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The Implacable Ritual

**A study examining the inertia of death penalty abolition within the
Universal Periodic Review, despite tacit support and global trends.**

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Master's Thesis in Public International Law (Advanced)

Specialisation: International Criminal Law

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17 July 2015

ACKNOWLEDGEMENTS

My passion for the abolition of death penalty began when, as an undergraduate law student, I was exposed to the callousness that was shown by the justice system of Singapore in executing a young Australian, Van Nguyen. Nothing positive can be said to come out of the tragic and unnecessary death of a young, fit and remorseful human being, however it did show me that my chosen profession was capable of incomprehensible cruelty. Julian McMahon, Van's lawyer, allowed me to work alongside him for many years and through his inspiring and selfless work, helped me develop my opposition to the death penalty. Reprieve Australia also gave me countless invaluable opportunities to pursue my passion, and despite Australia being free from capital punishment, they work tirelessly to see it abolished across the globe. Thank you to Professor William Schabas for his inspiring tutelage and helpful advice in identifying a unique topic within a huge field of scholarship. Also special thanks to Cassie Van and Peter Ong for their support, patience and proof reading.

Finally, this thesis is dedicated to Andrew Chan and Myuran Sukumaran, two young Australians executed by Indonesia this year, who bravely showed the world that we're all more than the worst thing we've ever done.

ABSTRACT

Abolition of the death penalty moves inexorably forward, and yet retentionist states show a level of intractability in accepting and implementing recommendations for abolition within the Universal Periodic Review framework. This thesis conducts an exhaustive study, through the procedures of the Universal Periodic Review, of the justifications provided by States that still retain the death penalty. These justifications demonstrate there is a strong undercurrent of acknowledgement of the inevitability of abolition. Based on the many and varied reasons given by retentionist States, a more effective means of making recommendations for abolition within the Universal Periodic Review is suggested. Furthermore, this thesis explores the ramifications of retentionist States showing a willingness to restrict the death penalty and adhere to international minimum standards. This is particularly relevant in cases where States adhere to obligations outside of their avowed treaty regime. Ultimately this thesis will give an opinion on whether or not the Universal Periodic Review demonstrates a clear and consistent *opinio juris* among retentionist States that is capable of supporting the creation of a customary norm of abolition.

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ABBREVIATIONS

DRC – Democratic Republic of the Congo

DPRK – Democratic People’s Republic of Korea

HRC – Human Rights Council

ECOSOC – Economic and Social Council

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

UN – United Nations

UDHR – Universal Declaration of Human Rights

UNGA – United Nations General Assembly

UPR – Universal Periodic Review

Safeguards – ECOSOC Safeguards guaranteeing the protection of the rights of those facing the death penalty.

1. INTRODUCTION

1.1 Background

“The papers often talked about a debt being owed to society. According to them, it has to be paid. But that hardly appeals to the imagination... there must be a chance of escaping, of breaking this implacable ritual... but when I really thought about it... everything was set against it, and I was caught in the mechanism again.”¹

The words of Meursault in Albert Camus’ *The Outsider* speak of a painful inevitability. They are the words of a man, outcast by society, struggling against a State apparatus that is bent on ending his life. The death penalty is described by Camus as an implacable ritual, which aptly characterises both its inherent brutality and unrelenting persistence. The death penalty has existed as a form of punishment for as long as law has been applied.² It was ubiquitous in Camus’ time, and to his mind the death penalty must have seemed a tragic certainty stemming from our intrinsic human frailties.³

Today we live in a world moving inexorably away from the death penalty.⁴ It is generally applied for a small number of serious crimes,⁵ by an ever decreasing number of States.⁶ The number of executions carried out by retentionist States decreases,⁷ and those who can be subjected to the penalty is also an area of restriction.⁸ The source of this progress is difficult to pinpoint. However, the contribution of international law, and the development of human rights standards are a powerful catalyst for change, both past and present.⁹

¹ Camus, A. (1982). *The Outsider*, Penguin Books, Translation by Joseph Laredo.

