[120] Ibid.

violations of one's rights as a prisoner plays no role in the decision to confine a prisoner to solitary confinement.

4. Federal, [S]tate, and local governments should compile data on the use of solitary confinement in their jurisdictions, including data on the effect of isolation on detainees.[121]

Currently, these recommendations are not being acknowledged by the US, as they are provided by a Stakeholder and not a UN member state. However, JS24 made significant points about the use of solitary confinement, furthering the argument in chapter 7.2.1 that Stakeholders should be able to submit advance questions that the US would respond to during the interactive dialogue. One criticism of these otherwise cogent recommendations provided by JS24, is that there is no mention of death row, despite the report referencing the psychological effects of solitary confinement on death row.[122] JS24 could have added 'death row' to its list of places where solitary confinement is used in recommendation one, to ensure solitary confinement on death row got the attention it requires.[123]

Given that JS24 provided a great deal of information and persuasive recommendations regarding solitary confinement, the other Stakeholders essentially just provided duplicated materials. It would have been more beneficial for JS24 to have provided a thematic individual submission on solitary confinement, and the other Stakeholders to have focused on other important areas of capital punishment, in order to avoid repetition and improve Stakeholder impact on the US UPR.[124]

Advance Questions and Recommendations

In its advance question posed to the US, Azerbaijan reiterated the discussion from the Compilation Report regarding the SRT, CAT, and the Committee.[125] This is important because this provides proof that the states are reading the Compilation Report and formulating their advance questions and recommendations based upon the content, making it even more important that the OHCHR provides clear guidance on how it compiles its reports.[126] However, the US did not respond to this during the interactive dialogue. This suggests there is a need

[121] Ibid 5.
[122] *See,* n 117.
[123] *See,* chapter 7.2.3.
[124] *See,* chapter 7.2.2.
[125] UNHRC, 'Advanced Questions to the United States of America Addendum 4' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> 2 accessed 24 August 2018. Azerbaijan: 'In 2013, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment urged the Government to ensure that solitary confinement was only imposed, if at all, in very exceptional circumstances, and indicated that keeping a person in solitary confinement for more than four decades clearly amounted to torture. The Committee against Torture (CAT) and the HR Committee were concerned about the practice of prolonged solitary confinement, and recommended, inter alia, that solitary confinement regimes be banned. CAT urged the United States to ensure that no one was held in secret detention under its de facto effective control and reiterated that such detention constituted per se a violation of the Convention'.
[126] *See,* chapter 7.1.1.

for the advance questions process to be formalised, including furthering the role of the troika, particularly as no recommendations were made specifically on solitary confinement.[127]

6.3 Death Row Phenomenon

The death row phenomenon is a legal term that is widely agreed upon to include three prongs: (1) harsh conditions on death row, (2) a prolonged wait for execution, (3) the adverse psychological effect of being sentenced to death.[128] There are also factors that will influence these three prongs, including 'the age of the inmate, his mental state upon incarceration, the incarceration conditions on death row, treatment on death row, the length of the incarceration period, and method of execution'.[129]

However, whilst judicial decisions have generally considered the death row phenomenon to relate to the prolonged wait on death row following conviction and sentence of death,[130] Yorke has argued 'that there still appears to be scope for greater clarity on the status of the capital charge, moratoriums, and execution methods' within the death row phenomenon.[131] This thesis agrees with Yorke's assertions, and also argues for more scientific and psychological research into the phenomenon. This would be beneficial for the general understanding of the death row phenomenon and its effects, and would also add more weight to legal arguments, particularly in the US.[132]

6.3.1 International Law

Soering v. United Kingdom

The death row phenomenon was first acknowledged in the case of *Kirkwood v. United Kingdom* by the European Commission on Human Rights in 1984.[133] The current leading case on the death row phenomenon is *Soering v. United Kingdom*, heard by the ECtHR in 1989.[134] Jens Soering, a German national detained in the UK, was facing extradition to the

[127] *See,* chapter 7.3.1.
[128] *Kirkwood v United Kingdom* (App. No. 10308/83), (1985) 37 DR 158, 184; *Soering* (n 1); Schabas, *The Death Penalty as Cruel Treatment and Torture* (n 1), William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 141; Jon Yorke, 'Inhuman Punishment and Abolition of the Death Penalty in the Council of Europe' (2010) European Public Law 16, no 1, 77-103, Christian Behrmann & Jon Yorke, 'The European Union and the Abolition of the Death Penalty' (2013) 4 No 1 Pace Intl L Rev Online Companion 1, 64, Smith (n 79) 244, 240, Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?' (2000) 11 Eur J Intl L 833, 836.
[129] Behrmann & Yorke (n 128) 240.
[130] *Kirkwood* (n 128); *Soering* (n 1).
[131] Yorke, (n 128) 91, 102.
[132] *See,* Justice Kennedy's reliance upon medical consensus in *Hall v Florida* 134 S Ct 1986, 1995, 2000 (2014).
[133] *Kirkwood* (n 128) 184.
[134] *Soering* (n 1).

Commonwealth of Virginia for the double homicide of his girlfriend's parents.[135] Soering petitioned the ECtHR on the grounds that, if the UK extradited him to the US, he would be sentenced to death and would be subject to the death row phenomenon, in violation of Article 3 ECHR, which prohibits inhuman and degrading treatment and punishment.[136]

In support of his claim, Soering produced evidence of 'extreme stress, psychological deterioration and risk of homosexual abuse and physical attack undergone by prisoners on death row, including Mecklenburg Correctional Center' where Soering would be housed on Virginia's death row.[137] The ECtHR concluded that it was likely Soering would face a death sentence if he were extradited.[138] Furthermore, in considering the length of time spent on death row in Virginia (six to eight years in 1989), the conditions of death row, and Soering's age and mental state, the ECtHR concluded that if the UK extradited Soering to Virginia, there would be a risk of the death row phenomenon which would breach Article 3.[139]

The ECtHR also briefly made reference to Article 7 ICCPR, in noting that the Article 3 standard is accepted worldwide in various treaties and conventions.[140] In fact, when the US acceded to the ICCPR in 1992, the SFRC confirmed that its reservation against Article 7 was lodged due to the Committee and ECtHR both concluding that 'prolonged judicial proceedings in cases involving capital punishment could in certain circumstances constitute [inhuman and degrading] treatment'.[141] It was following this decision that the death row phenomenon began to be frequently referred to.[142]

Decisions of the Human Rights Committee and the Privy Council

Other international courts and bodies have differing views on the death row phenomenon. For example, the Committee has generally taken a narrower approach to the ECtHR, in that 'prolonged delays in the execution of a sentence of death do not *per se* constitute cruel, inhuman or degrading treatment', but will take each case on its merits.[143] In *Howard Martin v. Jamaica*, the Committee found that 'prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading

[135] Ibid para 11-12
[136] Ibid para 76.
[137] Ibid para 64.
[138] Ibid 99, 111. This is relatively short when considered with the time people spend on death row now, and the temporal element of the death row phenomenon should be considered on a case-by-case basis.
[139] Ibid. In relation to the issue of extradition considered in *Soering*, the SRE in 2015 clarified that '[s]tates that have abolished the death penalty are absolutely prohibited from transferring a person when they know or ought to know that there is a real risk of the imposition of the death penalty'.[139] Therefore, according to the SRE, the UK would have been complicit in an 'internationally wrongful act' according to Article 16 of the International Commission's Articles on State Responsibility if they had extradited Soering to the US to face the death penalty, UNGA, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (7 August 2015) UN Doc A/70/304 para 99, 96.
[140] *Soering* (n 1) para 88.
[141] Senate Executive Report No 102-23 (1992) 12.
[142] Schabas, *The Death Penalty as Cruel Treatment and Torture* (n 1) 115.
[143] *Francis v Jamaica* Communication No 606/1994 UN Doc CCPR/C/54/D/606/1994 (1995) para 9.1. Emphasis added.

treatment if the convicted person is merely availing himself of appellate remedies'.[144] The Committee took the same approach in *Kindler v. Canada*, citing its decision in *Howard Martin*.[145] Furthermore, the Committee has found that it is better to be alive than dead, even for a prolonged period in harsh conditions.[146] This was held in *Johnson v. Jamaica,* where the Committee held that there was no evidence to show a violation of Article 7, despite Johnson being on death row for over eleven years.[147] In *Johnson,* Christine Chanet provided an individual opinion disagreeing with the finding that it is better to be alive than dead,[148] stating that the 'psychological torture' of a prolonged wait on death row in harsh conditions must be reduced to prevent it from being a breach of Article 7.[149] Moreover, in *Francis v. Jamaica*, the Committee found that twelve years on death row in Jamaica, plus the harsh conditions and the abuse Francis suffered during that time, had led to a serious deterioration of his mental health and therefore amounted to a breach of his Article 7 rights.[150] Similarly, in *Reece v. Jamaica*, twelve years on death row in extremely harsh conditions breached Reece's right to be treated with humanity, in breach of Article 10 ICCPR.[151]

The Judicial Committee of the Privy Council ('Privy Council') has also ruled upon the delay between sentence of death and execution.[152] The Privy Council ruled in *Pratt & Morgan v. Attorney General for Jamaica* that the death row phenomenon may be present if there was a delay of more than five years between sentence and execution.[153] Furthermore, the Ugandan Supreme Court found that a delay of three years on death row amounted to inhuman and degrading treatment,[154] and the Zimbabwean Supreme Court has found that delays of fifty-two and seventy-two months also constitute inhuman and degrading treatment.[155]

6.3.2 Domestic Law

In the US, the term 'death row phenomenon' itself has not been used by the courts. However, its effect was considered as early as 1959 in *People v. Chessman* by the Supreme Court of California.[156] Although the court agreed that spending more than eleven years on death row

[144] *Howard Martin v Jamaica* Communication No 317/1988 UN Doc CCPR/C/47/D/317/1988 (1993) para 12.2.
[145] *Kindler v Canada* Communication No 470/1991 UN Doc CCPR/C/48/D/470/1991 (1993) para 15.2.
[146] Ibid para 8.4
[147] *Johnson v Jamaica* Communication No 588/1994 UN Doc CCPR/C/56/D/588/1994 (1996) para 8.5-8.6.
[148] Ibid para A.
[149] Ibid.
[150] *Francis v Jamaica* (n 143) para 9.2.
[151] *Reece v Jamaica* Communication No 796/1998 UN Doc CCPR/C/78/D/796/1998 (2003) para 7.8.
[152] *See, Riley v Attorney General of Jamaica* (1983) 1 AC 719.
[153] *Pratt & Morgan v Attorney General for Jamaica* (1994) 2 AC 1.
[154] *See, Kigula and Others v Attorney General* (2006) S Ct Const App No 03, 56-57.
[155] *Catholic Comm'n for Justice & Peace in Zimbabwe v Attorney General* No S C 73/93 (Zimbabwe 24 June 1993).
[156] *People v Chessman* 52 Cal 2d 467 (1959).

awaiting execution would cause mental suffering, the court concluded that it did not constitute cruel and unusual punishment.[157]

Furthermore, in 1972 in the case of *People v. Anderson*,[158] the California Supreme Court held:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out.[159]

These decisions were early acknowledgements of the effects of the 'death row phenomenon', even before the ECtHR's decision in *Soering*. However, despite this, '[US] domestic courts generally remain unpersuaded by, if not outright hostile to, the logic of the death row phenomenon'.[160]

Lackey v. Texas

The key US case on the effect of the death row phenomenon is *Lackey v. Texas*, which was a denied writ of certiorari to SCOTUS on the grounds of excessive delays in execution.[161] Although *Lackey* did not explicitly use the term 'death row phenomenon', the case was concerned with its effect. Lackey had spent seventeen years on death row in Texas awaiting execution, and argued that it constituted cruel and unusual punishment. This was on the grounds that, considering the evolving standards of decency and international law and practice on this (in particular *Pratt & Morgan*), such a delay in execution would have been considered cruel and unusual punishment by the Framers,[162] and the time spent on death row in the harsh conditions amounted to 'tortuous psychological punishment'.[163] Lackey's writ of cert was denied, which saw the Court taking the same approach as the Committee in *Johnson*, finding that it is better to be alive and on death row than be dead, and that a prolonged stay on death row is not an Eighth Amendment issue, just as the Committee found that it was not an Article 7 issue.

However, Justice Stevens provided a memorandum attached to the denial of certiorari, wherein he noted the practices of foreign nations and their prohibitions against lengthy delays on death row.[164] Justice Stevens made sure to point out that this denial of cert was not 'a ruling

[157] Ibid 498-500.
[158] *People v Anderson* 493 P 3d 880 (1972).
[159] Ibid 894.
[160] David A Sadoff, 'International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon' (2008) 17 Til J Intl & Comp L 77, 93.
[161] *Lackey v Texas* 514 US 1045 (Mem 1995).
[162] *Lackey v Texas* 514 US 1045 (1995) (No. 94-8262), 1995 WL 17904041, 18-19 (Petition for Writ of Certiorari).
[163] Ibid 23.
[164] *Lackey* (n 161) 1045.

on the merits' and stated that this particular issue of the psychological effects of long stays on death row warranted further examination by the States in their capacity as 'laboratories of democracy'.[165] However, since *Lackey*, every writ of certiorari made on the same grounds has been denied.[166]

It must now be considered how the death row phenomenon can be remedied.[167] As Schabas has noted, apart from death penalty volunteers, it is unlikely a person facing execution will want to speed up the process.[168] Kara Sharkey asserted that, '[a]lthough it is not a complete solution, another way to partially resolve the problems underlying the *Lackey* claim is to improve the conditions of confinement on death row'.[169] However, simply improving the conditions on death row only removes one of the three elements of the death row phenomenon – the fear of death will still be there. The only real way to eradicate the death row phenomenon is to abolish the death penalty in its entirety and, as Justice Breyer noted in his dissent in *Glossip*, the death row phenomenon is one example of how the capital system is so flawed that it requires abolition.[170]

6.3.3 The 2010 Universal Periodic Review and the Death Row Phenomenon

In the 2010 UPR, it was only the Stakeholders in their individual submissions that mentioned the death row phenomenon. This is despite that fact that, in 2006, CAT had provided its views on the death row phenomenon in its conclusions and recommendations to the US.[171] However, its views were not cited in the Compilation Report. CAT had found that the Detainee Treatment Act 2005, which was enacted by the US Congress, 'prohibits cruel, inhuman, or degrading treatment and punishment of any person, regardless of nationality or physical location, in the custody or under the physical control of the State party'.[172] Although the US placed a reservation against Article 7 ICCPR, it uses the same language regarding prisoners in its domestic law. However, despite these international and domestic standards being in place, CAT remained 'concerned about the prolonged isolation periods detainees are subjected to, the effect such treatment has on their mental health, and that its purpose may be retribution,

[165] Ibid.
[166] *See, Elledge v Florida* 525 US 944 (1998); *Knight v Florida* 528 US 990 (1999); *Foster v Florida* 537 US 990 (2002); *Johnson v Bredesen* 130 S Ct 541 (Mem) (2009); *Thompson v McNeil* 556 US 1114 (2009); *Valle v Florida* 564 US 1067 (2011); *Boyer v Davis* 136 S Ct 1446 (Mem) (2016); *Conner v Sellers* 136 S Ct 2440 (Mem) (2016); *Jordan v Mississippi* 138 S Ct 2567 (Mem) (2018).
[167] Schabas, *The Death Penalty as Cruel Treatment and Torture* (n 1) 155.
[168] Ibid.
[169] Kara Sharkey, 'Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment' (2013) 161 U Pa L Rev 861, 890. Emphasis added.
[170] *Glossip v Gross* 135 S Ct 2726, 2764-72 (2015).
[171] UN Committee Against Torture, 'Conclusions and Recommendations of the Committee Against Torture – United States of America' (25 July 2006) UN Doc CAT/C/USA/CO/2 para 9 [hereinafter referred to as 'CAT Concluding Recommendations 2006'].
[172] Ibid para 9.

in which case it would constitute cruel, inhuman or degrading treatment or punishment'.[173] This was key information regarding the death row phenomenon that member states may have used to prepare their recommendations, further pointing to the need for transparency from the OHCHR as to how this report is compiled.[174]

Stakeholder Reports

As noted above, the Stakeholders provided information regarding the death row phenomenon in their individual submissions, but these references did not make it into the final Stakeholder Report. For example, USHRN noted in its Death Penalty Annex that 'prolonged incarceration on death row amid unendurable conditions of confinement violates the [US'] obligations to treat individuals with dignity', in violation of Articles 7 and 10(1) ICCPR and the Convention Against Torture.[175] USHRN also argued that the death row phenomenon has 'tortuous effects',[176] giving the example of César Roberto Fierro Reyna, a Mexican national on death row in Texas who had 'been scheduled for execution on [fourteen] separate occasions [and] [s]ix times, he has come within days of execution before receiving a court-ordered reprieve'.[177] Fierro Reyna had 'contacted the prison's psychiatric department for the first time on May 15, 1986, stating that he was hearing voices and he might injure himself'.[178] HRA gave further examples of those who have been affected by both solitary confinement and the death row phenomenon. For example, 'Cecil Johnson was executed in 2009 after [twenty-nine] years in solitary confinement on Tennessee's death row'.[179]

USHRN discussed California's death row in the Death Penalty Annex to its individual submission, noting that '[t]he cumulative effect of the conditions on San Quentin's death row is clearly aggravated by the length of time that California prisoners typically await their executions'.[180] Citing statistics about death row in California, USHRN stated that '[a]s the population of California's death row has grown, the length of the delay between sentence and disposition of appellate reviews has grown as well'.[181] In fact, the conditions in San Quentin were so poor that the US District Court for the Central District of California held that the exceptionally lengthy delays with no set execution dates on California's death row violated the Eighth Amendment protection against cruel and unusual punishment.[182]

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[173] Ibid para 36.
[174] *See,* chapter 7.1.1.
[175] USHRN, 'Stakeholder Submission Annex 5' (2010) (n 87) para 29.
[176] Ibid para 28.
[177] Ibid para 30.
[178] Ibid para 30.
[179] HRA, 'Stakeholder Submission' (2010) (n 24) para 8.
[180] USHRN, 'Stakeholder Submission Annex 5' (2010) (n 87) para 27.
[181] Ibid.
[182] *Jones v Chappell* 31 F Supp 3d 1050, 1053 (2014). This decision was reversed in 2015 by the Ninth Circuit in *Jones v Davis* 806 F 3d 538 (9th Cir Cal 2015).