² The punishment of death was provided for under the code of Hammurabi. See Schabas, W. (2002). *The Abolition of the Death Penalty in International Law* (3rd ed.), Cambridge: Cambridge University Press, p.3.

³ Meursault’s utter rejection of society is likely an expression of Camus’ despair at the modern prevalence of the death penalty. Our base desire for revenge and retribution lead Meursault to wish that at his execution the people should smile and cheer, reaffirming his desire to no longer be part of this world.

⁴ Schabas (2002), Preface.

⁵ Economic and Social Council, Report of the Secretary-General: Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, UN Doc. E/2015/49, 13 April 2015, pp.35-36.

⁶ General Assembly, Report of the Secretary-General, Moratorium on the use of the death penalty, UN Doc. A/69/288, 8 August 2014, pp.3-4.

⁷ E/2015/49, pp.15-16.

⁸ A/69/288, p.12.

⁹ Schabas W. (2004). *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 Wm. & Mary Bill Rts. J. 417, p.444.

Much like norms against torture and slavery, the death penalty has a chequered history in international law. However, while the former have met universal prohibition and enjoy jus cogens status, the death penalty's journey to abolition is much longer.¹⁰ Far from being exponential, the trend towards abolition is beginning to slow.¹¹ As the number of retentionist States decreases, the remaining States are, by deduction, only the most committed death penalty advocates.

One of the most recent methods of ensuring compliance with human rights standards is the Universal Periodic Review ("UPR"). This process, created by the Human Rights Council ("HRC"), has resulted in a measure of success in encouraging States to achieve progress in the area of human rights protection. And yet, notwithstanding the steady progress towards abolition, there has been limited success through the UPR mechanisms in relation to the death penalty.

Despite this limited success in achieving direct results, there is significant benefit to be drawn from the interaction of retentionist States in the UPR process. Exploring the justifications given by States in retaining the death penalty creates better understanding behind the reasons for retention. Furthermore, such justification also reveal hurdles confronted by retentionist States in moving towards abolition. From this information, a better method of making recommendations can be developed. Finally, the cumulative result of retentionist States providing their views on the death penalty can assist in the development of a customary norm through the identification of *opinio juris*.

1.2 Purpose

The cause of abolition has met strong resistance within the UPR. It has one of the lowest levels of acceptance and highest levels of non-implementation. By analysing the justifications given by the 91 States that retain the death penalty, this study will better establish what elements are of importance to retentionist States. By understanding the central reasons behind the support of the death penalty, this study hopes to develop a better method for abolitionist States to address the issue of the death penalty within the UPR framework.

This study will explore to what extent retentionist States comply with their relevant treaties in persisting with the death penalty. Furthermore, certain States recognise a standard of human rights beyond their avowed obligations. By examining the way in which States talk about the death penalty, we are able to establish that it is often held forward not as an inviolable right, but as a temporary necessity. By exposing this perspective within retentionist States, this study hopes to contribute to the

¹⁰ Schabas (2002), p.20.

¹¹ E/2015/49, p.15; Sitaraman, S. (2009). *State Participation in International Treaty Regimes*, Ashgate Publishing, p.112.

developing *opinio juris* that the death penalty is a punitive measure with a limited half-life; a brutal form of punishment that must be the exception rather than the rule.

For the purposes of this essay, a retentionist State will refer to a State that still retains the death penalty in its law books. In other words, it will include *de facto* abolitionist States. However, it is recognised that in practice a retentionist State refers to one that has not abolished the death penalty and has utilised the punishment in the last 10 years.¹²

1.3 Research Questions

In order to achieve the purpose stated above, the central question addressed by this thesis will be:

- Is there an undercurrent of tacit support for the abolition of the death penalty that can be identified in the comments made by retentionist States within the UPR framework?