HRA went into detail about the death row phenomenon in its individual submission, noting that '[t]hough many international judicial bodies have recognized the death row phenomenon as a violation of human right[s] law, [SCOTUS] has refused to hear appeals in cases alleging cruel and unusual punishment due to extremely long delays on death row'.[183] In order to encourage courts in the US to hear appeals pertaining to the death row phenomenon, this thesis argues that, within the UPR, member states should target their recommendations towards the judiciary.[184]

Furthermore, HRA stated in its individual submission that '[t]he manner in which the death penalty process is carried out in the [US] constitutes a violation of the ban on torture' including through 'the death row phenomenon'.[185] This is due to the fact that '[w]hen decades of incarceration precede execution, a prisoner effectively serves two sentences: a death sentence and a life sentence marked by prolonged psychological torture'.[186] HRA 'urged the federal government to remind the [S]tates of their obligations under international law regarding the prohibition of torture and to urge them to commute death sentences to life sentences where violations exist'.[187] Despite this cogent recommendation from a Stakeholder, no member state recommendations were made on the death row phenomenon in the 2010 UPR. This indicates that urgent changes need to be made to the UPR. This thesis argues that, first, the information Stakeholders are providing in their individual submissions must be logical enough to be transferred into the Stakeholder Report.[188] Second, the OHCHR must provide transparency as to how it decides upon the content of its reports to assist the Stakeholders.[189]

6.3.4 The 2015 Universal Periodic Review and the Death Row Phenomenon

In the 2015 UPR, there was no direct reference made to the death row phenomenon. As the death row phenomenon continues to pose a problem within the US capital system, this needs to be remedied before the 2020 UPR. In particular, the UPR can be utilised as a tool to highlight the death row phenomenon, allowing it to be considered under the second prong of the blueprint for abolition: the court's own judgment.[190] This has already been considered to some extent by Justice Breyer in *Glossip v. Gross*. In calling for the Court to hear a case on whether the death penalty itself is unconstitutional in his dissent in *Glossip*, Justice Breyer

[183] HRA, 'Stakeholder Submission' (2010) (n 24) para 9.
[184] *See,* chapter 7.4.3.
[185] HRA, 'Stakeholder Submission' (2010) (n 24) para 6.
[186] Ibid.
[187] Ibid para 10.
[188] *See,* chapter 7.2.3.
[189] *See,* chapter 7.1.1.
[190] Steiker & Steiker, *Courting Death: The Supreme Court and Capital Punishment* (n 196) 284.

made reference to the death row phenomenon albeit not by name.[191] He cited 'excessive delays' and the effects of such delays as being contrary to the 'cruel' element of the Eighth Amendment prohibition of 'cruel and unusual punishment'.[192]

In order to encourage discussion of the death row phenomenon in future UPRs, this thesis argues that four key changes should be made to the mechanism. First, thematic Stakeholder submissions would allow one Stakeholder to consider the death row phenomenon in detail, as USHRN and HRA did in 2010.[193] Second, more transparency from the OHCHR as to how the Stakeholder Report is compiled would help Stakeholders when compiling the thematic submission.[194] Third, member states should utilise the advance questions to raise the death row phenomenon as an issue.[195] Fourth, member states should consider targeting specific recommendations on the death row phenomenon to the judiciary, to further Justice Breyer's argument regarding excessive delays in the capital system.[196]

6.4 Methods of Execution in the US and the Universal Periodic Review

The final stage of the implementation of a death sentence is the execution itself, at least for the person on death row.[197] The most common method of execution currently used in the US is the lethal injection, as it is considered to be the most humane.[198] The final part of this chapter will examine the international and domestic standards relating to the method of execution, and the role the UPR plays in ensuring US adherence with Article 7 ICCPR.

6.4.1 International Law

To comply with Article 7 ICCPR, an execution 'must be carried out in such a way as to cause the least possible physical and mental suffering'.[199] Furthermore, the Safeguards provide that the death penalty 'shall be carried out so as to inflict the minimum possible suffering'.[200] The UN Secretary-General in his 2015 quinquennial report cited the SRT's finding that 'there is no categorical evidence that any method of execution in use today complies with the prohibition

[191] *Glossip* (n 170) 2764-72.
[192] Ibid.
[193] *See,* chapter 7.2.2.
[194] *See,* chapter 7.1.1.
[195] *See,* chapter 7.3.2.
[196] *See,* chapter 7.4.3. *Glossip* (n 170) 2764-72.
[197] *See, generally,* Michael L Radelet, 'The Incremental Retributive Impact of a Death Sentence Over Life Without Parole' (2016) 49 U Mich J L Reform 795, finding that the family of the person on death row continues to suffer following the execution.
[198] Other methods of execution in the US include hanging, electric chair, gas chamber, and firing squad.
[199] OHCHR, General Comment 20(44) (n 10) para 6.
[200] ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1984/50 (25 May 1984) No 9 [hereinafter referred to as 'Safeguards 1984'].

of torture and cruel, inhuman or degrading treatment'.[201] The SRT stated that, 'even if the required safeguards are in place, all methods of execution currently used can inflict inordinate pain and suffering'.[202]

The Committee has stated that the US 'must take into account the prohibition against causing avoidable pain and recommends the [s]tate party to take all necessary steps to ensure respect of [A]rticle 7 of the Covenant'.[203] The Committee has also ruled upon cases regarding methods of execution. In *Ng v. Canada*, Ng was facing extradition to the US, where he would be subjected to death by gas chamber, which the Committee found to be 'contrary to internationally accepted standards of humane treatment' and would be a violation of Article 7.[204] Despite this, the Committee has declined to rule that the lethal injection *per se* violates Article 7,[205] although it found in its General Comment 36 that the use of the 'injection of untested lethal drugs' is a violation of Article 7.[206]

The ECtHR has also ruled upon methods of execution, which provides an insight into the views of courts outside of the US.[207] For instance, in *Öcalan v. Turkey*, the court advised that the method of execution used must 'not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering' in order not to violate Article 3.[208] Furthermore, in *Al-Saadoon and Mufdhi v. The United Kingdom*, the ECtHR noted that '[w]hatever the method of execution, the extinction of life involves some physical pain'.[209] This was a pivotal observation made regarding methods of execution, and is the type of engagement with this area that is required within the US UPR.

6.4.2 Domestic Law

Prior to the introduction of the lethal injection, methods of execution utilised by the US have been hanging, the electric chair, the gas chamber, and firing squad.[210] Notably, no method of

[201] ECOSOC 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General' UN Doc E/2015/49 para 124 (13 April 2015), citing UNGA, 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 2012) UN Doc A/67/279, para 41.
[202] Ibid.
[203] UNCHR 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee – United States of America' (7 April 1995) UN Doc CCPR/C/79/Add.50 para 31.
[204] *Ng v Canada* Communication No 469/1991 (1994) UN Doc CCPR/C/49/D/469/1991 para 16.1.
[205] *See, Kindler* (n 145) para 15.3; *Cox v Canada* Communication No 539/1993 (1994) UN Doc CCPR/C/52/D/539/19930 para 17.3.
[206] UN Human Rights Committee, 'Draft General Comment 36' on 'Article 6 Right to Life' (2017) para 44 [hereinafter referred to as 'General Comment 36 2017'].
[207] *See also, Jabari v Turkey* Application no 40035/98 (2000); *Razaghi v Sweden* Application No 64599/01 (2003).
[208] *Öcalan v Turkey* (2003) 41 EHRR 45 para 231.
[209] *Al Saadoon and Mufdhi v. The United Kingdom* (2010) 51 EHRR 9 para 115.
[210] Steffi Yellin, 'The Death Penalty Experiment: State-Sanctioned Laboratories of Death' (2016) 14 Cardozo Pub L Poly & Ethics J 681, 684-86. Death Penalty Information Center, 'Authorized Methods' <https://deathpenaltyinfo.org/methods-execution> accessed 24 August 2018.

execution has ever been ruled to be unconstitutional by SCOTUS.[211] The US has seen an evolution of methods of execution, particularly through the medicalisation of the death penalty.[212] There has been a development from hanging, which saw the mutilation of the outside of the body, to lethal injection, which has led to the mutilation of the inside of the body, as discussed below. However, whilst it is espoused that new methods of execution are created to be more humane, the driving force is usually policy rather than humanity. A practical decision will be made to adopt a new method of execution to avoid criticism and condemnation, thus allowing the death penalty to be retained. In order to achieve abolition of the death penalty in the US, this factor must be acknowledged. Moreover, the UPR has not yet engaged with methods of execution on this level, as demonstrated by sections 6.4.3 and 6.4.4.

6.4.2.1 Lethal Injection

First adopted in 1977 by Oklahoma and first used by Texas in 1982,[213] the most common method of execution in the US today is the lethal injection.[214] It was considered a reliant method of execution until 2011, when US States began to struggle to procure the requisite drugs, predominantly because the only domestic US company that made sodium thiopental, Hospira, ceased its production.[215] Some US States then replaced sodium thiopental with pentobarbital. However, also in 2011, Lundbeck, a Danish pharmaceutical company, restricted the sale of its pentobarbital drugs for use in executions, following lobbying from the NGO Reprieve and UK-based doctors.[216] Since then, a number of pharmaceutical companies have followed suit and prohibited the sale of its drugs for use in executions, including Pfizer in 2016, one of the worlds' largest pharmaceutical manufacturers.[217] Furthermore, in late 2011, the EU Commission banned the sale of drugs from EU countries to be used in executions.[218]

Steffi Yellin has noted that in the US, '[p]rotocols have become erratic and inconsistent due to the non-manufacture and shortages of drugs, the use of compounded drugs from non-FDA

[211] *See, In re Kemmler,* 136 US 436, 449 (1890); *Louisiana ex rel. Francis v Resweber* 329 US 459, 462 (1947).
[212] *See, e.g.,* Jonathan Groner, 'Lethal Injection and the Medicalization of Capital Punishment in the United States' (2002) Health and Human Rights, vol 6, no 1, 64-79.
[213] James C Feldman, 'Nothing Less than the Dignity of Man: The Eighth Amendment and State Efforts to Reinstitute Traditional Methods of Execution' (2015) 90 Wash L Rev 1313, 1326.
[214] Initially, the most widely-used lethal injection protocol was a three-drug cocktail, with sodium thiopental as the anaesthetic, pancuronium bromide as the paralytic, and potassium chloride as the drug to induce fatal cardiac arrest.
[215] Chris McGreal, 'Lethal Injection Drug Production Ends in the US' *The Guardian* (23 January 2011) <www.theguardian.com/world/2011/jan/23/lethal-injection-sodium-thiopental-hospira> accessed 24 August 2018.
[216] Reprieve, 'Pharma Firm Lundbeck Wins Ethical Award for Stopping Use of Drugs in Executions' (29 March 2012) <www.reprieve.org.uk/press/2012_03_29_lundbeck_ethical_award/> accessed 24 August 2018.
[217] Erik Eckholm, 'Pfizer Blocks the Use of Its Drugs in Executions' *The New York Times* (13 May 2016) <www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html> accessed 24 August 2018.
[218] Organization for Security and Co-operation in Europe, 'The Death Penalty in the OSCE Area' (2013) 25. *See also,* EU Regulation 1236/2005 (2005), EU Regulation 1352/2011 (2011), Amended EU Regulation 2016/2134 (2016), and PACE Recommendation 2123 (2016).

approved sources, and the introduction of new drugs',[219] and Deborah Denno has referred to the lethal injection issues as 'chaos'.[220] Difficulties in procuring execution drugs have culminated in the serious problem of US States using a lethal injection protocol that potentially breaches the Eighth Amendment and Article 7 ICCPR, including the use of untested drugs such as midazolam, etomidate, and fentanyl. This has sparked litigation on this issue, as discussed in sections 6.4.3 and 6.4.4 below.

6.4.3 The 2010 Universal Periodic Review and Methods of Execution in the US

National Report: Baze v. Rees

There was no discussion of methods of execution or the lethal injection by the US government in its 2010 National Report, despite the important case of *Baze v. Rees* being decided by SCOTUS in 2008. *Baze* was a 7-2 decision in favour of Kentucky's lethal injection, which was a three-drug protocol using sodium thiopental, pancuronium bromide, and potassium chloride.[221] The petitioners in the case were not challenging the drugs used in the lethal injection – they accepted that the drugs in and of themselves would not be a violation of their Eighth Amendment rights[222] – instead they argued that the protocol itself was unconstitutional 'because of the risk that the protocol's terms might not be properly followed, resulting in significant pain'.[223]

The majority opinion, delivered by Chief Justice Roberts, found that the petitioners had not shown that Kentucky's 'lethal injection protocol creates a demonstrated risk of severe pain' or that the risk of severe pain 'is substantial when compared to the known and available alternatives'.[224] Furthermore, the Court found that '[t]he risks of maladministration [the petitioners] suggested – such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel – cannot remotely be characterized as "objectively intolerable"'.[225] The Court noted that '[s]ome risk of pain is inherent in any method of execution – no matter how humane – if only from the prospect of error in following the required procedure'.[226]

[219] Yellin (n 210) 682.
[220] *See,* Deborah Denno, 'Lethal Injection Chaos Post-Baze' (2014) 102 Geo L J 1331.
[221] *Baze v Rees* 553 US 35, 44 (2008).
[222] Ibid 41.
[223] Ibid.
[224] Ibid 61.
[225] Ibid 62.
[226] Ibid 47.

During the interactive dialogue, the US noted that '[r]ecently, [SCOTUS] has narrowed the class of individuals that can be executed, the types of crimes subject to the penalty, and the manner by which the punishment is administered so that it is not cruel and unusual'.[227] Yet, as shown by the decision in *Baze*, there had been no decisions from SCOTUS limiting the 'manner' or method of execution.

Compilation Report and Stakeholder Reports

Despite the silence in the National Report, the Compilation Report cited CAT, which had recommended that the US 'should carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering'.[228] AHR's individual Stakeholder submission similarly noted that '[d]eath by lethal injection can result in severe and excruciating pain violating human rights obligations related to torture and cruel and unusual punishment'.[229] AHR also acknowledged the decision in *Baze*, and cited the execution of Romell Broom in Ohio in 2009, wherein 'officials spent over two hours attempting to locate a suitable vein to use for the lethal injection before finally postponing his execution'.[230] AHR provided a recommendation on this issue in its individual submission that, due to the 'potential pain and torture inflicted during lethal injection procedures, and the execution of innocent individuals, [the US] and [US] [S]tates should immediately abolish the death penalty and commute all death sentences to a life imprisonment term'.[231] This adds to the argument in this thesis that Stakeholders providing advance questions would assist the UPR in facilitating the abolition of the death penalty in the US.[232] Although recommendations on abolishing the death penalty have had no measurable impact on the US,[233] given that there were no recommendations made and no discussion within the main reports, an advance question on methods of execution from AHR would have illuminated this as an issue to the member states.

Furthermore, the IACHR, in its submitted report on the cases of Medellín, Cardenas, and García, noted that the petitioners asserted that the 'lethal injection as currently practiced in Texas fails to comport with the requirements that a method of execution cause "the least possible physical and mental suffering"'.[234] This assertion indicated that Texas could be in

[227] Report of the Working Group 2010 (n 39) para 55.
[228] UNHRC, 'Compilation of UN Information – United States of America' (12 August 2010) UN Doc A/HRC/WG6/9/USA/2 para 25 [hereinafter referred to as 'Compilation Report 2010'].
[229] Advocates for Human Rights, 'United States Universal Periodic Review Stakeholder Report' (2010) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> para 6 accessed 24 August 2018.
[230] Ibid.
[231] Ibid para 7.
[232] *See,* chapter 7.2.1.
[233] *See,* chapter 3.2.3.1; UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum' (8 March 2011) UN Doc A/HRC/16/11/Add1 para 9 [hereinafter referred to as 'Report of the Working Group Addendum 2010']; UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (14 September 2015) A/HRC/30/12/Add1 para 10 [hereinafter referred to as 'Report of the Working Group Addendum 1 2015']. *See, also,* Appendix.
[234] IACHR, 'Stakeholder Submission Annex 2' (2010) (n 27) para 63.

contravention of Article 7 ICCPR. However, although both AHR and the IACHR had raised methods of execution in their individual submissions, this was not included in the main Stakeholder Report.

Advance Questions and Recommendations

The lack of discussion within the Stakeholder Report may have contributed to the absence of advance questions or recommendations regarding methods of execution in 2010. There were also other relevant factors including that, prior to the 2010 UPR, botched executions were rare, and so there was a lack of media attention alerting the key UPR actors to this issue.[235]

However, this thesis argues that this provides a striking example of where fundamental changes must be made to the UPR in order for it to function effectively as a human rights mechanism generally, and also to hold the US to account in terms of its international obligations, whilst gathering evidence to facilitate the abolition of the death penalty in the US. First, the content of the individual submissions must be cogent in order for the OHCHR to include it in the final report.[236] Second, the OHCHR must provide transparency regarding how it compiles the Stakeholder Report, perhaps through a briefing note on its website.[237] Third, Stakeholders should consider submitting thematic reports, as an attempt to ensure that important points, such as methods of execution, are not overlooked.[238]

6.4.4 The 2015 Universal Periodic Review and Methods of Execution in the US

Botched Executions

Due to the number of botched executions and the widespread media attention they garnered, method of execution was likely to feature more heavily in the 2015 UPR. The botched executions came about due to US States struggling to procure the requisite drugs for the lethal injection, and instead turning to the use of other, available drugs to execute people on death row. This has included using midazolam as a replacement for the anaesthetic.