In answering this broader question, this thesis will also explore a number of specific questions, such as:

- (i) What are the reasons given by States in retaining the death penalty, and do these reasons comply with their obligations under international law?
- (ii) Why are death penalty recommendations among the least implemented by States?
- (iii) Is there a more effective way of addressing abolition in the UPR when making recommendations to States?
- (iv) Do retentionist States recognise human rights outside of their avowed soft law and hard law obligations?

By answering these more specific questions, this paper will attempt to establish whether or not the UPR has revealed a strong *opinio juris*. Therefore, the final question is:

- (v) Does the UPR truly demonstrate that progress towards abolition is inexorable, or is it evidence of the death penalty's implacability?

1.4 Methods & Materials

This thesis adopts a number of different research methods. Part 2 utilises traditional forms of legal research. By analysing standard sources of international law, it will establish the background and

¹² E/2015/49, p.5.

structure of the UPR and its founder, the HRC. Furthermore, this thesis will establish the current status of the death penalty under international law. By analysing the relevant treaty bodies that seek to address the death penalty,¹³ a clear understanding of the current legal landscape will be established. This section will conclude by broadly assessing the issue of the death penalty within the UPR framework, based on established statistics.¹⁴

Part 3 will take an exhaustive scientific approach to examining the reasons given by the 91 States that retain the death penalty in the UPR. This study will not analyse in detail the circumstances of the death penalty in relation to every single retentionist State within the United Nations (“UN”). States are able to express their views in either their National Report, during the Working Group process, or in follow up documents provided to the troika. This study has comprehensively reviewed the statements and submissions of all retentionist States. By establishing the reasons given, it will be assessed whether they often comply with reality and applicable international law. Finally, a more political analysis will be adopted in assessing whether the current practice of making recommendations to retentionist States can be improved in the UPR process.

1.5 Delimitations

This study does not seek to assess in great detail the effectiveness of the UPR framework. Extensive study already exists on this topic. Furthermore, this thesis will not directly address whether international law in general is an effective method of abolishing the death penalty. In many cases abolition takes place domestically, with either popular support leading to abolition, or legal challenges based on constitutional rights.¹⁵ Finally, this study will not engage in a detailed discussion regarding the moral, or ethical issues that surround the death penalty.

1.6 Outline

Part 2 of this study will lay the foundations for the subsequent analysis. The status of the death penalty under international law will be the first issue that is addressed. Relevant treaties, their established bodies, and any decisions arising from those bodies, all inform the current landscape of the death penalty under international law. Although international law does not impose an absolute

¹³ Both directly and indirectly.

¹⁴ UPR-info, <http://www.upr-info.org/en> (last accessed 16-07-2015).

¹⁵ International Commission Against the Death Penalty (2013), How States abolish the death penalty, Oslo, p.6.

prohibition on the death penalty, a strong abolitionist influence is clear. This influence is mirrored by developing state practice, which shows a trend towards the abolition of the death penalty. Ultimately both these factors demonstrate that international law supports an abolitionist perspective.

Upon establishing the status of the death penalty, Part 2 will turn to the human rights procedures set up by the Human Rights Council, namely the UPR. The UPR is a simplified procedure that has a number of clearly defined goals and methods. Through collaboration between States with the assurance of procedural equality, it aims to bring about concrete and beneficial change on the ground in relation to human rights. This study will briefly look at whether or not this process has been successful, and will conclude that it is a resounding success in terms of universal engagement, and a moderate success in terms of implementation. Having examined the functioning of the UPR, the study will then look at the marriage between the UPR and the death penalty. Part 2 will conclude with the finding that death penalty related recommendations are among the least implemented.

The vital question of why abolition is so commonly rejected at the UPR by retentionist States can only be answered by first conducting a comprehensive study of the reasons given by States. Part 3 will seek to explore this issue in detail. This section will be divided up in sections according to the reasons given by retentionist States. Under the sub-heading of each applicable reason will be a deeper analysis of whether these justifications:

- (i) Comply with the principles of international law;
- (ii) Comply with the factual realities applicable to each State, such as the existence of a mandatory death sentence or the execution of minors;
- (iii) Are capable of leading to a more effective means of addressing retentionist States when making recommendations.