Clayton Lockett was executed by the State of Oklahoma in 2014. Due to the cuts he had made to his arm on the morning of his execution, the IV drip had to be inserted in a vein close to his groin.[239] After Lockett had been injected with midazolam, and he had been declared

[235] *See,* chapter 7.6.1.
[236] *See,* chapter 7.2.3.
[237] *See,* chapter 7.1.1.
[238] *See,* chapter 7.2.2.
[239] *Glossip* (n 170) 2734. This was potentially a suicide attempt, given that Lockett also 'swallowed a handful of pills that he had been hoarding', Michael T. Maerowitz, 'Glossip v. Gross: The Insurmountable Burden of Proof in Eighth Amendment Method-of-Execution Claims' (2017) 49 Ariz St L J 279, 279.

unconscious, the two other drugs were injected.[240] However, at this point Lockett woke up and '[v]arious witnesses reported that Lockett began to writhe against his restraints, saying, "[t]his s* * * is f* * *ing with my mind," "something is wrong," and "[t]he drugs aren't working."'[241] At that point, 'the Warden asked if Lockett could be resuscitated. The doctor explained that CPR could save him, but Lockett would need to be transferred to an emergency room immediately'.[242] Following this, 'State officials ordered the blinds lowered, then halted the execution', however, '[ten] minutes later—approximately 40 minutes after the execution began—Lockett was pronounced dead'.[243] In the post-execution autopsy, it was determined that 'the concentration of midazolam in Lockett's blood was more than sufficient to render an average person unconscious', despite the State of Oklahoma providing a 'report identifying a flaw in the IV line as the principal difficulty'.[244]

Charles Warner was also executed in Oklahoma in 2015, using the revised execution safeguards that were put into place following Lockett's botched execution.[245] Despite this, after Warner had been injected with midazolam, he said 'my body is on fire'.[246] In fact, nine months after the execution, the State of Oklahoma became aware that it had used the wrong drug in his execution, instead of potassium chloride, potassium acetate was used.[247] Following an investigation into this, a grand jury found that when the State attempted to execute another Oklahoma inmate, Richard Glossip, a State official noticed that they had the incorrect potassium, but allowed the drugs to be passed to the execution team anyway. It was only when the error was noticed by a member of the execution team that Glossip's execution was halted.[248] Despite this, there were no indictments handed down by the grand jury and, in March 2018, after carrying out no executions since Warner's in January 2015, Oklahoma confirmed it would be seeking to pursue executions by nitrogen gas.[249]

Furthermore, Joseph Wood was executed in Arizona in 2014, and, '[d]espite being given 750 milligrams of midazolam [subsequently] Wood gasped and snorted for nearly two hours'.[250] In 2016, Alabama executed Ronald Smith using midazolam as the anaesthetic, and he 'heaved,

[240] *Glossip* (n 170) 2782 (Sotomayor J dissenting).
[241] Ibid.
[242] Maerowitz (n 239) 280-81.
[243] *Glossip* (n 170) 2782 (Sotomayor J dissenting).
[244] Ibid.
[245] Ibid 2735.
[246] Mahita Gajanan, 'Oklahoma Used Wrong Drug in Charles Warner's Execution, Autopsy Report Says' *The Guardian* (8 October 2015) <www.theguardian.com/us-news/2015/oct/08/oklahoma-wrong-drug-execution-charles-warner> accessed 24 August 2018.
[247] Ibid.
[248] *In re Multicounty Grand Jury*, Report Number 14 of the Grand Jury, State of Oklahoma (19 May 2016) Case No. SCAD-2014-70,100.
[249] Timothy Williams, 'Oklahoma Turns to Gas for Executions Amid Turmoil Over Lethal Injection' *New York Times* (14 March 2018) <www.nytimes.com/2018/03/14/us/oklahoma-nitrogen-executions.html> accessed 24 August 2018.
[250] *Glossip* (n 170) 2791 (Sotomayor, J dissenting).

gasped and coughed while struggling for breath for 13 minutes after the lethal drugs were administered, and death was pronounced 34 minutes after the execution began'.[251]

National Report

In the 2015 National Report, although the US government did not refer to the botched executions directly, it did state that '[t]here are strict prohibitions against the use of any method of execution that would inflict cruel and unusual punishment'.[252] Furthermore, the National Report made reference to the *Glossip* litigation, advising that SCOTUS had 'agreed to hear an argument, and is expected to rule in June 2015, on whether the lethal injection protocol used in execution by Oklahoma constitutes cruel and unusual punishment under the Eighth Amendment of our Constitution'.[253] This appeared to be an attempt to placate the international community on this point. However, during the UNHRC plenary session in September 2015 following the *Glossip* judgment, Ireland noted that it 'continued to be concerned about the manner in which the death penalty is implemented [and] also regretted that [SCOTUS] had recently upheld the use of the lethal injection'.[254]

Glossip v. Gross

The *Glossip* case was brought before SCOTUS following the botched executions of Clayton Lockett and Joseph Wood, to rule upon whether the use of midazolam was cruel and unusual punishment contrary to the Eighth Amendment, as the petitioners argued it 'fails to render a person insensate to pain'.[255] In a 5-4 ruling, the majority affirmed the decision of the Oklahoma District Court and Tenth Circuit, holding that the petitioners had not established that the increased dose of midazolam now used by Oklahoma following Lockett's execution 'entails a substantial risk of severe pain'.[256] Further, relying upon its decision in *Baze v. Rees*,[257] the Court held that the Eighth Amendment required the petitioners to 'identify a known and available alternative method of execution that entails lesser risk of pain', which they had not done.[258] This burden on the petitioners to find an alternative method for their own execution in order for it to have a lesser risk of pain would arguably be a breach of Article 7,[259] although Article 7 was not mentioned in the *Glossip* case by the majority or the dissenting justices. This may be because the US has placed the reservation against Article 7, and the ICCPR is a non-

[251] Death Penalty Information Center, 'Botched Executions' para 49 <https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions> accessed 24 August 2018.
[252] National Report 2015 (n 49) para 49.
[253] Ibid.
[254] Report of the UNHRC Thirtieth Session (n 58) para 380.
[255] *Glossip* (n 170) 2731.
[256] Ibid.
[257] *Baze* (n 221).
[258] *Glossip* (n 170) 2731.
[259] UNHRC, 'General Comment 36 2017' (n 206) para 44.

self-executing treaty. Although this did not prevent the majority from considering Article 6 when SCOTUS determined the juvenile death penalty to be unconstitutional in 2005.[260] Furthermore, seemingly in direct conflict with Article 7 ICCPR, the majority held that 'some risk of pain is inherent in any method of execution'.[261] In acknowledgement of the issue of the prohibition of cruel and unusual punishment, the majority held that if 'the Eighth Amendment demands the elimination of essentially all risk of pain [it] would effectively outlaw the death penalty altogether'.[262] This is not in line with international law, which provides that there must be minimal suffering.[263]

Justice Sotomayor stated in her dissent that '[n]othing compels a State to perform an execution. It does not get a constitutional free pass simply because it desires to deliver the ultimate penalty'.[264] In fact, Justice Breyer used his dissent to argue that the death penalty *per se* is a breach of the Eighth Amendment and welcomed a case challenging the constitutionality of capital punishment.[265] To make this argument, Justice Breyer carried out a review of capital punishment within the US. Whilst the vast majority of his review was based upon US constitutional principles, he did engage with examples from international domestic courts.[266] Given that the UPR can provide a complete assessment of the death penalty, it may have furthered Justice Breyer's argument to cite the US UPR both as an examination of the US death penalty, and regarding international consensus.[267] This would also have increased the exposure of the UPR.[268]

However, when a petition for a writ of cert was presented to SCOTUS in *Hidalgo v. Arizona*, asking the Court to consider whether capital punishment is a violation of the Eighth Amendment protections, SCOTUS declined to hear the case.[269] Should the Court decide in the future to hear such a case, reference to the UPR would be beneficial to further the argument for abolition of capital punishment.

The *Glossip* oral arguments had been heard at the time of the 2015 US UPR, but judgment had not been handed down by SCOTUS before the review took place. Therefore, this thesis argues that the outcome of this case, the ramifications of which potentially breach Article 7 ICCPR, must be addressed in the 2020 UPR by all key actors.

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[260] *Roper v Simmons* 543 US 551, 567 (2005).
[261] *Glossip* (n 170) 2733.
[262] Ibid.
[263] OHCHR, 'General Comment 20(44)' (n 10) para 6; Safeguards 1984 (n 200) No 9.
[264] *Glossip* (n 170) 2795 (Sotomayor, J dissenting).
[265] Ibid 2755 (Breyer, J dissenting).
[266] Ibid 2767.
[267] *See,* chapter 7.4.3.
[268] *See,* chapter 7.6.1.
[269] *Hidalgo v Arizona* 138 S Ct 1054 (Mem 2018).

Drug Secrecy Laws

In the Compilation Report, the Secretary-General's report on a moratorium on the death penalty was cited, finding that '[t]he Secretary-General stated that the use of untested means of execution had demonstrably increased the risk of execution amounting to cruel and unusual punishment'.[270] Upon further inspection of the Secretary-General's report briefly cited in the Compilation Report, the Secretary-General had gone into much more detail about the issues surrounding the lethal injection in the US, including highlighting specific problem-States in the US[271] and concerns over drug secrecy laws.[272]

The secrecy surrounding lethal injection drugs is a particularly concerning aspect of the method of execution debate. As noted in section 6.4.2.2 above, some pharmaceutical companies have been blocking the sale of its drugs for executions. Other companies have attempted to block executions due to States illegally procuring their drugs.[273] For example, in Nevada, Alvogen successfully stayed the execution of Scott Dozier due to the State unlawfully obtaining fentanyl from the pharmaceutical company.[274] The predominant reason for this reaction from drug companies is likely because a company's association with the death penalty can have financially detrimental effects, as '[c]onsumers may not want to purchase drugs that are linked to executions'.[275] To shield pharmaceutical companies from the problems associated with selling execution drugs, 'a substantial number of [S]tates have enacted secrecy provisions that shield the identity of medical professionals, pharmaceutical companies, and pharmacies involved with the execution process'.[276] The lack of execution drugs has also led to States attempting to import drugs, particularly sodium thiopental, from abroad. It was discovered in 2011 that Dream Pharma, a company operating from the back of a London-based driving school, had supplied Arizona with compounded sodium thiopental that had been used in numerous executions.[277] The issue with using compounded drugs is that they may not be FDA-approved, as required by law.[278] This has led to the FDA confiscating a number of imported drugs from different States, including Texas and Arizona, who had attempted to import compounded sodium thiopental from India. Arizona took an even more

[270] Compilation Report 2015 (n 66) para 19.
[271] UNGA, 'Moratorium on the Use of the Death Penalty Report of the Secretary-General' (8 August 2014) UN Doc A/69/288 para 41.
[272] Ibid para 42.
[273] *See,* Richard A Oppel Jr, 'Nevada Execution is Blocked After Drugmaker Sues' *The New York Times* (11 July 2018) <www.nytimes.com/2018/07/11/us/dozier-execution-fentanyl.html> accessed 24 August 2018; Grant Schulte, 'Drugmaker Seeks to Block Nebraska from Using Execution Drugs' *Associated Press* (8 August 2018) <https://apnews.com/0a35c6e561074906a00e5a22a47c46a5> accessed 24 August 2018.
[274] Richard A Oppel Jr, 'Nevada Execution is Blocked After Drugmaker Sues' (n 273).
[275] Denno (n 220) 768.
[276] Ibid 771-72.
[277] Owen Bowcott, 'London Firm Supplied Drugs for US Executions' *The Guardian* (6 January 2011) <www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions> accessed 24 August 2018.
[278] *Cook v FDA* 733 F 3d 1 (DC Cir 2013).

bizarre approach in 2017, by inviting death row inmates to bring their own drugs for the lethal injection to their execution.[279]

Although not cited in the Compilation Report, the Secretary-General went on to discuss Georgia's Secrecy Act, noting that '[t]he [A]ct makes the identities of companies and individuals who manufacture and supply lethal injection drugs, and the identities of the doctors hired by the [S]tate to oversee executions, a "[S]tate secret" shielded from disclosure to the public, the media and even the judiciary'.[280] This was also a concern for JS17 in its individual UPR submission, and two states recommended on this point.

JS17 noted that to ensure the continued use of the drugs, '[s]everal [US] [S]tates have passed secrecy laws to conceal the identities of these drug suppliers, thus allowing [S]tates to withhold critical information to detainees seeking assurances about the drugs' quality and effectiveness and barring them from bringing a legal challenge to the method of execution'.[281] The issue for abolitionists is not only the obvious problems with drug secrecy laws – that we are unaware of what drugs are being injected into a person and their effects – but also that more pharmaceutical companies may be willing to supply the drugs if there is anonymity, as this will lift the pressure of the financial effects of selling drugs for executions.

Furthermore, Sweden noted that its advance question regarding the lethal injection was not answered[282] and therefore made a recommendation which, among other issues, asked the US to '[c]ommit to ensuring that the origin of drugs being used is made public'.[283] The US 'supported this recommendation in part',[284] but confirmed that the US government did not support 'the part of this recommendation concerning the origin of drugs used for purposes of capital punishment'.[285] However, there was no explanation as to why the US will not commit to ensuring the transparency of lethal injection drug origins. Similarly, France recommended that the US '[c]ommit to full transparency on the combination of medicines used during executions by injection'.[286] The US noted this recommendation and did not provide any

[279] David Millward, 'Arizona Invites Death Row Inmates to Bring Their Own Execution Drugs to Sidestep EU Ban' *The Telegraph* (15 February 2017) <www.telegraph.co.uk/news/2017/02/15/arizona-invites-death-row-inmates-bring-execution-drugs-sidestep/> accessed 24 August 2018.
[280] UNGA, 'Moratorium on the Use of the Death Penalty Report of the Secretary-General' (n 271) para 41.
[281] Joint Submission 17, 'United States Universal Periodic Review Stakeholder Submission' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> para 4 accessed 24 August 2018. JS17 was comprised of Advocates for Human Rights, Minneapolis (USA); The Greater Caribbean for Life (Trinidad and Tobago); and The Puerto Rican Coalition Against the Death Penalty, San Juan (Puerto Rico).
[282] UNHRC, 'Advanced Questions to the United States of America' (2015) <www.ohchr.org/EN/HRBodies/UPR/Pages/USIndex.aspx> accessed 24 August 2018.
[283] Report of the Working Group 2015 (n 53) para 176.180.
[284] Report of the Working Group Addendum 1 2015 (n 57) para 9.
[285] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Appendix to the Addendum' (2015) 8 [hereinafter referred to as 'Report of the Working Group Appendix to the Addendum 2015'].
[286] Report of the Working Group 2015 (n 53) para 176.202.

reasoning as to why,[287] adding to the argument in this thesis that the state under review should be required to provide reasons why they accept and note recommendations.[288]

Stakeholder Reports

There was no reference made to methods of execution in the Stakeholder Report, which is surprising considering the number of botched executions that had taken place across the US. This had also been discussed within the individual Stakeholder submissions, providing content for the OHCHR to reference.[289]

JS41 cited the botched execution of Joseph Wood in Arizona, noting that the State used 'a dubious process and without the disclosure of the drug sourcing', finding that 'Wood was pronounced dead nearly two hours after the drugs' initial administration, though the lethal injection process normally lasts only 10 or 11 minutes'.[290] In JS41's Annex, it provided a recommendation on this issue that 'federal legislation should be adopted to ensure lethal injections are carried out via well-tested procedures that do not cause unnecessary pain using drugs approved by the [US] FDA; with full oversight and transparency of the sourcing and administration of the drugs'.[291] This thesis argues that, if JS41 had had the opportunity to provide an advance question on this, rather than the information being only in JS41's Annex document and not in the main Stakeholder Report, it would have placed more pressure on the US to address the lethal injection problem during the interactive dialogue.[292]

JS17 went into great detail regarding the lethal injection and botched executions.[293] However, despite the amount of important information provided by JS17, none of it was cited in the main Stakeholder Report. It noted the outcome of *Baze* was that the lethal injection was constitutional, '[d]espite a spate of horrific executions'.[294] However, JS17 further advised that '[c]hallenges to other [US] [S]tates' lethal injection procedures have since been brought in other [S]tate courts and, in some cases, have halted executions pending litigation'.[295] This has included the *In re Ohio Execution Protocol Litigation* case.[296] Despite SCOTUS setting the precedent on the constitutionality of the lethal injection drugs in *Glossip*, in January 2017, the District Court for the Southern District of Ohio ruled that 'the use of midazolam as the first drug

[287] Report of the Working Group Addendum 1 2015 (n 57) para 10.
[288] *See,* chapter 7.5.1.
[289] *See,* chapter 7.1.1, 7.1.2.
[290] JS41, 'Stakeholder Submission' (2015) (n 110) 3.
[291] Ibid para 6.
[292] *See,* chapter 7.2.1.
[293] Joint Submission 17, 'Stakeholder Submission' (2015) (n 281).
[294] Ibid para 17.
[295] Ibid para 18.
[296] *In re Ohio Execution Protocol Litigation* 235 F Supp 3d 892 (SD Ohio 2017).

in Ohio's present three-drug protocol will create a "substantial risk of serious harm" or an "objectively intolerable risk of harm" as required by *Baze* and *Glossip'*.[297]

JS17 also asserted that 'several foreign governments and the [EU] have restricted the supply of drugs used in executions',[298] citing the examples provided above. Due to the shortage of drugs, JS17 noted that '[US] [S]tates have turned to other drugs to administer a lethal dose'.[299] This has then led to 'pharmaceutical companies [refusing] to supply these drugs for execution purposes in the [US]'.[300] JS17 also highlighted the issue discussed above of States procuring execution drugs from 'questionable sources',[301] including '[w]hen supplies of sodium thiopental were scarce in 2010, Arizona executed Jeffrey Landrigan with drugs purchased from [Dream Pharma which was] operating in the back of a London driving school'.[302] Specific problems with drugs outside of the FDA's approval were highlighted by JS17 to include 'a greater likelihood of tampering, improper labeling, and diminished potency, quality, and efficacy of those drugs—factors which elevate the risk of a botched execution'.[303]

JS17 took the reins on this issue, which is a positive indication that thematic Stakeholder submissions have the potential to be successful. However, given that the information provided by JS17 did not make it into the final Stakeholder Report, what is needed now is clear guidance on how the OHCHR decides what will make it into the Stakeholder Report, as argued for in chapter 7.1.1.

Furthermore, what these examples of botched executions and litigation show is that the lethal injection is failing; Florida has not only had to forego sodium thiopental and pentobarbital, but it has now abandoned the use of midazolam. In August 2017, Florida executed Mark Asay, the first person to be executed in eighteen months in the State, using the untested anaesthetic etomidate, the paralytic procuronium bromide, and potassium acetate which was mistakenly used in the Charles Warner execution in Oklahoma.[304] It is important that these botched executions and failings of the lethal injection are conveyed within the UPR, and in order to do this, the changes argued for throughout section 6.4 need to be made.

[297] Ibid 953. On appeal, the Sixth Circuit initially upheld the District Court's decision, but upon rehearing en banc it reversed the decision, finding that 'the claim is unprecedented' on the basis that SCOTUS has never declared a method of execution unconstitutional, and this very execution protocol in question has been approved by SCOTUS, *In re Ohio Execution Protocol Litigation* 860 F 3d 881, 884 (6th Cir 2017).
[298] Joint Submission 17, 'Stakeholder Submission' (2015) (n 281) para 4.
[299] Ibid.
[300] Ibid.
[301] Ibid.
[302] Ibid para 21.
[303] Ibid.
[304] Associated Press, 'Florida Executes Man with Drug Never Used in Lethal Injection' *The Guardian* (25 August 2017) <www.theguardian.com/us-news/2017/aug/24/florida-execution-mark-asay-anesthetic-etomidate> accessed 24 August 2018.

Advance Questions and Recommendations

Despite the lack of discussion in the main documents, two advance questions were asked regarding the methods of execution and the secrecy of drugs in 2015, suggesting that the media attention around these issues may have had some influence on the UPR.[305] Belgium asked the US to 'give an overview of…[t]he evolution since the first UPR cycle in the mode of administering capital punishment and more information on the particularly worrisome reintroduction of the fire squad'.[306] Sweden asked that the US elaborate on 'new measures' ensuring 'that the origin of the drugs used for executions is made public'.[307] However, neither of these advance questions were answered by the US during the interactive dialogue. This provides evidence for the argument in this thesis that the advance questions require reform, including formalising the process and having the troika encourage the state under review to acknowledge the questions.[308]

Furthermore, during the interactive dialogue, 'Portugal was concerned at recent cases where executions by lethal injection had inflicted cruel and unusual punishment'.[309] However, there was no response from the US delegation, and Portugal did not follow this up with a recommendation.[310] The Democratic Republic of Congo recommended that the US 'reconsider the use of methods which give raise to cruel suffering when this punishment is applied'.[311] The US supported this recommendation in part, advising that '[w]e support the second part of this recommendation to the extent provided for under our Eighth Amendment, which prohibits imposition of cruel and unusual punishment'.[312] However, Article 7 provides a broader protection than the Eighth Amendment, and this should be addressed within the 2020 US UPR.

6.5 Conclusion

This chapter has considered the punishment of death in terms of the harsh conditions on death row whilst awaiting execution, and the method of carrying out the execution. The harsh conditions on death row encompass solitary confinement and the death row phenomenon, which are topical concerns within the US death penalty that require urgent attention. Whilst the US retains the death penalty, the UPR can be used to ensure the US is adhering to international standards regarding conditions on death row and the limiting of the effects of the

[305] *See,* chapter 7.6.1.
[306] UNHRC, 'Advanced Questions' (2015) (n 282).
[307] Ibid.
[308] *See,* chapter 7.3.1.
[309] Report of the Working Group 2015 (n 53) para 45.
[310] *See,* chapter 7.4.2.
[311] Report of the Working Group 2015 (n 53) para 176.199.
[312] Report of the Working Group Addendum 1 2015 (n 57) para 8.

death row phenomenon. Furthermore, it also collates a repository of information to advance on Justice Breyer's argument in *Glossip* and the Steikers' blueprint for the inevitable abolition of the death penalty in the US. Furthermore, this chapter identified the issue of botched executions and the lethal injection does not get sufficient coverage in both UPRs. However, this should change in the 2020 US UPR, particularly given the widespread media attention the issue has garnered recently. The analysis conducted in this chapter on the UPR and the punishment of death in the US has highlighted the shortfalls of the mechanism. As such, it has suggested changes that should be made to the UPR, in order to improve its efficacy, as argued in chapter seven.

CHAPTER SEVEN

RECOMMENDATIONS TO STRENGTHEN THE UNIVERSAL PERIODIC REVIEW

Part II of this thesis provided an analysis of the three broad themes identified within the US UPRs regarding capital punishment: the right to a fair trial, intellectual disabilities and mental health, and the implementation of a death sentence. On the basis of that analysis, this thesis now recommends a number of key ways in which the UPR can be strengthened. If implemented, these suggested improvements would increase the effectiveness of the UPR in facilitating the abolition of the death penalty in the US, and also benefit the mechanism generally, for the protection and promotion of human rights globally. Moreover, these recommendations fill a lacuna in the scholarship and policy approaches to the UN.

Six areas of the UPR have been identified as requiring reform: one, the role of the OHCHR, two, the role of the Stakeholders, three, the advance questions, four, the recommendations process, five, the follow-up to the review, and, six, publicising the UPR. The next sections of this chapter will address each of these in turn.

7.1 The Role of the Office of the High Commissioner for Human Rights

The OHCHR is responsible for compiling two of the three documents that each member states' UPR is based upon – the Compilation Report and the Stakeholder Report. These two documents are essential to each review because their contents shape the recommendations made by the other member states.[1] Therefore, it is vital that they are as comprehensive as possible, in order to ensure the UPR is working effectively and fulfilling its mandate. However, as noted in Part II, key information regarding the death penalty was not included in these reports in the 2010 and 2015 US UPRs, which had ramifications for the content of the recommendations made by the UN member states.[2] Therefore, this thesis proposes two ways to overcome this shortcoming of the UPR process: one, the OHCHR needs to be more transparent in how it compiles its documents, and two, the strict limits on page numbers need to be relaxed.

[1] Roland Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015) 92.
[2] *See,* chapters 4.2.3, 4.3.3, 4.3.4, 4.4.3, 4.4.4, 5.2.3, 6.1.3, 6.2.4, 6.3.3, 6.3.4, 6.4.3, and 6.4.4.

7.1.1 Transparency of OHCHR Reports

The OHCHR needs to be more transparent in how it compiles the Compilation Report and Stakeholder Report, and how it determines what information will be included and excluded from them. The OHCHR already provides information on how the Stakeholders should compile their individual submissions and the content they should include.[3] Therefore, realising this recommendation would not be a particularly onerous task for the OHCHR. However, this relatively small task could have a wide-ranging impact upon the efficacy of the UPR, both for the entire UPR mechanism and specifically in terms of the abolition of the death penalty in the US. Pertinent information that is currently being omitted from the two reports would have a better chance of being included in future UPRs if UN mechanisms and Stakeholders were aware of how the OHCHR decides on the content of its reports. This could potentially lead to real change for human rights on the ground, as the UPR was mandated to achieve.[4] To implement this change, the OHCHR could provide a briefing paper on how it compiles each report, in a similar format to its information on the content of Stakeholder submissions, making the briefing paper available on its UPR repository on the UN website.

7.1.2 Page Limits of the OHCHR Reports

The strict page limits on the two documents – both can be no more than ten pages[5] – should be relaxed, particularly for member states that receive high numbers of individual Stakeholder submissions and recommendations from UN bodies. This is certainly the case for the US, which received 103 individual Stakeholder submissions in 2010 and ninety-one in 2015.[6] Relaxing the page limits would allow the OHCHR to transfer more information into the final reports, which would help to avoid important information regarding capital punishment being omitted. This would also benefit the UPR process more generally, by allowing other member state reports to be as comprehensive as possible on other significant human rights issues.

To implement this change, it would require a review of the UPR mechanism from the UN. The UNHRC was mandated in Resolution 60/251 to 'review its work and functioning five years after its establishment and report to the General Assembly'.[7] This was a beneficial task that

[3] OHCHR, 'Universal Periodic Review: A Practical Guide for Civil Society' (July 2014) <www.ohchr.org/EN/HRBodies/UPR/Documents/PracticalGuideCivilSociety.pdf> accessed 24 August 2018; OHCHR, 'Universal Periodic Review (Third Cycle): Information and Guidelines for Relevant Stakeholders' Written Submissions' <https://drive.google.com/file/d/0B6XUJ0SW4C68QVRwYzFTNUc0TzA/view> accessed 24 August 2018.
[4] UNGA Resolution 5/1 (18 June 2007) para 4(a).
[5] Ibid paras 15(b), 15(c).
[6] UNHRC, 'Summary of Stakeholders Information – United States of America' (14 October 2010) UN Doc A/HRC/WG.6/9/USA/3/Rev1; UNHRC, 'Summary of Stakeholders Information – United States of America' (16 February 2015) UN Doc A/HRC/WG.6/22/USA/3.
[7] UNGA Resolution 60/251 (3 April 2006) para 16.

led to Resolution 16/21 and UNHRC decision 17/119, both of which made necessary improvements to the UPR process, such as increasing the cycles to four and a half years[8] and attempting to tackle the issue of politicisation by modifying the approach to state speakers during the interactive dialogue.[9] Unfortunately, there was no ten-year review mandated for 2016, although it is clear from the analysis in Part II that the UPR would have benefited from such an appraisal to further develop and improve the mechanism.

7.2 Role of the Stakeholders

The Stakeholders are integral to the successful functioning of the UPR, as they provide honest and unbiased accounts of the human rights situation on the ground. They engender authenticity and legitimacy to the UPR by generally being impartial from the state under review and the UN mechanisms. As UPR Info has noted, '[t]he true power of the UPR lies in the universality of its [S]takeholders'.[10] The Stakeholders currently contribute through various channels including the Stakeholder Report, lobbying the member states to influence their recommendations, providing oral comments on the Outcome Report at the UNHRC plenary session, and participating in the UPR Pre-sessions. However, the analysis in Part II discovered that there is the potential for the Stakeholders to have much greater influence over, and impact upon, the UPR. This is especially true of the death penalty in the US. As noted above, important information has been missed when the OHCHR is collating the Stakeholder Report and there were many examples of vital evidence regarding the US death penalty in the individual Stakeholder submissions that were overlooked when the final report was compiled. This has highlighted the need for reform, and this thesis argues that this should be carried out in three ways: first, the Stakeholders should be allowed to submit advance questions, second, thematic Stakeholder submissions should be encouraged, and, third, Stakeholders should tailor the content of their individual submissions. These proposals also apply equally to other areas of human rights under review at the UPR.

7.2.1 Stakeholders and Advance Questions

At present, the Stakeholders are not given the opportunity to take the floor during the review. They can do this during the consideration and adoption of the Outcome Report, but it is then too late to have an impact on that cycle's recommendations. Although, ideally, the

[8] UNHRC Resolution 16/21 (25 March 2011) para 3.
[9] UNHRC Decision 17/119 (19 July 2011) part IV.
[10] UPR Info, 'The Butterfly Effect – Spreading Good Practices of Implementation' (10 November 2016) <www.upr-info.org/en/news/the-butterfly-effect-spreading-good-practices-of-upr-implementation> v accessed 24 August 2018.

Stakeholders would be able to take the floor during the review process and provide measurable recommendations, factors of time and resources must be considered. Instead, it would be more realistic to allow the Stakeholders to submit advance questions prior to the review – just as other UN member states currently do. The state under review would then be able to respond to these Stakeholder questions during the interactive dialogue. This would allow the Stakeholders to have further impact on the review, without needing to extend time limits or incur significant travel costs for NGOs travelling to Geneva for the review.

There were many examples identified in Part II supporting this argument that Stakeholders should play a greater role in the UPR through submitting advance questions.[11] It would be particularly useful in ensuring the UPR was being used as a tool to facilitate the abolition of the death penalty in the US, as it would allow the Stakeholders to voice the work they are already carrying out on the ground and present their concerns regarding the capital system directly to the US. Although they already provide individual submissions, these are unlikely to be read in full by the US delegation and, even if they are read, they can be easily ignored by the US, particularly if they raise uncomfortable issues about the death penalty. In contrast, the advance questions would be read by the US, and some would be responded to during the review in front of the UNHRC, just as they have been in the 2010 and 2015 UPRs. Furthermore, the Stakeholders' specialist knowledge could be utilised to formulate important questions which they believe will ensure adherence with international law and ultimately lead to the abolition of the death penalty in the US. This would also allow the Stakeholders' input to be more measurable than it is at present, further legitimising the role the Stakeholders play in the UPR.

In order to implement this change to allow Stakeholders to submit advance questions, this would require a formal change to the UPR process through a Resolution or decision of the UNHRC, similar to the outcome of the five-year review as noted above. Such a review should be scheduled before the end of cycle three, to implement the relevant changes before cycle four begins in 2022.

7.2.2 Thematic Stakeholder Submissions

A further way for the Stakeholders to increase the impact they can have upon the UPR and the abolition of the death penalty in the US is through thematic individual submissions. Generally, Stakeholders submit reports on a plethora of human rights issues, not just on the death penalty. However, the individual submissions that reported on capital punishment in the

[11] *See,* chapters 4.2.3, 4.2.4, 4.3.3, 4.3.4, 4.4.3, 4.4.4, 4.5.3.2, 5.3.1, 6.2.3, 6.2.4, 6.4.3, and 6.4.4.

US UPRs saw a great deal of repetition, which often meant that the required detail on the key issues within the capital system was missing. Although it would be an ambitious task, this thesis proposes that, for the Stakeholders that provide a 'death penalty' section of their individual reports, each Stakeholder (or joint submission) should take one theme or issue and report on that in detail. These thematic submissions would allow each area of concern regarding the death penalty in the US to be investigated thoroughly, which may also lead to these issues being more widely cited in the final Stakeholder Report by the OHCHR.

There were many examples throughout the analysis in Part II that showed where particular issues would have benefited from thematic submissions.[12] However, this suggestion would be more difficult to realise in practice, as it would involve a collaboration between the different Stakeholders, which would potentially take up their valuable and limited time. Perhaps in the first instance, the larger Stakeholders that are already more widely cited in the UPR can work together to produce thematic reports, such as ABA, ACLU, AI, HRA, HRW, and USHRN. There could also be one central co-ordinator to facilitate this between the larger Stakeholders. If this became a regular feature for the US UPR, such Stakeholders may also see the benefit of adopting this tactic with other UPR submissions, meaning that this change would impact the UPR mechanism as a whole, as well as benefiting the facilitation of the abolition of the death penalty in the US.

7.2.3 Content of Stakeholder Submissions

Although in general, the Stakeholder submissions are well-drafted and informative, Part II uncovered a potential barrier to information being included in the final Stakeholder Report, namely, poorly-drafted content or lack of content in the individual submissions.[13] Guidance is available from the OHCHR on what the content should include,[14] but this problem also needs to be directly communicated to the relevant Stakeholders, in order for them to alter future submissions accordingly. Potentially, this could be achieved through the UPR Pre-sessions organised by UPR Info, as the Pre-sessions see many Stakeholders in attendance.

[12] *See,* chapters 4.2.4, 4.4.4, 5.2.4, 5.3.2, 6.1.3, 6.2.3, 6.2.4, 6.3.4, and 6.4.3.
[13] *See,* chapters 4.5.3.2, 5.2.4, 5.3.2, 6.2.3, 6.2.4, 6.3.3, and 6.4.3.
[14] OHCHR, 'Universal Periodic Review: A Practical Guide for Civil Society' (n 3); OHCHR, 'Universal Periodic Review (Third Cycle): Information and Guidelines for Relevant Stakeholders' Written Submissions' (n 3).

7.3 Advance Questions

7.3.1 State Under Review Responses to the Advance Questions

The advance questions have the potential to be a more functional part of the UPR process. As they are submitted in advance of the review, they can shape the content of the interactive dialogue and even impact upon the recommendations. However, this thesis has identified that the advance questions process as it currently stands is quite informal and lacking impact in comparison with the rest of the UPR. For example, the documents uploaded to the UPR webpage for each member state are just simple Microsoft Word documents, they do not have their own UN document number and are only in one language, not the usual six working languages of the UN. Furthermore, the state under review is not currently required to provide a response to the advance questions, and it is not always evident during the interactive dialogue when the state under review is responding to the advance questions, unless it explicitly says so. In other circumstances, the state under review will simply ignore the advance questions entirely.

In order for the advance questions to be as influential on the UPR as possible, and particularly if Stakeholders are to be invited to submit advance questions, this process needs to be formalised. This would include giving the documents a UN document number and translating them into the six official UN languages, using the same template as the other UPR documents. The formalisation of the advance questions would indicate to the UN member states that this is a part of the UPR that is to be taken seriously, and would allow states, Stakeholders, and members of the public who speak all six UN languages, to engage with this part of the UPR, enhancing the transparency of the mechanism. Moreover, the troika should play a particular role in ensuring that the state under review acknowledges the advance questions during the interactive dialogue. This is not to say that the state under review must respond substantively to the advance questions; engagement with the UPR is voluntary and it should remain this way to ensure 100% co-operation from member states. However, the state under review should at least acknowledge that the question was asked. If the question is then not answered in full, member states (and potentially Stakeholders) would be able to consider why, and could then identify how it can reword its recommendations during the review or future advance questions, in order to elicit a meaningful response.

This would be particularly beneficial for the abolition of the death penalty in the US because, as identified in Part II, there were many advance questions on capital punishment that were ignored by the US delegation.[15] This would also require a formal change to the UPR process

[15] *See,* chapters 4.3.4, 4.4.3, 4.4.4, 6.2.4, and 6.4.4.

through a Resolution or decision of the UNHRC, similar to the outcome of the five-year review as noted above. As the UPR is a relatively new mechanism, it would be sensible to have regular reviews such as this, to allow the process to be amended where needed.

7.3.2 Encouraging Member States to Use the Advance Questions

To ensure the advance questions are achieving their full potential, UN member states participating in the UPR need to engage with them and provide questions to the state under review. For example, currently, member states ask advance questions and, if the state under review ignores the question or does not answer it in full, the member state rarely follows this up with a related recommendation.[16] More member states should use the advance questions and, following in the footsteps of the Stakeholders, they could also collaborate to submit joint advance questions on key issues. In the context of the death penalty, this could include questions on the possibility of a categorical exemption for the mentally ill, or the method of execution being used, and examples of this were identified throughout Part II.[17] To implement this change, the UPR Pre-sessions arranged by UPR Info are the ideal platform to encourage better use of the advance questions, as they attract wide state delegation attendance. Furthermore, this could also provide the opportunity for joint advance questions to be formulated, as side briefing sessions with numerous government delegations take place at the Pre-sessions, creating an environment for collaboration.

7.4 Recommendations

The recommendations stage is one of the most critical and also most criticised of the UPR process.[18] The two main criticisms are that, one, there are too many recommendations made and, two, they are too broadly drafted to have sufficient impact.[19] Therefore, to tackle these concerns, this thesis proposes three ways the recommendations process should be improved. First, the recommendations should be thematically grouped together to remove the issue of over-burdening the state under review, second, the specificity of the recommendations should be increased to encourage implementation, and, third, recommending states should place more focus on the target audience.

[16] *See*, chapters 6.1.3 and 6.2.3.
[17] *See,* chapters 4.3.4, 5.3.1, 6.1.3, 6.1.4, and 6.3.4.
[18] *See,* Hilary Charlesworth & Emma Larking, 'Introduction: The Regulatory Power of the UPR' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015) 15; Emma Hickey, 'The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground?' (2013) ICL Journal, Vol 7, No 4, 6.
[19] Chauville (n 1) 97-99.

7.4.1 Number of Recommendations

The US received 571 recommendations in total across the 2010 and 2015 reviews. Although the US is a wealthy country with many resources at its disposal, as Hickey stated, a high number of recommendations means that the 'more critical issues will tend to get diluted',[20] which in turn allows the US to be selective over which issues it addresses first.[21] In order to reduce the number of recommendations when collating the Outcome Report, the troika should group them together thematically. The troika already has the option to collate identical and very similar recommendations, but this is not being carried out consistently. For example, in the 2015 UPR, the troika grouped together the following recommendations as one:

> Impose a moratorium on executions with a view to abolishing the death penalty at the federal and state levels (Namibia) / Institute a moratorium on the application of the death penalty with a view to abolition (Togo) / Establish, at the federal level, a moratorium on executions with a view to abolishing the death penalty (France) / Establish an official moratorium on the use of the death penalty (Montenegro) / Establish a moratorium on the application of the death penalty (Spain) / Impose a moratorium on executions and abolish the death penalty in all states of the United States (Turkey) / Ensure the establishment of a moratorium of the death penalty in those states that have not abolished it yet (Chile).[22]

This turned seven individual recommendations into one, which lowered the total number the US received. The same process could have been carried out for other recommendations regarding international obligations and ratification of treaties. For example, four recommendations were made in 2010 asking the US to withdraw its reservation against Article 6 ICCPR,[23] and a further five could have been grouped together in 2015 asking the US to ratify the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.[24] By collating recommendations thematically, this would avoid over-burdening the recommending states as they would be free to recommend on any issue at any time, but would crucially reduce the final number of recommendations made to the state under review. Therefore, this

[20] Emma Hickey, 'The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground?' (2013) ICL Journal, Vol 7, No 4, 6.
[21] Charlesworth & Larking (n 18) 15-16.
[22] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (20 July 2015) UN Doc A/HRC/30/12, para 176.175 [hereinafter referred to as 'Report of the Working Group 2015'].
[23] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (4 January 2011) UN Doc A/HRC/16/11 para 92.48 (France), para.92.49 (Uruguay), para.92.50 (Austria), 92.118 (Sweden) [hereinafter referred to as 'Report of the Working Group 2010].
[24] Report of the Working Group 2015 (n 22) para 176.13 (Australia), para 176.11 (Chile), para.176 14 (Gabon), para 176 12 (Namibia) and para.176 10 (Timor-Leste).

would encourage states to engage with all recommendations, preventing it from being selective over which human rights issues it does and does not address.