Finally, part 4 will explore the broader question of whether the UPR process demonstrates a trend among retentionist States that tacitly supports abolition. To establish this, the study will draw on the analysis conducted in Part 3 to identify a strong trend of either overt support for abolition, or a recognition that the death penalty is a temporary measure, with abolition as the ultimate goal.

Furthermore, the study will explore the extent to which retentionist States rely on human rights duties outside of their avowed soft and hard law obligations. This study will conclude that this approach by retentionist States can be firmly established. As such, their declarations comply with the abolitionist perspective of international law, as outlined in part 2.

In reaching this conclusion, the study will then assess whether or not such a trend can make a positive contribution to the *opinio juris* of States and that abolition is a customary norm of international law.

Finally, the study will conclude by exploring the benefits of the establishment of such a norm.

2. DEATH PENALTY AND THE UPR

The relationship between human rights enforcement mechanisms and the death penalty is an area of significant academic scholarship.¹⁶ In order to effectively address the way in which the two intersect, it is necessary to establish the foundational elements of both the death penalty and the UPR in their own unique context.

2.1 Death Penalty in International Law

The death penalty is an issue that spans across a number of broader human rights issues. Furthermore, these human rights principles are interwoven. A critical example can be found in the imposition of mandatory death sentences, which can run afoul of the prohibition against cruel and unusual punishment,¹⁷ as well as the protection against arbitrary deprivation of the right to life.¹⁸ Furthermore, while the principles themselves are interwoven, there are a number of human rights instruments which overlap. For example, the right to life is codified in a number of different treaties,¹⁹ all of which are similar, but far from identical. Due to the labyrinthine structure of human rights, it is necessary to clearly establish the key principles that relate to the death penalty. Furthermore, there are a number of international legal realities that contribute to the intersection of international law and the death penalty, particularly through State cooperation.

A number of instruments relate to the restriction of the death penalty, including multilateral treaties such as the International Covenant on Civil and Political Rights (“ICCPR”) and its Second Optional Protocol. The Economic and Social Council (“ECOSOC”) declared a resolution on Safeguards Guaranteeing Protection of Those Facing the Death Penalty (“Safeguards”) which set out clear guidelines relating to application of the death penalty, and are internationally recognised minimum standards.²⁰ The European Convention on the Protection of Human Rights and Fundamental Freedoms has two protocols which deal with the total abolition of the death penalty.²¹ The Protocol to

¹⁶ Schabas (2002), pp.443-445.

¹⁷ Schabas (2002), p.324.

¹⁸ E/2015/49, para.64.

¹⁹ Schabas (2002), pp.6-7.

²⁰ E/2015/49, para.61.

²¹ Council of Europe, Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty, 28 April 1983, ETS 114; Council of Europe, Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances, 3 May 2002, ETS 187.

the American Convention on Human Rights to Abolish the Death Penalty is also a significant abolitionist instrument.²²

2.1.1 Right to life

First and foremost is the right to life, which is the most prominent right restricting the use of the death penalty. A number of instruments and treaties provide for the right to life, including the Universal Declaration of Human Rights (“UDHR”),²³ and ICCPR.²⁴ It also forms part of regional multi-lateral human rights treaties.²⁵ While no reference to the death penalty forms part of the UDHR, it is explicitly provided for in a number of other instruments. The consequences of a right to life in relation to the death penalty have been subject to lengthy debate. Article 6 of the ICCPR was negotiated for 11 years before any agreement was reached.²⁶ As such, it deals in great detail with the issue of the death penalty and now enjoys practically universal acceptance.²⁷

The right to life contained in Article 6 of the ICCPR has been described as both permissive and restrictive.²⁸ The permissive perspective argues that the death penalty is provided as an exception to the right to life and therefore recognition that it is accepted practice. The counter argument describes these exceptions as a “regrettable and temporary compromise”.²⁹ Indeed, one need only look at paragraph 6 of the Article to find the intentions of the drafters clearly expressed. Article 6 is not intended to promote or support the existence of the death penalty, and as such it states that “[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment”.