In its report, 'The Butterfly Effect', UPR Info made some persuasive arguments as to why a high number of recommendations is actually helpful, such as, they 'do not overburden the [s]tate under [r]eview as they call for a similar action',[25] and '[t]he more recommendations are repeated, the more pressure will be put on the [s]tate to implement [them]'.[26] Furthermore, in her study of UPR recommendations made to eight particular states on domestic violence, Sarah Tufano found that 'the more recommendations that name this issue...the more substantive the changes following the UPR'.[27] Alan Desmond also argued that larger numbers of recommendations will put 'greater pressure' on a state to implement them.[28] However, by grouping the recommendations together as suggested above, this will continue to put pressure on the state under review, but will prevent the state relying upon the high number of recommendations as an excuse for prioritising certain human rights issues, whilst avoiding others.

Furthermore, De la Vega and Lewis suggested that, rather than listing each recommendation made, the troika should provide 'a key set of recommendations that cover the principal concerns noted during the review', in order to avoid the high number of recommendations having a negative impact upon the UPR.[29] However, by removing the verbatim recommendations and allowing the troika to summarise, this may lose the authenticity of the intergovernmental nature of the UPR, and also encourage politicisation. For example, recommending states may believe the troika is overlooking certain recommendations and including others, on the basis of politics rather than human rights. Instead, as this thesis argues above, keeping the verbatim recommendations as at present, but grouping them together thematically, will reduce the number of recommendations without attracting politicisation.

This change to the recommendations would be particularly beneficial for the death penalty, as it would encourage the US to consider specific issues substantively, such as access to counsel and conditions on death row. Furthermore, if the US received fewer recommendations but ones that are detailed and provided specifics on implementation, it would highlight the

[25] UPR Info, 'The Butterfly Effect' (n 10) 21.
[26] Ibid.
[27] Sarah Tufano, 'The "Holy Trinity" of the United Nations Universal Periodic Review: How to Make an Effective Recommendation Regarding Women's Rights' (2018) 21 U Pa L J & Soc Change 187, 188.
[28] Alan Desmond, 'The Triangle that could Square the Circle? The Un International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Eu and the Universal Periodic Review' (2015) European Journal of Migration and Law 17, 39-69, 65.
[29] Constance de la Vega and Tamara N Lewis, 'Peer Review in the Mix: How the UPR Transforms Human Rights Discourse' in M Cherif Bassiouni and William A Schabas (eds) *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 381.

shortcomings of the death penalty system and force the US to acknowledge the prospect that the system cannot be remedied and abolition is the only recourse. This would also help to gather pertinent evidence to further the Steikers' blueprint for abolition, through the UPR.

The grouping together of recommendations could be implemented through a formal change, for example, through a review of the UNHRC and its mechanisms, or it could be a more simple arrangement of the UNHRC asking the troika before each UPR to ensure it groups similar recommendations together. Given that this is already happening, albeit inconsistently, this would not involve a significant change in practice.

7.4.2 Content of Recommendations

Part II provided many examples of poorly-worded recommendations having little to no effect upon the UPR,[30] which highlighted the need for reform. It is important to note that there are already factors in place to ensure the recommendations process is improved. For example, UPR Info provides helpful guidance for recommending states on how to phrase recommendations in order to ensure implementation, suggesting that states should use the SMART recommendations technique, i.e. they should be specific, measurable, achievable, relevant and time-bound.[31] In her study on the eight states' UPRs and domestic violence recommendations, Tufano argued that 'recommendations should also outline a specific course of action that is easy to follow and difficult to evade'.[32] Building on from these points, this thesis argues that the way in which recommendations are provided by states, along with the drafting and content, should be reconsidered, both generally and with the abolition of the death penalty in mind.

In particular, the focus should be on the 'specific' element of the SMART recommendations. Part II identified that recommendations suggesting that the US abolish the death penalty or place a moratorium on it will be outright rejected.[33] Instead, recommendations should identify the key issue, provide the recommendation (which may still be 'abolish the death penalty'), and then consider ways in which the state under review can implement it. This does not have to be in any great detail, and in fact the time limits on the states during the review will not allow

[30] *See,* chapters 4.2.4, 4.3.3, 5.2.3, 5.3.1, 5.3.2, 6.1.3, 6.1.4, 6.2.4, and 6.4.4. The chapters also identified areas in which there had been no recommendations, but specific recommendations would have been beneficial.
[31] UPR Info, 'A Guide for Recommending States at the UPR' (2015) <www.upr-info.org/sites/default/files/general-document/pdf/upr_info_guide_for_recommending_states_2015.pdf> 27-29 accessed 24 August 2018.
[32] Tufano (n 27) 210-11.
[33] *See,* chapter 3.2.3.1; UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum' (8 March 2011) UN Doc A/HRC/16/11/Add1 para 9 [hereinafter referred to as 'Report of the Working Group Addendum 2010']; UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (14 September 2015) A/HRC/30/12/Add1 para 10 [hereinafter referred to as 'Report of the Working Group Addendum 1 2015']; *See, also,* Appendix.

for this. Instead, for example, death penalty abolitionist states (particularly states with a federal system like the US) could reflect upon the steps they took to abolish the death penalty, while also briefly sharing best practices.[34] Again, this could be implemented through the UPR Info Pre-sessions, where this could be filtered down to the government delegations to ensure that their recommendations are having the desired impact.

7.4.3 Target Audience of Recommendations

A further point for member states to consider is the target audience of their recommendations. Usually, in the case of the US, they would be made to the federal government, as that is the delegation that attends the UPR as a state under review and a recommending state. However, thought should be given to making recommendations directly to the US States on the abolition of the death penalty, particularly as chapter four noted that '[t]he US States are carrying out a punishment that is regulated by the ICCPR and, as such, the often-used reliance upon federalism as a barrier to abolition should be challenged through the UPR'.[35] Examples of this practice of UN member states working with US States was discussed in chapter four in relation to the climate change deal between California and China,[36] and the Oklahoma and Nevada courts engaging with the international social contract in death penalty cases at the State level.[37] Therefore, recommendations regarding acceptance of international opinion and practice targeted at specific retentionist US States would be a nuanced and potentially effective use of the UPR in the context of the abolition of the death penalty.

Alongside aiming recommendations at the individual US States, this thesis argues that they should also be targeted towards the judiciary. The US noted in its Addendum to the 2015 Outcome Report that, '[w]ith respect to judicial remedies, we note that we cannot make commitments regarding, and do not control, the outcome of court proceedings'.[38] Therefore, in noting that the federal government cannot control the outcome of litigation, member states should make recommendations directly to the courts. In the context of the death penalty, this could have a two-fold outcome. First, this could lead to attorneys discussing the UPR in briefs and, thereafter, could lead to domestic US courts citing the UPR, as to date no court has made reference to the mechanism.[39] Second, it could further the second prong of the Steikers'

[34] *See,* De la Vega and Lewis (n 29) 367, noting the importance of peer review, as in the UPR, for 'knowledge transfer', as it allows states to 'benefit from seeing how other [s]tates have tackled similar problems in their country'.
[35] *See,* Chapter 4 page 125.
[36] *See,* ibid.
[37] *See,* Chapter 4 page 133-35.
[38] Report of the Working Group Addendum 1 2015 (n 33) para 3.
[39] Correct as at 24 August 2018.

'blueprint for abolition',[40] by giving examples of the international consensus on capital issues such as racial discrimination and wrongful convictions. This could eventually have a positive impact upon the abolition of the death penalty through a SCOTUS decision, as Justices Breyer and Ginsburg in particular have acknowledged the importance of international law and the practice of other nations.[41] Furthermore, if Justice Breyer's review of the death penalty in his dissent in *Glossip*[42] had referenced the review of the US death penalty that the UPR provides, this would have added to his argument towards abolition.[43] If a future case is heard by the Court on the constitutionality of the death penalty, the UPR should be cited, as should the specific death penalty recommendations from UN member states, as it furthers both prongs of the proportionality doctrine as per the blueprint for abolition.

In order to disseminate recommendations made to the US States and judiciary, or the equivalent in other UN member states, the national consultations with civil society and the general public should be utilised. As noted in chapter three, the state under review is 'encouraged to prepare the information through a broad consultation process at the national level with all relevant [S]takeholders' prior to its submission of the National Report.[44] In preparation for both UPRs, the US federal government engaged in consultations with civil society and members of the public.[45] This would provide the opportunity for any recommendations made to the States or judiciary to be circulated and acted upon.

Part II of the thesis noted that numerous sections of the US UPRs would have benefited from recommending states aiming its recommendations to US States or the judiciary.[46] Again, this change to how the UN member states approach recommendations could be addressed through a briefing at the UPR Pre-sessions.

7.5 Follow-Up to the Review

The reliance upon recommendations accepted in the previous review as a means of follow-up is hindering the positive role the UPR can play in the death penalty abolition movement. For example, is currently futile for a state to recommend that the US should abolish the death penalty, as the US will simply note the recommendation and take no further action. Therefore, this thesis argues that there are three potential ways this could be remedied to allow the UPR

[40] Ibid 271, 278.
[41] *See, Roper v Simmons* 543 US 551, 575-78 (2005); Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage Books 2015) 7.
[42] *Glossip v Gross* 135 S Ct 2726, 2755 (2015) (Breyer, J dissenting).
[43] *See,* chapter 6.4.4.
[44] UNGA Res 5/1 (n 4) para 15(a).
[45] UNHRC, 'Annex II: Selected Civil Society Consultations' (2015) UN Doc A/HRC/WG6/22/USA/1/USA/AnnexII/E; US Department of State Bureau of Democracy, Human Rights, and Labor, '2015 UPR Report Fact Sheet on U.S. Process' (6 Feburary 2015) <www.state.gov/j/drl/upr/2015/237251.htm> accessed 24 August 2018.
[46] *See,* chapters 4.5.1.2, 5.2.3, 5.2.4, 6.3.3, 6.3.4, and 6.4.4.

to have more impact on the capital system in the US, and generally on human rights across the globe. First, through responses to accepted and noted recommendations, second, through engagement with the mid-term reporting, and, third, by potentially creating a new thematic special procedures mandate specifically for the follow-up to the UPR.

7.5.1 Responses to Recommendations

The US, in both 2010 and 2015, provided an Addendum to the Outcome Report detailing which recommendations were accepted, noted, and accepted in part.[47] In the Addendum, the US delegation also provided reasons why the 'accepted in part' recommendations were not fully accepted, which was helpful for the key UPR actors as it provided some clarity on what the barriers were preventing the US from fully accepting and implementing some recommendations. This thesis further argues that, in subsequent reviews, the state under review could be asked to provide short reasons why the remaining recommendations were accepted or noted, and outline practical steps they are going to take to implement the accepted recommendations. In doing so, this would allow a discussion to take place during the UNHRC plenary session between the state under review, UN member states, and Stakeholders regarding the reasons why the noted recommendations were not accepted. This would inform the other key UPR actors as to the barriers blocking the remedy of specific human rights issues in the US and would allow them to formulate their advance questions and recommendations for the next UPR accordingly. It would also allow the Stakeholders to disseminate this information locally to affect change on the ground. There were a number of examples identified in Part II where this improvement to the UPR would have benefited the facilitation of the abolition of the death penalty in the US.[48]

This would involve a formal change to the UPR process through a Resolution or decision of the UNHRC, but does not mean that the focus of the subsequent reviews would not be predominantly on the recommendations accepted in the previous review. It is important that this remains the leading focus to ensure the continued 100% cooperation from member states. However, a discussion regarding *why* the recommendations were noted would potentially prevent states from being tactical in what human rights issues they do and do not address. Currently, the effectiveness of the UPR is being hindered due to recommendations being noted and thereafter ignored, and others accepted partially or in full but not being acted upon.

[47] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (8 March 2011) UN Doc A/HRC/16/11/Add1; Report of the Working Group Addendum 1 2015 (n 33).
[48] *See,* chapters 4.2.4, 4.3.3, 4.4.4, 4.5.4, 5.3.1, 6.1.3, 6.1.4, 6.2.3, and 6.4.4.

If the government delegation provides responses to recommendations, it will ensure the state under review can be held to account.

7.5.2 Mid-Term Reports

The mid-term reporting provides the ideal platform to report back on the implementation of the accepted recommendations in between reviews. For example, the UK's first mid-term report lists some of the recommendations it accepted in cycle one and the UK action taken to date to implement each recommendation.[49] This is useful for Stakeholders and member states, both of which play an active role in the implementation of recommendations. The mid-term reports are described as voluntary, however, participation in the entire UPR itself is voluntary as there is no obligation on a state to take part in the process. Despite this, in the first cycle all 193 states cooperated in the review process, but only fifty-five states submitted mid-term reports.[50] The US declined to submit a mid-term report.[51]

Chauville argued that 'the lack of an independent United Nations-led assessment mechanism' is a weakness of the UPR.[52] To remedy this to some extent, through a review of the UNHRC and its mechanisms, the mid-term reports should be made a core part of the UPR process, to be considered as important as the National Report currently is. Although this still may not attract 100% cooperation, particularly as '[m]any developing countries resisted…the proposal that the informal practice of mid-term reporting on the progress of implementing accepted UPR recommendations be made mandatory',[53] it should, at the very least, improve the submission numbers of mid-term reports. Also, if states were to provide details on how they intend to implement accepted recommendations as suggested above, the mid-term report would be a way of specifically measuring the progress made between reviews.

The issue of the US submitting a mid-term report also needs to be considered during the 2020 US UPR. There would be the opportunity to discuss this during the initial three reports, through advance questions, during the interactive dialogue, and at the UNHRC plenary session. The

[49] United Kingdom Mission, 'Universal Periodic Review Mid-Term Progress Update by the United Kingdom of Great Britain and Northern Ireland on its Implementation of Recommendations Agreed in June 2008' (2010) <http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/GB/UKmid_term_report2010.pdf> accessed 24 August 2018.
[50] *See,* UNHRC, 'UPR Mid-term Reports' <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx> accessed 24 August 2018.
[51] Ibid.
[52] Chauville (n 1) 87-88.
[53] Jane K Cowan & Julie Billaud, 'Between Learning and Schooling*:* The Politics of Human Rights Monitoring at the Universal Periodic Review' (2015) 36 Third World Q 1175-90, 1184.

UPR is not a 'naming and shaming' mechanism,[54] but it is there to identify ways in which a state's human rights record can be improved, including through a mid-term report.

Despite the US not submitting a mid-term report between its first and second reviews, Stakeholders still assessed the US' cooperation with recommendations. For example, in 2013, UPR Info undertook its own mid-term assessment of the US to consider its implementation of the 2010 recommendations.[55] From this assessment, UPR Info found that none of the death penalty recommendations had been implemented, even partially.[56] Adding to this, Part II identified areas of the US UPRs that would have benefited from the submission of a mid-term report from the US.[57] In particular, the lack of implementation of accepted, or partially accepted, recommendations could be remedied and recommendations may be further implemented if the US were to provide a mid-term report. It would allow civil society, other member states, and the OHCHR to keep up with the efforts being made to implement the few recommendations regarding the death penalty that were accepted by the US. The mid-term reports have the potential to be a way to ensure improvement to human rights on the ground, just as Resolution 5/1 stated the UPR should.

7.5.3 Creating a 'UPR' Thematic Special Procedure

In order to have a UN-led monitor of implementation of recommendations, Chauville suggested that '[a]n objective assessment by the OHCHR, published one month before the review in the format of a report, would be an effective way to fill this gap'.[58] Another possible solution to encourage meaningful follow-up by the state under review, would be to create a new, thematic special procedure mandate specifically to monitor implementation of the UPR recommendations. This would be a way of ensuring UN-led scrutiny, but from an independent source. It would require the creation of a new thematic special procedure mandate, and the need for a qualified Special Rapporteur or Working Group to be hired.

From a practical perspective, this could be controversial, as the UPR has been criticised for overshadowing the important work of the special procedures. However, the UPR can be, and has been, used to reinforce the findings of the special procedures and encourage

[54] *See,* Elvira Domínguez Redondo, 'The Universal Periodic Review – Is There Life beyond Naming and Shaming in Human Rights Implementation?' (2012) 4 NZ L Rev 673 (2012).
[55] UPR Info, 'United States of America: Mid-Term Implementation Assessment' (1 July 2013, as amended 16 July 2013) <www.upr-info.org/followup/assessments/session22/united_States/MIA-United_States.pdf> 4-10 accessed 24 August 2018.
[56] Ibid.
[57] *See,* chapters 4.5.4 and 6.1.4.
[58] Chauville (n 1) 96.

engagement.[59] This suggests that the mechanisms working together would benefit human rights on the ground.

7.6 Publicising the UPR

Currently, the UPR is not as well-known as the other UN mechanisms, particularly to the general public. In order to improve its effectiveness, both generally, and specifically in the context of the abolition of the death penalty in the US, the UPR needs to be more widely publicised. This would be particularly beneficial given James E. Coleman's argument that, in order for the abolition of the death penalty in the US to be realised, there must be the 'continued erosion of public confidence in the death penalty'.[60] Furthermore, in July 2018, a 'call to action' was published by two social workers, providing actionable recommendations as to how social workers can assist with the abolition of the death penalty.[61] Other professions could use this as a model to take forward, using the UPR as a repository of information regarding the US death penalty. In order to do this, the publicity of the mechanism must be improved.

7.6.1 Role of Key Actors

A number of key actors can assist in providing the UPR mechanism with meaningful publicity, to ensure that it can be as impactful as possible for human rights on the ground. These include UN member states, Stakeholders, practitioners, academics, courts, and the media.[62]

The UN member states and Stakeholders can promote the UPR within the wider community by engaging with the general public in preparation for each review, as the US has already done prior to the 2010 and 2015 reviews.[63] It is good practice for both member states and Stakeholders to consult with the general public regardless of publicising the mechanism, as the UPR is there to promote and protect the human rights of citizens across the globe. However, as well as being good practice for the authenticity and legitimacy of the National and

[59] Ingrid Nifosi-Sutton, 'The System of the UN Special Procedures: Some Proposals for Change' in M Cherif Bassiouni and William A Schabas (eds) *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 397-98.
[60] James E Coleman, 'One Way Or Another the Death Penalty Will be Abolished, but Only After the Public No Longer Has Confidence in its Use' (2018) 13 Duke J Const L & Pub Poly 15, 16.
[61] L Lauren Brown & Sarah Graham McGee, 'Social Work and Capital Punishment: A Call to Action' (2018) Journal of Human Rights and Social Work, pp 1-11, 1.
[62] *See,* chapters 4.4.4, 6.4.3, and 6.4.4.
[63] UNHRC, 'Annex II: Selected Civil Society Consultations' UN Doc A/HRC/WG6/22/USA/1/USA/AnnexII/E; US Department of State Bureau of Democracy, Human Rights, and Labor, '2015 UPR Report Fact Sheet on U.S. Process' (6 Feburary 2015) <www.state.gov/j/drl/upr/2015/237251.htm> accessed 24 August 2018.

Stakeholder Reports, it would also allow the general public to engage with the UPR and increase the public's knowledge of the mechanism.

Furthermore, if the UPR recommendations were targeted towards the courts and not just the federal government, as stated above, this could lead to the UPR being cited in briefs by practitioners. Thereafter, the courts may cite the UPR in its judgments, which would raise the profile and publicity of the UPR in the US.

Academics can also be of assistance to the publicity of the UPR by conducting further research on the mechanism. Following this thesis, the author intends to carry out more research on the UPR, both generally, and specifically on the US and the abolition of the death penalty. Moreover, human rights education is imperative for the future of the promotion and protection of global human rights, and the UNHRC and its mechanisms should be part of this education. Particularly at university-level, modules focusing on human rights and/or the UN should include the UPR.

Finally, the media has a role to play in publicising the UPR, particularly US media outlets regarding the US UPRs and follow-up. If the media began to report on the UPR more frequently, this would be a way to widely increase the general public's awareness of the mechanism, whilst also positively influencing the discussion of the death penalty in the US UPRs.

7.7 Practical Implementation of the Recommendations

This chapter has suggested recommendations to improve the UPR mechanism, and ways the key UPR actors can put them into practice. However, these recommendations have been formulated from a legal scholar's perspective, and so there will be practical considerations to be made in order for them to be implemented.

Before there can be any implementation of these recommendations, they must be transferred from the thesis into the wider world. As such, in order for these recommendations to be considered by the key actors, a dialogue must be started, for example with the OHCHR, the UN member states, and the Stakeholders. In the first instance, it is proposed that the author will approach UPR Info with the suggested recommendations, to discuss the viability of them being realised in practice, and for UPR Info's expert opinion as to how this can be facilitated. From there, dialogues will be created with Stakeholders to discuss the findings of this research and the recommendations it makes. Although the Stakeholders are likely already aware of the shortfalls of the UPR process, to provide them with evidence and suggested ways to improve Stakeholder engagement with the UPR, may encourage changes from them, such as, through

co-ordinating thematic individual submissions. Once this research, in particular the recommendations, has been published, and networks have been created with UPR Info and other Stakeholders, the OHCHR can also be approached to facilitate a discussion about more formal changes to the UPR process.

Clearly, there will be limitations to whether these recommendations can be realised in practice, due to the inherently political nature of an intergovernmental mechanism such as the UPR. However, by starting dialogues, and providing evidence for why the UPR should be changed through the findings of this research, it will start discussions and hopefully see positive changes made for the protection and promotion of human rights across the globe.

7.8 Conclusion

This chapter has identified the areas of the UPR that this thesis argues can be modified in order to improve the mechanism to ensure it is fulfilling its mandate to help protect and promote human rights globally. Furthermore, these proposed changes to the UPR would encourage US adherence to international law whilst it continues to administer capital punishment. It will also help to gather the evidence needed to pursue the Steikers' blueprint for abolition, which will further the ultimate goal that this research is hoping to contribute to – the abolition of the death penalty in the US.

CHAPTER EIGHT

CONCLUSION

8.1 Key Findings of the Thesis

Through a qualitative review of the 2010 and 2015 US UPRs in the context of the abolition of the death penalty, this thesis has filled a gap in the current academic discourse. In carrying out the analysis of the first two US UPR cycles, the author identified three broad themes regarding capital punishment. One, the right to a fair trial and due process, two, intellectual disabilities and mental health, and, three, the implementation of a death sentence. Furthermore, from this review of the three themes within the 2010 and 2015 US UPRs, the author identified recommendations to strengthen the UPR mechanism.

By improving the UPR as suggested in this thesis, its impact will be three-fold. First, it will assist in ensuring the US is held to account to its international obligations whilst it retains the death penalty. This thesis has demonstrated how the UPR can be utilised to facilitate this. Second, it will further the Steikers' 'blueprint for abolition', by gathering evidence to show the arbitrary application of the death penalty in the US in violation of international and domestic laws. This is in preparation for SCOTUS hearing a case on the constitutionality of the death penalty in the future. Third, the strengthening of the UPR will benefit the mechanism generally, for the protection and promotion of human rights globally.

This section of the chapter provides an overview of the key findings of this thesis. This includes a summary of the main arguments in each chapter, how the analysis met the three aims of the thesis, and the recommendations proposed from the outcome of the analysis.

Chapter Two

Before the analysis of the UPR could take place, given that it is based upon international law, an examination of the US' relationship with international law was carried out in chapter two. From the outset, it was clear that the US has a thorny relationship with international law, owing in part to American exceptionalism, also outlined in the chapter. In terms of treaties, this thesis has been predominantly concerned with the ICCPR, given its role in the international death penalty framework, and the US ratified but attached a number of RUDs to the ICCPR.[1] However, from the examination of its reservations against Articles 6 and 7, this thesis found that the reservations are invalid, as they go against the object and purpose of the ICCPR, and

[1] *See,* chapter 2.3.

are therefore severable from the US accession to the treaty.[2] As such, the analysis of the UPR within Part II took into account that Articles 6 and 7 are binding upon the US.

This thesis argued that the abolition of the death penalty can be achieved through the Steikers' 'blueprint for abolition', which utilises the 'proportionality doctrine'.[3] This doctrine is two-fold, involving firstly, 'objective evidence' and secondly, SCOTUS' 'own judgment' on Eighth Amendment issues.[4] International law can provide assistance to further the blueprint,[5] and the UPR can be used to gather the requisite evidence. Although the appointment of Justice Gorsuch to the Court in 2017, and the retirement of Justice Kennedy in 2018 is a setback for the fulfilment of this blueprint for abolition, it was argued this is not a closed door. For example, there is the possibility that another conservative justice, just like Justice Kennedy, will gradually move further towards the centre of the Court.

Chapter Three

The complex and exceptional relationship the US has with international law was also demonstrated by its engagement with the UN and its human rights mechanisms.[6] The most recent example of this was the Trump Administration's withdrawal from the UNHRC.[7]

Through an introduction to the UPR, chapter three highlighted some preliminary strengths and weaknesses of the mechanism, even before the analysis in Part II. For example, the fact that the US had consulted with members of the public prior to both the 2010 and 2015 UPRs was a positive, as this had never been seen before.[8] Furthermore, the post-UPR Working Groups created by the US provided a response to each UPR recommendation, whereas there were no responses to the treaty body and special procedure recommendations, indicating the positive effect of the UPR compared to the other human rights mechanisms.[9] However, some preliminary criticisms that would be built upon in Part II were also identified. These included: the fact that the page limits on documents were having negative effects on the UPR,[10] repetition of content in the individual Stakeholder submissions,[11] the lack of transparency from

[2] *See,* chapter 2.3.2.
[3] *See,* chapter 2.5.3; Carol S. Steiker & Jordan M. Steiker, *Courting Death The Supreme Court and Capital Punishment* (HUP 2016) 271, 278.
[4] Ibid 282, 278.
[5] *See,* chapter 2.5.3.
[6] *See,* chapter 3.1.
[7] BBC News, 'US Quits 'Biased' UN Human Rights Council' (20 June 2018) <www.bbc.co.uk/news/44537372> accessed 24 August 2018.
[8] *See,* chapter 3.2.2.1.
[9] *See* chapter 3.2.5.
[10] *See,* chapter 3.2.2.3.
[11] Ibid.

the OHCHR when compiling the Compilation and Stakeholder Reports,[12] the informal process of the advance questions,[13] the broad content of recommendations,[14] the repercussions of a state receiving a high number of recommendations,[15] and the US' refusal to submit a mid-term report.[16]

Part II

Part II was where the analysis of the 2010 and 2015 US UPRs took place, in the context of the death penalty. To do this, the author identified three broad areas of capital punishment that were significant within the US UPRs: chapter four examined the death penalty and the right to a fair trial, chapter five considered intellectual disabilities as a current categorical exemption to the death penalty and mental illnesses as a potential categorical exemption, and chapter six reviewed the implementation of a death sentence. From this analysis, chapter seven set out a number of recommendations proposed by this thesis, in order to improve the UPR mechanism.

Chapter Four

The Right to Counsel

The analysis of the right to counsel in capital cases within the 2010 US UPR identified a number of ways in which the UPR could be improved. For example, allowing Stakeholders to provide advance questions would have allowed more information regarding access to capital counsel to be relayed to UN member states when they formulated their recommendations.[17] Furthermore, the IACHR's case report on Medellín, Cardenas, and Leal García provided clear evidence of the ineffective assistance of counsel many capital defendants and appellants face in breach of both international and domestic laws.[18] However, this key information was not transferred into the final Stakeholder Report, making it difficult for the US to be held to account to its international obligations. Moreover, a direct link between a lack of information in the Compilation Report and no recommendations being made was identified.[19] To remedy this, it was suggested that the OHCHR needs to provide more transparency regarding how it

[12] Ibid.
[13] *See,* chapter 3.2.3.
[14] *See,* chapter 3.2.3.1.
[15] *See,* chapter 3.2.3.2.
[16] *See,* chapter 3.2.5.
[17] *See,* chapter 4.2.3.
[18] Ibid.
[19] *See,* ibid; Roland Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015).

compiles the Compilation and Stakeholder Reports, which would also benefit the UPR mechanism generally.[20]

In the 2015 UPR, the sharp reduction in discussion on the right to counsel, particularly from the Stakeholders, indicated that thematic Stakeholder submissions could be beneficial. They would ensure that every pivotal issue within the capital system could be addressed in the individual submissions, with the ABA being an obvious candidate to tackle IAC.[21] Also, the acceptance without comment of Poland's recommendation on effective capital counsel pointed to a flaw in the follow-up to the review. It was argued that the state under review should be expected to briefly address in the Addendum to the Working Group Report how it will implement accepted recommendations, and why it did not accept noted recommendations.[22] In future UPRs, this would allow the key actors to provide assistance in implementing the recommendations and would provide a basis for advance questions and recommendations in subsequent reviews.

Furthermore, the fact that only one recommendation was made on access to counsel in both the 2010 and 2015 UPRs was proof of two problems within the recommendations. One, there are too many recommendations made and, two, they are too broadly drafted to have sufficient impact. It was suggested that the troika needs to group identical or similar recommendations together to lower the final number of recommendations a state receives.[23] Moreover, member states should be more specific with the recommendations they provide to encourage action on the ground.[24]

Racial Discrimination

Section 4.3 examined racial discrimination within the capital system. A particular issue that was raised in the 2010 US UPR was that the domestic definition of racial discrimination did not accord with international law, as the domestic law definition did not include non-intentional discrimination.[25] The US noted a recommendation from China which suggested it bring its definition in line with ICERD,[26] stating that '[w]e believe that our law is consistent with our [I]CERD obligations'.[27] This provided an example of American exceptionalism, as the US

[20] *See* chapter 4.2.3.
[21] *See,* chapter 4.2.4.
[22] *See,* ibid; UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (14 September 2015) A/HRC/30/12/Add1 [hereinafter referred to as 'Report of the Working Group Addendum 1 2015'].
[23] *See,* chapter 4.2.4.
[24] Ibid.
[25] *See,* chapter 4.3.3.
[26] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (4 January 2011) UN Doc A/HRC/16/11 para 92.63 [hereinafter referred to as 'Report of the Working Group 2010']. Bolivia also provided a similar recommendation at para 92.62.
[27] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum' (8 March 2011) UN Doc A/HRC/16/11/Add1 para 30 [hereinafter referred to as 'Report of the Working Group Addendum 2010'].

delegation sought to differentiate between its obligations and other member states' obligations under ICERD. However, in 2015, the US UPR saw a positive change on this point. Ghana made a similar recommendation to China's from 2010,[28] which the US supported in part, noting that 'although we recognize there is always room for improvement, we believe that our law is consistent with our [I]CERD obligations'.[29] Albeit small, progress was made between the two UPRs, as the recommendation had progressed from being noted in 2010 to accepted in part in 2015, with the US acknowledging that the law could be improved. Stakeholders and UN member states now need to consider how they can approach this issue in 2020 to ensure future recommendations on this point will be accepted and implemented.[30] This is particularly important if the UPR is to be used to encourage US adherence with international standards when implementing the death penalty.

The analysis of the 2015 US UPR showed a positive improvement on 2010, in that all key actors came together to further France's 2010 recommendation to undertake studies on racial discrimination in the death penalty. This was an example of good practice in the UPR, as the key actors provided information and recommendations on the same issue in order to affirm its importance to the US, which in turn will put pressure on the US to implement France's recommendation. This can also be used as a model for future UPRs on other issues. It was further argued that France should use the advance questions in the 2020 US UPR to ask how its recommendation in 2015 was implemented, particularly given that a new Administration with different priorities has taken over since it made the recommendation.[31] However, it was also argued that, in practice, the use of conducting more studies on race and the death penalty would be limited. Instead, it would be more beneficial for UN member states to recommend on how the findings of these studies can be implemented to reduce racial discrimination.[32] In fact, this would provide proof that the death penalty is flawed beyond repair, adding to the evidence to further the Steikers' blueprint for abolition.

There were examples of Stakeholders providing cogent recommendations to the US on racial discrimination within both UPR cycles.[33] This provided another example of why Stakeholders should be permitted to provide advance questions, to ensure that important issues such as racially discriminate juries are raised and not just left unread by member states in individual submissions.[34] Four advance questions were asked on racial discrimination in the 2015 UPR,

[28] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (20 July 2015) UN Doc A/HRC/30/12 paras 176.122 [hereinafter referred to as 'Report of the Working Group 2015'].
[29] Report of the Working Group Addendum 1 2015 (n 22) 5-6.
[30] *See,* chapter 4.3.4.
[31] *See,* chapter 4.3.4.
[32] Ibid.
[33] *See,* chapters 4.3.3 and 4.3.4.
[34] *See,* chapter 4.3.3.

but the unsatisfactory responses from the US indicated the need for the advance questions to be reformed. This thesis suggested the troika should have a more prominent role in directing the state under review to the advance questions during the interactive dialogue to ensure they are acknowledged.[35]

The analysis further demonstrated the positive link between a high volume of discussion within the main reports, and an increase in recommendations. In 2015, the US received fifty-seven recommendations on racial discrimination[36] compared with thirty in 2010.[37]

Wrongful Capital Convictions

Section 4.4 analysed wrongful convictions within capital punishment. Although a plethora of information was provided by the Stakeholders on wrongful convictions, there was a disappointing lack of discussion in the main reports, which led to no recommendations being made.[38] This added to the argument that the OHCHR needs to be more transparent in how it decides upon the content of its reports, to ensure this does not happen in future UPRs regarding all human rights issues.

In the 2015 UPR, there was an increase in discussions on wrongful convictions, particularly focused upon compensation following an exoneration from death row.[39] Germany asked a question about compensation which was not addressed by the US during the interactive dialogue, highlighting the ineffectiveness of the advance questions and the need for reform.[40] JS17 provided a corpus of information regarding wrongful convictions and compensation, including cogent recommendations for the US, but these were not transferred into the Stakeholder Report. This added to the argument that allowing the Stakeholders to provide advance questions, and produce thematic Stakeholder submissions, could improve the impact Stakeholders can have on the UPR.[41]

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[35] Ibid.
[36] Report of the Working Group 2015 (n 28) paras 176.90 (Chile); 176.91 (Namibia); 176.92 (Cuba); 176.93 (Iran); 176.94 (South Africa); 176.95 (Cape Verde); 176.118 (Korea); 176.119 (Bangladesh); 176.120 (Lebanon); 176.121 (Kazakhstan); 176.122 (Ghana); 176.123 (Senegal); 176.124 (Serbia); 176.125 (Iran); 176.126 (Egypt); 176.130 (Namibia); 176.131 (Singapore); 176.132 (Nigeria); 176.133 (Israel); 176.134 (Singapore); 176.135 (Niger); 176.136 (Azerbaijan); 176.137 (Maldives); 176.140 (Algeria); 176.141 (France); 176.142 (Malaysia); 176.143 (Bolivia); 176.144 (Malaysia); 176.145 (Nigeria); 176.146 (Russia); 176.147 (Azerbaijan); 176.148 (Togo); 176.149 (Pakistan); 176.150 (Bangladesh); 176.151 (Brazil); 176.152 (Egypt); 176.153 (Holy See); 176.154 (Mexico); 176.155 (Pakistan); 176.156 (China); 176.157 (Croatia); 176.158 (Democratic People's Republic of Korea); 176.159 (Iran); 176.160 (Turkey); 176.161 (Indonesia); 176.195 (France); 176.198 (Belgium); 176.220 (Angola); 176.221 (Argentina); 176.222 (Australia); 176.224 (Democratic Republic of the Congo); 176.225 (Ireland); 176.226 (Cuba); 176.232 (Iceland); 176.276 (Ghana); 176.277 (Poland); 176.278 (Libya).
[37] Report of the Working Group 2010 (n 26) paras 92.3 (Russia); 92.45 (Venezuela); 92.62 (Bolivia); 92.63 (China); 92.64 (Egypt); 92.67 (Democratic People's Republic of Korea); 92.68 (Democratic People's Republic of Korea); 92.79 (Guatemala); 92.82 (Venezuela); 92.94 (Cuba); 92.95 (France); 92.96 (Austria); 92.97 (Haiti); 92.98 (Egypt); 92.99 (Bangladesh); 92.100 (Libya); 92.101 (Mexico); 92.102 (Sudan); 92.103 (Ecuador); 92.104 (Vietnam); 92.106 (Bangladesh); 92.107 (Ghana); 92.108 (Mexico); 92.110 (Ecuador); 92.111 (Qatar); 92.151 (China); 92.190 (Iran); 92.207 (Cuba); 92.219 (Qatar); 92.220 (Algeria).
[38] *See,* chapter 4.4.3.
[39] *See,* chapter 4.4.4.
[40] Ibid.
[41] Ibid.