Four of the six paragraphs of Article 6 refer explicitly to the issue of the death penalty.³⁰ Article 6(2) restricts the death penalty to the “most serious crimes”. No consistent definition has arisen regarding this provision. The Human Rights Committee states in General Comment 6(16) that the provision must be read restrictively.³¹ The ECOSOC Safeguards expand on this threshold. It states the most

²² Organization of American States (OAS), Protocol to the American Convention on Human Rights to Abolish the Death Penalty (“Pact of San Jose”), 8 June 1990, OAS Treaty Series, N° 73.

²³ General Assembly Resolution 217A (III), Universal Declaration of Human Rights, U.N. Doc A/810 at 71, 10 December 1948, Art. 3.

²⁴ ICCPR, UNGA Res. 2200A. International Covenant on Civil and Political Rights. 16 December 1966, Art. 6.

²⁵ ECHR, Art. 2(1); ACHR, Art. 4.

²⁶ Schabas (2002), p.77.

²⁷ Schabas, (2004), p.423.

²⁸ Schabas (2002), p.95.

²⁹ Schabas (2002), p.95.

³⁰ ICCPR, Arts. 6(2), (4), (5), & (6).

³¹ CCPR General Comment No. 6: Article 6 (Right to Life), UN Human Rights Committee (HRC), 30 April 1982, para.7.

serious crimes should be intentional, and that carry “lethal or other extremely grave consequences”.³² This approach was subsequently adopted by the General Assembly (“UNGA”).³³ Furthermore, this restriction is understood to prohibit the death penalty applying to political crimes,³⁴ drug offences,³⁵ and crimes not resulting in death.³⁶

Article 6(5) also clearly prohibits the death penalty being applied to minors and pregnant women. Paragraph 5 refers to persons under the age of 18 at the time of offending. This provision is clear, and is almost universally applied since the U.S., one of the few recalcitrant States, abolished the death penalty for minors in 2005.³⁷ However, in relation to pregnant women, it is unclear whether such a sentence can be carried out subsequent to the mother giving birth.³⁸ Article 6(4) also requires that clemency is available. Finally, Article 6 sets a number of conditions that are to be applied to the death penalty. For example, that it not be arbitrarily imposed,³⁹ that it must be subject to rigorous checks and balances, including appellate procedures,⁴⁰ and that it not be reintroduced following abolition.⁴¹

2.1.2 Cruel and unusual punishment

The focus of human rights and the death penalty is often centered on the right to life, however issues of implementation and methods are also relevant.⁴² The prohibition against cruel and unusual punishment appears in a number of human rights instruments⁴³ and has been used as an indirect means

³² Economic and Social Council, Safeguards guaranteeing protection of the rights of those facing the death penalty, Resolution 1984/50, 25 May 1984.

³³ UN General Assembly (14 December 1984) Human rights in the administration of justice, Resolution A/RES/39/118.

³⁴ The death penalty in relation to political crimes is expressly prohibited in the ACHR, Art. 4(4)

³⁵ Human Rights Committee, 'Concluding Observations, Sri Lanka', para. 14; HRC (8 July 2005) Concluding observations: Thailand, CCPR/CO/84/THA, para. 14; HRC (29 August 2007) Concluding observations: Sudan, CCPR/C/SDN/CO/3, para. 19; HRC (18 June 2010) Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Communications to and from governments, A/HRC/14/24/Add.1, pp. 45–46.

³⁶ *Chisanga v. Zambia*, Communication No. 1132/2002, para. 5.4.

³⁷ *Roper v. Simmons*, SCOTUS.

³⁸ Schabas (2002), p.135.

³⁹ Eg. Mandatory death sentences, See, *Thompson v. St. Vincent and the Grenadines* (No. 806/1998), UN Doc. CCPR/C/70/D/806/1998, para. 8.2.

⁴⁰ “the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal”, General Comment 6, para.7.