Three recommendations were made on wrongful convictions in 2015, again showing the positive link between the content of the main reports and recommendations made.[42] However, they were accepted without comment by the US, adding evidence to the argument that the state under review should be required to address how it will implement accepted recommendations, and why it did not accept noted recommendations.[43] Furthermore, it was argued that the recommending states should consider the target audience of their recommendations, looking to the individual US States or courts to have further impact.[44]

Foreign Nationals' Rights

Section 4.5 considered foreign nationals' rights under the VCCR. In this section, the key VCCR cases were outlined, including the ICJ decisions against the US and the treatment of the ICJ judgments by domestic US courts. It analysed the ramifications of these decisions and the role of the UPR in ensuring this due process right is adhered to. Furthermore, the purported withdrawal from the Optional Protocol to the VCCR was analysed, arguing that the withdrawal is invalid, based upon the application of Article 56 VCLT and the parties' intentions.[45] However, in order to test the argument that the US' withdrawal was invalid, another state must initiate proceedings against the US under the Optional Protocol. This thesis argued that an ideal test case would be from the UK regarding British grandmother, Linda Carty, who is on death row in Texas and was not advised of her Article 36 rights.[46] To further this argument, the author will approach the British Foreign and Commonwealth Office with the findings, encouraging them to take the case to the ICJ. The UPR can also be utilised to encourage the UK to bring a test case against the US in the Linda Carty case.[47]

The analysis identified that consular assistance and the death penalty had been raised throughout both US UPRs.[48] However, the US accepted recommendations during the two UPRs but provided no comment on them, and thereafter did not implement them. This added to the argument that the state under review should be required to detail how it will implement accepted recommendations and state why it did not accept noted recommendations.[49] It was also suggested that the mid-term reports should become a core part of the UPR. This would encourage member states, such as the US, to submit a mid-term report, providing an update on its progress in implementing accepted recommendations, including those related to consular assistance and the VCCR.[50]

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[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] *See,* chapter 4.5.3.2.
[46] Ibid.
[47] Ibid. *See, also, Carty v Thaler* 583 F 3d 244, 251 (5th Cir La 2010).
[48] *See,* chapter 4.5.4.
[49] Ibid.
[50] Ibid.

Chapter Five

Intellectual Disabilities

In both US UPRs, the Stakeholders raised the disturbing point that the US States are continuing to execute the intellectually disabled, in spite of the *Atkins* decision.[51] However, this was not transferred into the main report. To avoid key information being omitted from the main documents, such as the continued execution of the intellectually disabled in violation of both international and domestic standards, the OHCHR needs to be more transparent in how it compiles its Stakeholder Report.[52] This would encourage US adherence to international law, but would also benefit Stakeholders in all UPRs regarding all human rights issues when compiling their individual submissions. Furthermore, it was proposed that member states should make specific recommendations on this issue, alongside considering the intended audience of its recommendations.[53] On the issue of States continuing to execute persons with an intellectual disability, recommendations aimed at the State governments and judiciaries would be particularly helpful.

In the 2015 US UPR, the analysis discovered that misinformation had been provided by the US government in its National Report: the US stated that capital punishment 'is barred…for individuals found by a court to have a significant intellectual disability'.[54] However, the categorical exemption in the US is for all persons with any intellectual disability,[55] not a 'significant' intellectual disability. This should have been addressed throughout the rest of the 2015 UPR and is something the key actors should look out for in future UPRs for all human rights issues.

Between the 2010 and 2015 UPRs, SCOTUS handed down its judgment in *Hall v. Florida*.[56] In the majority opinion, Justice Kennedy found that 'Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world'.[57] However, this thesis argued that the US has much to learn from the world community, and the UPR is an example of the world teaching the US about human rights and decency, particularly regarding capital punishment. Adding to this was the majority opinion's holding that '[t]he States are laboratories for experimentation, but those experiments may not deny the basic

[51] *See,* chapter 5.2.3 and 5.2.4. *Atkins v Virginia* 536 US 304 (2002),
[52] *See,* chapter 5.2.3.
[53] Ibid.
[54] UNHRC, 'National Report of the United States of America' (13 February 2015) UN Doc A/HRC/WG.6/22/USA/1 para 49 [hereinafter referred to as 'National Report 2015'].
[55] *See, Atkins* (n 51).
[56] *Hall v Florida* 134 S Ct 1986 (2014).
[57] Ibid 2001.

dignity the Constitution protects'.[58] Just as the US States are laboratories within the US federal system, this thesis likened the US to a laboratory within the international field. Following Justice Kennedy's reasoning, it was argued that, although the US is a laboratory of international experimentation, this must not deny the basic dignity that international standards set for states administering the death penalty. As some justices have been receptive to international standards assisting in the interpretation of the Constitution,[59] this thesis argued the UPR should be utilised to ensure the US is aware of its limits as a laboratory, in that its application of the death penalty is curtailed by international standards. It was proposed that this can be achieved through member states targeting the judiciary when formulating its recommendations.[60]

Other Mental Illnesses

Section 5.3 moved on to consider the possibility of a categorical exemption for those with severe mental illnesses, as prescribed by international law.[61] In analysing this area of the death penalty, it provided a poignant example of a particular shortfall of the UPR: the page limits on the main reports are preventing key information, such as a need for a categorical exemption for all mental illnesses, being included.[62] As such, it was argued that the strict page limits need to be relaxed, and that some duplication in the Compilation Report with other UN mechanisms should be expected, as the Compilation Report presents an opportunity to collate the corpus of UN recommendations on capital punishment in the US.[63]

In 2010, three recommendations were made regarding the execution of those with any mental illness. The US accepted the recommendations in part, but failed to identify *why* the exemption does not extend to all mental illnesses.[64] It was argued that utilising the advance questions in future UPRs to query *why* the US will not extend the categorical exemption to all those suffering from mental illnesses would seek to elicit a response from the US, which would allow more specific recommendations to be formulated in future UPRs.[65] Linked to this was Venezuela's recommendation that the US should '[a]bolish the death penalty, which is also applied to persons with mental disabilities and commute those which have already been imposed',[66] which the US 'noted'.[67] The analysis identified that the US will not accept

[58] Ibid.
[59] For example, Justice Stevens in *Atkins*, *Atkins* (n 51) FN21. and Justice Ginsburg in oral arguments during *Roper v Simmons* 543 US 551 (2005).
[60] *See,* chapter 7.4.3.
[61] *See,* chapter 5.3.
[62] *See,* chapter 5.3.1.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Report of the Working Group 2010 (n 26) para 92.133.
[67] Report of the Working Group Addendum 2010 (n 27) para 9.

recommendations asking it to abolish the death penalty or implement a moratorium. Instead, the thesis argued that states should make specific recommendations regarding particular aspects of concern within the US capital system, including the execution of those with a severe mental illness.[68] This would encourage the US to adhere to international law by extending the categorical exemption to cover those with all mental illnesses, whilst gathering evidence to further the second prong of the Steikers' blueprint. Specific recommendations from UN member states would also benefit the UPR mechanism in general.

Although, in 2015, five advance questions were asked on the issue of mental illness as a categorical exemption, they still did not query *why* the US will not extend the categorical exemption, and the US then provided a vague response. Therefore, it was argued that the member states (and potentially the Stakeholders) need to be clearer when asking advance questions, and the way advance questions are dealt with requires reform.[69] Two recommendations were made in 2015, but again, they failed to include the relevant detail needed, adding to the argument for the need for specific recommendations.[70] In this context, it was suggested that the member states should consider recommending on how the US can go about exempting persons with all mental illnesses from the death penalty, including conducting studies led by the DOJ in consultation with medical professionals and Stakeholders, or propose changes to federal and State laws.[71]

Chapter Six

Chapter six examined the implementation of the death sentence from two aspects: the conditions on death row and methods of execution. Under the heading of conditions on death row, chapter six considered general conditions on death row, solitary confinement, and the death row phenomenon.

Conditions on Death Row

In the 2010 UPR, AI was cited in the Stakeholder Report as it 'referred to the harsh conditions on death rows in many [S]tates'.[72] However, it did not provide any further detail in its individual submission. Therefore, it was argued that this is further evidence to suggest that thematic Stakeholder submissions would be of benefit, allowing one Stakeholder to go into detail about each capital issue.[73] Moreover, three Stakeholders provided relevant information regarding

[68] *See,* chapter 5.3.1.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] UNHRC, 'Summary of Stakeholders Information – United States of America' (14 October 2010) UN Doc A/HRC/WG.6/9/USA/3/Rev1 para 30 [hereinafter referred to as 'Stakeholder Report 2010].
[73] *See,* chapter 6.1.3.

the harsh conditions on death row generally, and two Stakeholders provided information specifically regarding California's death row, that were not included in the final report. Even if the Stakeholders adopt the thematic submissions, it is imperative that the OHCHR provides clarity, potentially through a briefing document, on how it compiles these reports to allow the Stakeholders to have this information when compiling their submissions in future UPRs.[74]

Four recommendations were made regarding prison conditions generally, which can also be related to death row. However, the US accepted the recommendation from Iran on the prohibition of torture in its prisons, on the basis that it believed would require no further action to implement, regardless of what international law prescribes. This thesis argued that it may have led to more meaningful implementation by the US if Iran had provided a more specific recommendation, detailing how the US might ensure the prohibition of torture in its prisons, to bring it in line with its international obligations.[75]

In 2015, Ireland stated its concerns about conditions on death row during the interactive dialogue, but the US did not address this. To remedy this in future UPRs, it was suggested that first, member states should use the advance questions to ask the US delegation specific questions on conditions on death row,[76] and second, they should follow that up with specific recommendations on ways to remedy the harsh conditions.[77] There was also a recommendation made by Japan on general prison conditions, which the US accepted but has shown no sign of implementing. This thesis argued that the follow-up to the review part of the UPR requires improving, through ensuring states explain why they accepted or noted a recommendation, making the mid-term reports a pivotal part of the UPR, and considering the creation of a specific mandate for a UPR Special Procedure.[78]

Solitary Confinement

Section 6.2 dealt with solitary confinement on death row. In the 2010 UPR, USHRN had provided a corpus of information regarding solitary confinement in its Death Penalty Annex to its individual submission. However, as this was an Annex document, it was not cited in the final report and it is very unlikely that member states would have read this individual document. This furthered the argument that thematic Stakeholder submissions should be encouraged, as one Stakeholder could have used its individual submission to provide detailed information on solitary confinement within the death penalty, increasing the chance of this issue being referenced in the main Stakeholder Report.[79]

[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] *See,* chapter 6.1.4.
[79] *See,* chapter 6.2.3.

The remainder of the discussions on solitary confinement in 2010 were regarding prisons generally, not death row. HRW had made a specific recommendation on solitary confinement in its individual submission, but this was not measurable, adding to the argument that Stakeholders should be permitted to submit advance questions to raise key issues such as this.[80] Although Sweden made a general recommendation regarding prisoners' rights, this was very broad and was therefore not implemented, furthering the argument that member states need to increase the specificity of their recommendations.[81]

In 2015, there was more discussion of solitary confinement in the US UPR. Similar to the HRW recommendation in 2010, JS41 provided another in its individual submission, which again adds to the argument that Stakeholders providing advance questions would raise awareness of the issue of solitary confinement, whilst encouraging the US to adhere to international standards.[82] The analysis identified that JS24 was the main Stakeholder that submitted information on solitary confinement in 2015, indicating that organised thematic submissions could reduce the amount of duplication between Stakeholders.[83] Furthermore, JS24 provided four cogent recommendations, providing additional evidence for allowing Stakeholders to submit advance questions.[84] However, this thesis provided one criticism of these otherwise clear recommendations provided by JS24, in that there was no mention of death row, despite the report referencing the psychological effects of solitary confinement on death row.[85] JS24 could have added 'death row' to its list of places where solitary confinement is used, to ensure solitary confinement on death row attracted the attention it requires.[86]

Azerbaijan asked an advance question, based upon the information in the Compilation Report, providing more practical evidence that the member states are utilising the main reports when collating their advance questions or recommendations. This thesis argued that this evidence makes it even more important that the OHCHR provides clear material on how it compiles its reports.[87] Furthermore, the US did not respond to this advance question, and it was argued that the advance questions process requires formalising to have the most impact upon key human rights issues.

[80] Ibid.
[81] *See,* chapter 6.2.4.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.

Death Row Phenomenon

Section 6.3 considered the death row phenomenon, which is widely agreed upon to include three prongs. One, harsh conditions on death row, two, a prolonged wait for execution, and three, the adverse psychological effect of being sentenced to death.[88]

In the 2010 US UPR, only the Stakeholders in their individual submissions discussed the death row phenomenon. For example, both USHRN and HRA went into detail about the effects of the death row phenomenon and gave specific examples, including the particular problem on California's death row. However, none of this information was conveyed in the final report.[89] Furthermore, the Compilation Report provided no information regarding the death row phenomenon. This was despite the fact that, in 2006, CAT had provided a report on the US which documented its concerns over the effects of the death row phenomenon.[90] It was argued that this was key information regarding the death row phenomenon that member states may have used to prepare their recommendations, and it pointed to the need for transparency from the OHCHR as to how this report is compiled.[91]

Furthermore, no recommendations were made by member states on the death row phenomenon. It was argued that, in order to encourage US courts to entertain appeals on the grounds of the death row phenomenon, the UN member states should make specific recommendations directed towards the judiciary within the US UPR.[92]

However, disappointingly, there was no reference to the death row phenomenon whatsoever in the 2015 US UPR.[93] In order to encourage discussion of the death row phenomenon in future reviews, and other human rights issues generally within the UPR, this thesis argued that four key changes should be made to the mechanism. First, thematic Stakeholder submissions would allow at least one Stakeholder to consider the death row phenomenon in detail, as USHRN and HRA did in 2010.[94] Second, more transparency from the OHCHR as to how the Stakeholder Report is compiled would help Stakeholders when compiling the thematic

[88] *Kirkwood v United Kingdom* (App No 10308/83) (1985) 37 DR 158, 184; *Soering v United Kingdom* (1989) 11 EHRR 439; William A Schabas, *The Death Penalty as Cruel Treatment and Torture* (Northeastern University Press 1996); William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 141; Jon Yorke, 'Inhuman Punishment and Abolition of the Death Penalty in the Council of Europe' (2010) European Public Law 16, no 1, 77-103, Christian Behrmann & Jon Yorke, 'The European Union and the Abolition of the Death Penalty' (2013) 4 No 1 Pace Intl L Rev Online Companion 1, 64; Amy Smith, 'Not "Waiving" but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution' (2008) 17 B U Pub Int L J 237, 244, 240; Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?' (2000) 11 Eur J Intl L 833, 836.
[89] *See,* chapter 6.3.3.
[90] UN Committee Against Torture, 'Conclusions and Recommendations of the Committee Against Torture – United States of America' (25 July 2006) UN Doc CAT/C/USA/CO/2 para 9.
[91] *See,* chapter 6.3.3.
[92] Ibid.
[93] *See,* chapter 6.3.4.
[94] *See,* chapter 7.2.2.

submission.[95] Third, member states should utilise the advance questions to raise the death row phenomenon as an issue.[96] Fourth, member states should consider targeting its recommendations to the judiciary, to further Justice Breyer's argument regarding excessive delays in the capital system.[97]

Methods of Execution

Section 6.4 analysed methods of execution. In 2010, there was one reference to potential pain and suffering caused by the lethal injection by CAT in the Compilation Report, but no discussion of methods of execution in the main Stakeholder Report, despite AHR and IACHR reporting on it.[98] This also potentially led to the lack of advance questions and recommendations on methods of execution in the 2010 UPR. It was argued that this provided a striking example of where fundamental changes must be made to the UPR in order for it to function effectively as a human rights mechanism generally, to hold the US to account to its international obligations when administering the death penalty, and also to facilitate the abolition of capital punishment in the US. First, the content of the individual submissions must be cogent in order for the OHCHR to include it in the final report.[99] Second, the OHCHR must provide transparency regarding how it compiles the Stakeholder Report, perhaps through a briefing note on its website.[100] Third, Stakeholders should consider submitting thematic reports, as an attempt to ensure that important points, such as methods of execution, are not overlooked.[101]

There was much more discussion of methods of execution in 2015, most likely due to the number of botched executions that took place between the 2010 and 2015 UPRs. For example, in the National Report, the US addressed the fact that SCOTUS was hearing a case about the constitutionality of the lethal injection.[102] However, during the UNHRC plenary session in September 2015 following the *Glossip* judgment, Ireland noted that it 'continued to be concerned about the manner in which the death penalty is implemented [and] also regretted that [SCOTUS] had recently upheld the use of the lethal injection'.[103] It was also argued that because the *Glossip* judgment had not been handed down before the review in 2015, the US 2020 UPR must address the judgment and its ramifications.[104]

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[95] *See,* chapter 7.1.1.
[96] *See,* chapter 7.3.2.
[97] *See,* chapter 7.4.3. *Glossip v Gross* 135 S Ct 2726, 2764-72 (2015).
[98] *See,* chapter 6.4.3.
[99] *See,* chapter 7.2.3.
[100] *See,* chapter 7.1.1.
[101] *See,* chapter 7.2.2.
[102] *See,* chapter 6.4.4.
[103] UNHRC, 'Draft Report of the Human Rights Council on its Thirtieth Session' (10 May 2016) UN Doc A/HRC/30/2 para 380 [hereinafter referred to as 'Report of the UNHRC Thirtieth Session'].
[104] *See,* chapter 6.4.4.

The Compilation Report cited the UN Secretary-General's report on a moratorium on the death penalty and the comments about the uncertainty of untested methods of execution.[105] However, upon reading the full report of the UN Secretary-General, it had gone into much more detail, particularly about drug secrecy laws in the US. JS17 also noted the secrecy surrounding drugs, and Sweden and France provided recommendations on the origin of lethal injection drugs.[106] However, the US noted these recommendations and provided no reasons why. It was therefore argued that the state under review should be required to provide reasons why they accept and note recommendations to encourage transparency.[107]

JS17 took the reins on this issue in its individual submission, which was a positive indication that thematic Stakeholder submissions could be successful. However, given that the information provided by JS17 did not make it into the final Stakeholder Report, this made it even more important for clear guidance to be provided on how the OHCHR decides on the content of the Stakeholder Report.[108] Sweden and Belgium asked advance questions on methods of execution, but these were not addressed by the US. It was argued that the advance questions require reform, including formalising the process and having the troika encourage the state under review to acknowledge the questions.[109]

Chapter Seven

Chapter seven collated together the recommendations made to improve the UPR throughout chapters four, five, and six, and provided possible ways of implementing them. Six areas of the UPR that require reform were identified: (1) the role the OHCHR plays, (2) the role of the Stakeholders, (3) the advance questions, (4) the recommendations process, (5) the follow-up to the review, and (5) the publicity of the UPR. These recommendations provide a contribution to the scholarship and policy approaches to the UPR.