⁴¹ In support of this conclusion, see ACHR, Art. 4(3); UN Human Rights Committee: Concluding Observations, Lebanon, UN Doc. CCPR/C/79/Add.78, para.20; Whether or not article 6 prohibits reintroduction of the death penalty is not conclusive, see Schabas (2002), pp.102-104.

⁴² E/2015/49, para.110.

⁴³ ICCPR, Art. 7; CAT, UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations.

of attacking the use of the death penalty.⁴⁴ The Human Rights Committee note in General Comment 20 that the death penalty “must be carried out in such a way as to cause the least possible physical and mental suffering”.⁴⁵ This has been applied in cases relating to the methods of execution,⁴⁶ and the psychological harm arising from such a sentence.⁴⁷

The Convention on the Rights of the Child expressly prohibits the imposition of the death penalty for crimes committed by a person under the age of 18.⁴⁸ This is provided for under the auspices of a provision prohibiting cruel and unusual punishment. In a similar vein, a finding was made by the U.S. Supreme Court prohibiting the execution of children on the basis that it would amount to cruel and unusual punishment.⁴⁹ Most recently the U.S. Supreme Court held, in a deeply divided judgement, that lethal injection does not amount to cruel and unusual punishment.⁵⁰

2.1.3 Right to consular assistance

A number of cases regarding the death penalty have involved elements of international law when dealing with the right to consular assistance.⁵¹ Such cases have involved disputes between States relating to the Vienna Convention on Consular Relations, in particular the right to consular assistance.⁵² The LaGrand case before the International Court of Justice (“ICJ”) involved the execution of two German nationals, who were executed without receiving the consular assistance that is required under the Vienna Convention. The result was the U.S. being found in breach of international law.⁵³ This resulted in an uproar of protest in the Europe, with the German Justice Minister describing it as “barbaric and unworthy of a state based on the rule of law.”⁵⁴ Such cases are not uncommon,⁵⁵ and have resulted in bitter legal disputes between States. While the issues is not

⁴⁴ Schabas (2002), pp.18-19.

⁴⁵ CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), UN Human Rights Committee (HRC), 10 March 1992, para.6.

⁴⁶ UNHRC, Chitat Ng v. Canada, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), paras. 16.3–16.5.

⁴⁷ Schabas, W. (1996). *The Death Penalty as Cruel Treatment and Torture*, Boston: Northeastern University Press, pp.96-97; ECHR, Soering v. The United Kingdom, Application No. 14038/88, 7 July 1989, para.111.

⁴⁸ CRC, UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Art 37(1).

⁴⁹ Supreme Court of the U.S., *Roper v Simmons*, 543 U.S. 551 (2005) 112 S. W. 3d 397.

⁵⁰ Supreme Court of the U.S., *Glossip v. Gross* 576 U.S. (2015) 776 F. 3d 721

⁵¹ Schabas (2002), fn.96.

⁵² United Nations, Vienna Convention on Consular Relations, (1963) 596 UNTS 261, Art 36(1)(b).

⁵³ LaGrand Case (Germany v. United States of America), International Court of Justice (ICJ), 27 June 2001.

⁵⁴ Warren, M. (2004). *Death, Dissent, and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*, 13 Wm. & Mary Bill Rts. J. 309, p.1.

⁵⁵ Supreme Court of the U.S., *Breard v. Gilmore*, 523 U.S. 371 (1998); *Avena and Other Mexican Nationals (Mexico v. United States of America)*, International Court of Justice (ICJ), 31 March 2004.

strictly related to the validity of the death penalty, it is certainly linked to issues of due process, and the necessity for any death penalty regime to adhere to legal standards. Furthermore, it is demonstrative of the critical role that State interaction can play in raising death penalty issues.

2.1.4 State cooperation

The imposition of the death penalty has resulted in a number of disputes between States, causing a disruption in cooperation. The most significant impact on State interactions has been in the area of extradition. The European Court of Human Rights has adopted a number of decisions prohibiting the extradition of persons who face a real risk of being subjected to death penalty.⁵⁶ Similar issues have been raised in the cases relating to extraordinary rendition, whereby the applicants alleged that they were at risk of being subjected to the death penalty, but were transferred regardless.⁵⁷ For this reason, many States refuse to extradite to the U.S.⁵⁸

Not only can the death penalty directly impact on the ability for cooperation between States to be achieved, but it can also severely harm relationships. The death penalty has been described as the Achilles' heel of the U.S. in relation to its foreign policy on human rights issues.⁵⁹ A number of U.S. retired diplomats stated that the practice of executing juveniles would create "diplomatic isolation".⁶⁰ Furthermore, the death penalty is also capable of stalling bilateral agreements, as demonstrated in the dispute between the U.S. and Australia over an agreement that would restrict the applicability of the death penalty to arrested persons.⁶¹ More recently, Indonesia bore the brunt of withering diplomatic criticism after carrying out executions on Brazilian, Dutch and Australian citizens, with all three countries withdrawing their Ambassadors.⁶² The death penalty is no longer an internal measure of criminal justice, but one that has far reaching diplomatic consequences.

⁵⁶ ECHR, *Kaboulov v. Ukraine*, Application No. 41015/04, Judgement of 19 November 2009; ECHR, *Al Nashiri v. Poland*, Application No. 28761/11, Judgement of 24 July 2014.

⁵⁷ ECHR, *Husayn (Abu Zubaydah) v. Poland*, Application No. 7511/13), Judgment of 24 July 2014.

⁵⁸ Schabas (2004), p.422.

⁵⁹ Douglas, D. (2004). Introduction: Death Penalty and International Law, 13 *Wm. & Mary Bill Rts. J.* 305, p.306.

⁶⁰ Warren (2004), p.323.

⁶¹ Warren (2004), p.326.

⁶² The Guardian, 'Brazil and Netherlands recall Indonesia ambassadors over drug executions', 18 January 2015; BBC News, 'Indonesia executions: Australia recalls ambassador', 29 April 2015.

2.1.5 International criminal law

Despite a history of international criminal law adopting the use of the death penalty, recent examples demonstrate otherwise.⁶³ The practice of international criminal law has resulted in a restriction of the death penalty. The most direct impact arises from the creation of tribunals such as the International Criminal Tribunal for Rwanda, which had a direct impact on abolition in the country.⁶⁴ Furthermore, a powerful statement was made by the Security Council in excluding capital punishment from the statute of the International Criminal Tribunal for the Former Yugoslavia, despite the seriousness of the crimes open to the court.⁶⁵ The drafting of the Rome Statute for the International Criminal Court involved discussions of the application of the death penalty, with a conclusion that such a penalty should not be applied.⁶⁶ While this could be touted as a great victory for abolition in international law, Article 80 was included to appease retentionist States, which provided that “[n]othing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.” The inclusion of Article 80 suggests that the Rome Statute is neutral in relation to the death penalty, and this has been relied upon by retentionist States as evidence that no prohibition of the death penalty exists under international law.⁶⁷ Despite this, both the Secretary General and European Union have cited the ICC’s rejection of the death penalty as a “significant international development”.⁶⁸

2.2 History and Purpose of the UPR

Understanding the purpose and structure of the UPR is vital to any study of its processes. Furthermore, the history behind its creation is informative of the issues that confront the UPR’s operation. In essence the UPR is a means of not only reviewing the status of human rights in a certain country, but also bringing about change through the making of recommendations by other States. The UPR is in its infancy, as is its parent the HRC. The UPR was established to replace its predecessor,

⁶³ Schabas (2002), pp.236-237.

⁶⁴ Cassese, A. (2009). *The Oxford Companion to International Criminal Justice*, Oxford University Press, p.291.

⁶⁵ Cassese (2009), p.291.

⁶⁶ Schabas (2002), p.358.

⁶⁷ General Assembly, Note verbale dated 16 April 2013 from the Permanent Mission of Egypt to the United Nations addressed to the Secretary-General, UN Doc. A/67/841, 23 April 2013, p.3.