The role of the OHCHR requires improvement in two ways. First, it needs to be more transparent in how it collates its two reports, potentially through publishing a briefing paper on its UPR repository.[110] Second, the page limits on the documents need to be relaxed particularly for member states that receive high numbers of individual Stakeholder submissions and

[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] *See,* chapter 7.1.1.

recommendations from UN bodies. To implement this, it was suggested that a formal review of the UPR would be required.[111]

The role of the Stakeholders can be reformed in three ways. First, the Stakeholders should be allowed to submit advance questions, which would involve a formal review of the UPR.[112] Second, thematic Stakeholder submissions on capital punishment should be encouraged. Although this would be harder to realise in practice, in the first instance, the larger Stakeholders that have more resources could work together to produce thematic reports.[113] Third, Stakeholders should carefully consider the content of their individual submissions, which can be conveyed to the Stakeholders during the Pre-sessions conducted by UPR Info.[114]

Furthermore, the advance questions require formalising. This would include giving the documents a UN document number and translating them into the six official UN languages, using the same template as the other UPR documents. The troika should also play a particular role in ensuring that the state under review acknowledges the advance questions during the interactive dialogue.[115] To implement this, it would require a formal review of the UPR. Member states also need to engage further with the advance questions. To implement this change, the UPR Pre-sessions would be the ideal platform, as they attract wide state delegation attendance. It was also proposed that this could also provide the opportunity for joint advance questions to be formulated, as side briefing sessions with numerous government delegations take place at the Pre-sessions, creating an environment for collaborations.[116]

In terms of the recommendations, three ways to improve the process were suggested. First, the recommendations should be thematically grouped together to remove the issue of over-burdening the state under review, which the troika already does, albeit inconsistently. The grouping together of the recommendations could be implemented through a formal change, for example, through a review of the UNHRC and its mechanisms, or it could be a simpler arrangement of the UNHRC asking the troika before each UPR to ensure it groups similar recommendations together.[117] Second, the specificity of the recommendations should be increased to encourage implementation, which could be implemented via a briefing at the UPR Info Pre-sessions.[118] Third, recommending states should place more focus on the target

[111] *See,* chapter 7.1.2.
[112] *See,* chapter 7.2.1.
[113] *See,* chapter 7.2.2.
[114] *See,* chapter 7.2.3.
[115] *See,* chapter 7.3.1.
[116] *See,* chapter 7.3.2.
[117] *See,* chapter 7.4.1.
[118] *See,* chapter 7.4.2.

audience, including US States and courts, and this could also be addressed through a briefing at the UPR Info Pre-sessions.[119]

The follow-up to the review also requires remedying, as the reliance upon recommendations accepted in the previous review as a means of follow-up is hindering the positive role of the UPR. It was suggested that there are three potential ways this could be improved to further all three aims of this thesis. First, the state under review should provide responses to accepted and noted recommendations, which would require a formal change to the UPR.[120] Second, engagement with the mid-term reporting should be improved, which would also require a formal change to the UPR.[121] Third, a new, thematic special procedures mandate could be created specifically for the follow-up to the UPR, which would involve the creation of the new mandate and the hiring of a Special Rapporteur.[122]

Finally, it was argued that the UPR requires more publicity, and there are a number of key actors that have the responsibility to do this. These actors include, UN member states, Stakeholders, practitioners, academics, courts, and the media.[123]

The thesis also noted the potential limitations to these recommendations being realised in practice. It noted that, before there can be any implementation of these recommendations, they must be transferred from the thesis into the wider world. As such, it was suggested that a dialogue must be started, for example, with the OHCHR, the UN member states, and the Stakeholders. In the first instance, UPR Info will be approached to gain their expertise on how these recommendations can be realised.

These amendments to the UPR intend to address each of the key aims of this thesis. They intend to improve the UPR mechanism generally, encourage US adherence to international death penalty standards, and gather evidence to further the abolition of the death penalty through the Steikers' blueprint in the future.

8.2 Limitations of the Research

Although this thesis has provided an in-depth analysis of the UPR mechanism in the context of the abolition of the death penalty in the US, there were limitations to the research. First, only two UPR cycles could be analysed, given that the US has only been through two cycles of review. Second, in order to provide the required detail of a PhD thesis, only one theme

[119] *See,* chapter 7.4.3.
[120] *See,* chapter 7.5.1.
[121] *See,* chapter 7.5.2.
[122] *See,* chapter 7.5.3.
[123] *See,* chapter 7.6.1.

within one UN member state could be analysed, namely the death penalty in the US. Third, the findings of this study are limited to the author's own review and other scholars may have identified other themes within the data. Finally, although the reforms argued for in this thesis will benefit the UPR mechanism generally, they were formulated within the context of the abolition of the death penalty in the US.

8.3 Future Research

This thesis has provided a detailed analysis of the UPR, and, from this, it has created a number of future avenues of research. In the first instance, the recommendations argued for in this thesis need to be addressed in practice. To do this, the author will firstly approach UPR Info, to discuss the viability of them being realised in practice, and for UPR Info's expert opinion as to how this can be facilitated.[124] Thereafter, a dialogue will be created with Stakeholders and the OHCHR in order to discuss how the recommendations can be implemented to improve the UPR.

Furthermore, the author will be submitting a Stakeholder Report with the Centre for Human Rights at Birmingham City University to the 2020 US UPR. This will build upon the findings of this thesis, raising a number of issues articulated within the three capital themes identified.

As one of the limitations of this research was that only one theme and one state could be analysed, the author will be expanding her research on the UPR, and collaborating with other scholars. This will include research on the UPR in other states, and on other issues such as the right to health, the right to education, and women's rights. Moreover, the UPR gives rise to comparative studies, one such being the use of life without the possibility of parole sentencing in the US and UK, and how the UPR approaches this.

What is clear from this thesis is that further research must be conducted on the UPR. This will benefit the mechanism to ensure its effectiveness, both as a human rights mechanism generally, and as a vehicle to facilitate the abolition of the death penalty in the US.

[124] *See,* chapter 7.7.

APPENDIX

UPR DEATH PENALTY RECOMMENDATIONS RECEIVED BY THE US

2010

Recommending State	Recommendation	Reference[125]	US Response	Reference[126]
France	'Take the necessary measures to consider lifting the United States reservation to article 5, paragraph 6 of the International Covenant on Civil and Political Rights that bans the imposition of the death penalty for crimes committed by persons under 18'.	Para 92.48.	Supported.	Para 28.
Uruguay	'Consider the withdrawal of all reservations and declarations that undermine the objective and spirit of the human rights instruments, in particular reservation to article 6 paragraph 5 of the International Covenant on Civil and Political Rights that bans the imposition of the death penalty to those who committed a crime when they were minors'.	Para 92.49.	Supported.	Para 28.
Austria	'Withdraw the reservation to article 6, paragraph 5 of the International Covenant of Civil and Political Rights and consider further to abolish the death penalty in all cases'.	Para 92.50.	Noted.	Para 30.

[125] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (4 January 2011) UN Doc A/HRC/16/11.
[126] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum' (8 March 2011) UN Doc A/HRC/16/11/Add1.

Mexico	'Take appropriate action to resolve the obstacles that prevent the full implementation of the Avena Judgment of the International Court of Justice and, until this occurs, avoid the execution of the individuals covered in said judgment'.	Para 92.54.	Supported.	Para 28.
Sweden	'A national moratorium on the death penalty is introduced with a view to completely abolish the penalty and, before such a moratorium is introduced, to take all necessary measures to ensure that any use of the death penalty complies with minimum standards under international law relating to the death penalty such as under article 6 and 14 of the International Covenant on Civil and Political Rights'.	Para 92.118.	Supported in part.	Para 8.
Russian Federation	'Consider the possibility of announcing moratorium on the use of the death penalty'.	Para 92.119.	Noted.	Para 9.
Various	'Establish a moratorium on the use of the death penalty at the federal and state level as a first step towards abolition (United Kingdom); Establish a moratorium on executions on the entire American territory, with a view to a definitive abolition of the death penalty (Belgium); Establish, at all levels, a moratorium on executions with a view	Para 92.120.	Noted.	Para 9.

	to completely abolish the death penalty (Switzerland); Adopt a moratorium on the use of the death penalty with a view to abolishing capital punishment in federal and national legislations (Italy); Establish a moratorium to the death penalty with a view to its abolition (Uruguay); Impose a moratorium on executions with a view to abolishing the death penalty nationwide (New Zealand); Work towards a moratorium on executions with the view to abolishing the death penalty, in conformity with General Assembly resolution 62/149, adopted on 18 December 2007 (Netherlands)'.			
Cyprus	'Take all necessary measures in order to impose a moratorium on the use of the death penalty, with a view to abolishing it both at the federal and State levels'.	Para 92.121.	Noted	Para 9.
Various	'Abolish the death penalty and in any event, establish a moratorium as an interim measure towards full abolition (Australia); Abolish capital punishment and, as a first step on that road, introduce as soon as practicable a moratorium on the execution of death sentences (Hungary); That steps be taken to set federal and state-level moratoria on	Para 92.122.	Noted.	Para 9.

	executions with a view to abolish the death penalty nationwide'.			
Slovakia	'Impose a nationwide moratorium on executions and commute existing death sentences to imprisonment term with a view to abolish the capital punishment entirely'.	Para 92.123.	Noted.	Para 9.
Turkey	'Consider abolishing death penalty'.	Para 92.124.	Noted.	Para 9.
Germany	'Abolish the death penalty'.	Para 92.125.	Noted.	Para 9.
France	'Implement at the federal level a moratorium on executions'.	Para 92.126.	Noted.	Para 9.
Various	'Begin a process leading to the ending of the death penalty punishment (Ireland); Pursuing the process to abolishing the death penalty (Holy See)'.	Para 92.127.	Noted.	Para 9.
Nicaragua	'Abolish as soon as possible the death penalty in the 35 Federal States where this brutal practice is authorized'.	Para 92.128.	Noted.	Para 9.
Algeria	'Study the possibility for the Federal Government of campaigning in favour of applying the United Nations Moratorium on the death penalty'.	Para 92.129.	Noted.	Para 9.
Spain	'Establish a de jure moratorium of the death penalty at the federal level and in the military justice, in view of its abolition and as an example for the States that still retain it'.	Para 92.130.	Noted.	Para 9.
Denmark	'That, until a moratorium is applied, steps be taken to restrict the number of	Para 92.131.	Noted.	Para 9.

	offences carrying the death penalty'.			
Norway	'A review of federal and state legislation with a view to restricting the number of offences carrying the death penalty'.	Para 92.132.	Noted.	Para 9.
Venezuela	'Abolish the death penalty, which is also applied to persons with mental disabilities and commute those which have already been imposed'.	Para 92.133.	Noted.	Para 9.
Cuba	'End the prosecution and execution of mentally-ill persons and minors'.	Para 92.134.	Supported in part.	Para 8.
Ireland	'Extend the exclusion of death penalty to all crimes committed by persons with mental illness'.	Para 92.135.	Supported in part.	Para 8.

2015

Recommending State	Recommendation	Reference[127]	US Response	Reference[128]
Timor-Leste	'Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty'	Para 176.10.	Noted.	Para 22.
Chile	'Sign and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty'.	Para 176.11.	Noted.	Para 22.
Namibia	'Consider the ratification of the Second Optional Protocol to the	Para 176.12.	Supported.	Para 20.

[127] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America' (20 July 2015) UN Doc A/HRC/30/12.
[128] UNHRC, 'Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1' (14 September 2015) A/HRC/30/12/Add1.

	International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty'.			
Australia	'Establish a formal moratorium on the death penalty with a view to ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty'.	Para 176.13.	Noted.	Para 10.
Gabon	'Adhere to international legal instruments to which it is not yet a party, particularly the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty'.	Para 176.14.	Supported in part.	Para 21.
Various	'Abolish the death penalty in those states where it is still used (Nicaragua) / Abolish the death penalty in all states of the Union (Ecuador)'.	Para 176.165.	Noted.	Para 10.
Costa Rica	'Abolish the death penalty'.	Para 176.166.	Noted.	Para 10.
Bolivia	'Abolish the death penalty'.	Para 176.167.	Noted.	Para 10.
Austria	'Continue efforts towards abolishing the death penalty'.	Para 176.168.	Noted.	Para 10.
Congo	'Reduce gradually the number of persons sentenced to death, and ensure that efforts on this matter are pursued'.	Para 176.169.	Noted.	Para 10.
Lithuania	'Introduce a moratorium at the federal level with view to achieving nationwide	Para 176.170.	Noted.	Para 10.

	moratorium of capital punishment as a first step to abolishing such penalty'.			
Luxembourg	'Establish a federal moratorium on the death penalty with a view to the total abolition of the death penalty in the United States'.	Para 176.171.	Noted.	Para 10.
Nepal	'Establish a moratorium on death penalty at the federal and states levels with a view to ultimately achieve nationwide legal abolition'.	Para 176.172.	Noted.	Para 10.
Uruguay	'Establish a moratorium on the death penalty aiming at its complete abolition in all states'.	Para 176.173.	Noted.	Para 10.
Argentina	'Establish a moratorium on the application of the death penalty aimed at its abolition and also condone the death penalty for an Argentinian citizen, Victor Saldano, who has been on death row since 1996'.	Para 176.174.	Noted.	Para 10.
Various	'Impose a moratorium on executions with a view to abolishing the death penalty at the federal and state levels (Namibia) / Institute a moratorium on the application of the death penalty with a view to abolition (Togo) / Establish, at the federal level, a moratorium on executions with a view to abolishing the death penalty (France) / Establish an official moratorium on the use of the death penalty (Montenegro) /	Para 176.175.	Noted.	Para 10.

	Establish a moratorium on the application of the death penalty (Spain) / Impose a moratorium on executions and abolish the death penalty in all states of the United States (Turkey) / Ensure the establishment of a moratorium of the death penalty in those states that have not abolished it yet (Chile)'.			
Rwanda	'Work towards a moratorium on executions with a view of abolishing the death penalty'.	Para 176.176.	Noted.	Para 10.
Portugal	'That federal and state authorities impose a moratorium on executions with a view to abolishing the death penalty nationwide'.	Para 176.177.	Noted.	Para 10.
Iceland	'Impose a moratorium on executions with a view to abolishing the death penalty nationwide'.	Para 176.178.	Noted.	Para 10.
Ireland	'Impose a moratorium on executions with a view to abolishing the death penalty nationwide'.	Para 176.179.	Noted.	Para 10.
Sweden	'Introduce a national moratorium on the death penalty aiming at complete abolition and take all necessary measures to ensure that the death penalty complies with minimum standards under international law. Exempt persons with mental illness from execution. Commit to ensuring that the origin of drugs being used is made public'.	Para 176.180.	Supported in part.	Para 9.

Russian Federation	'Impose a moratorium on the use of the death penalty'.	Para 176.181.	Noted.	Para 10.
Azerbaijan	'Impose at least a moratorium on the death penalty'.	Para 176.182.	Noted.	Para 10.
Germany	'Formally establish a moratorium on executions at the federal level while engaging with retentionist states to achieve a nationwide moratorium with the objective to ultimately abolish the death penalty nationwide'.	Para 176.183.	Noted.	Para 10.
Netherlands	'Take all necessary steps to work towards an immediate moratorium on execution of the death penalty, with a view to a complete abolishment, in line with international human rights standards such as the right to live'.	Para 176.184.	Noted.	Para 10.
Slovakia	'Take necessary steps to introduce a moratorium on the use of the death penalty at the federal and state levels'.	Para 176.185.	Noted.	Para 10.
New Zealand	'Impose a moratorium on executions with a view to abolishing the death penalty for federal offences'.	Para 176.186.	Noted.	Para 10.
Estonia	'Impose a moratorium on executions with a view to abolishing the death penalty nationwide, and ensure that prosecutors in all jurisdictions cease pursuing death sentences'.	Para 176.187.	Noted.	Para 10.
Sierra Leone	'Continue efforts to establish a moratorium and eventually abolish	Para 176.188.	Noted.	Para 10.

	capital punishment in all states'.			
Italy	'Take into consideration the possibility of adopting a moratorium of capital executions at the state and federal levels, given that 26 states have abolished or adopted a moratorium on capital executions'.	Para 176.189.	Noted.	Para 10.
Various	'Consider as a first step the application of a moratorium on executions, both at the state and federal levels, with a view to ultimately abolishing the death penalty (Cyprus) / Consider imposing an official moratorium on executions toward the complete abolition of the death penalty in the country (Greece)'.	Para 176.190.	Noted.	Para 10.
Holy See	'Consider introducing at the federal level a moratorium on the use of the death penalty with a view to its permanent abolition'.	Para 176.191.	Noted.	Para 10.
Uzbekistan	'Consider adoption of a moratorium on the death penalty at the federal level'.	Para 176.192.	Noted.	Para 10.
Norway	'A review of federal and state legislation to restrict the number of offences carrying the death penalty and steps towards federal- and state-level moratoriums on executions with a view to its permanent abolition'.	Para 176.193.	Noted.	Para 10.
Angola	'Identify the root causes of ethnic disparities concerning especially those sentenced to capital punishment in order to	Para 176.194.	Supported	Para 8.

	find ways for eliminate ethnic discrimination in the criminal justice system'.			
France	'Identify the factors of racial disparity in the use of the death penalty and develop strategies to end possible discriminatory practices'.	Para 176.195.	Supported	Para 8.
Spain	'When continuing to implement the death penalty, do not apply it to persons with intellectual disabilities'.	Para 176.196.	Supported in part.	Para 9.
France	'Ensure that no person with a mental disability is executed'.	Para 176.197.	Supported in part.	Para 9.
Belgium	'Take specific measures in follow-up to the recommendations of the Human Rights Committee to the United States in 2014 with regards to capital punishment such as measures to avoid racial bias, to avoid wrongful sentencing to death and to provide adequate compensation if wrongful sentencing happens'.	Para 176.198.	Supported in part.	Para 9.
Democratic Republic of the Congo	'Strengthen the justice sector in order to avoid imposing the death penalty on those persons wrongly convicted, and reconsider the use of methods which give raise to cruel suffering when this punishment is applied'.	Para 176.199.	Supported.	Para 8.
Poland	'Strengthen safeguards against wrongful sentencing to death and subsequent wrongful execution by	Para 176.200.	Supported.	Para 8.

	ensuring, inter alia, effective legal representation for defendants in death penalty cases, including at the postconviction stage'.			
Bulgaria	'Continue the efforts on the progress towards the abolishment of the death penalty, based on the Department of Justice's review of how it is being applied in the country'.	Para 176.201.	Noted.	Para 10.
France	'Commit to full transparency on the combination of medicines used during executions by injection'.	Para 176.202.	Noted.	Para 10.

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