⁶⁸ Schabas (2002), p.258.

the United Nations Commission on Human Rights due to a perceived failure of the latter.⁶⁹ This failing was due to a lack of independence and the politicisation of the process.⁷⁰

The purpose of the HRC is to promote and strengthen human rights protection across the globe.⁷¹ This mandate is governed by the application of certain core principles, such as the importance of universal coverage and the equal treatment of States.⁷² The UPR is one of the functions which the HRC utilises to fulfill its mandate. It has been described as one of the most important elements of the HRC, and is “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”.⁷³ The objectives of the UPR are to not only achieve progress on the ground, but to assist States in sharing knowledge and praising positive developments.⁷⁴ In conducting the review of a State, the UPR looks at the State’s treaty obligations and any voluntary pledges or commitments.⁷⁵

The structure and procedure of the UPR are not complex, and first involve the submission of a national report by the State under review. Once this report is received, information from a number of stakeholders, as well as questions from other States are compiled and disseminated amongst the working group of States. The working group consists of the 47 Member States of the HRC, and each individual State review is overseen by a troika of States, one that may be chosen from the region of the State under review.⁷⁶ The troika’s role is to facilitate the discussion in the working group, and to ensure that each representative of the Council has an equal amount of time to speak. Each State that sits on the Council, as well as observer States, may make recommendations to the State under review. During the dialogue, the State under review may choose to respond to certain recommendations made. Following the working group, a report is drafted that summarises all comments made.⁷⁷ This report also outlines which recommendations enjoy the support of a State under review, and which were simply noted. All recommendations accepted by the State under review are voluntary commitments.⁷⁸

Recommendations made to States as part of the UPR framework are a central part of ensuring that lasting improvements to human rights can be achieved on the ground. The system recognises that

⁶⁹ Charlesworth, H. & Larking, E. (2015). *Human Rights and Universal Period Review: Rituals and Ritualism*, Cambridge University Press, p.1.

⁷⁰ Freedman, R. (2013). *The United Nations Human Rights Council: A Critique and Early Assessment*, Routledge, p.26.

⁷¹ General Assembly, Human Rights Council: resolution adopted by the General Assembly, A/RES/60/251, 13 April 2006, para.4.

⁷² A/RES/60/251, para.5.

⁷³ A/RES/60/251.

⁷⁴ UN Human Rights Council, Institution-building of the United Nations Human Rights Council, A/HRC/RES/5/1, 18 June 2007, para 4.

⁷⁵ Charlesworth (2015), p.3.

⁷⁶ Charlesworth (2015), p.3.

⁷⁷ Charlesworth (2015), p.4.

⁷⁸ Charlesworth (2015), p.4.

while it may be politically impossible for some States to make recommendations to other States about certain issues, there is often another State that can easily make such a recommendation. However, the process of the UPR has been criticised by some as being far too ritualised.⁷⁹ The ritualisation of proceedings can result in a sense of indifference and a lack of regulation. Further, the UPR has been criticised for its lack of critical analysis behind the justifications States give for refusing recommendations. Some States claim that an asserted right either does not exist or is not culturally applicable.⁸⁰ This is certainly an issue and is explored in greater detail in Part 3. A lack of implementation has been a strong basis for criticism,⁸¹ including the total non-engagement of certain States regarding certain issues.

2.3 Death Penalty within the UPR

The abolition of death penalty is an issue that is raised as a recommendation to nearly every State that retains it. Furthermore, it is one of the most highly non-implemented and least accepted recommendations of the entire UPR process.⁸² It is difficult to ascertain why this is the case, however it is undoubtedly linked to the long history of debate regarding the applicability and legality of the death penalty in international law. Part 3 will attempt to explore in greater detail the possibility of improved practice in making recommendations to retentionist States within the context of the UPR.

In terms of the sources dealt with in the context of the UPR, these include multilateral treaties such as the ICCPR and Second Optional Protocol. Other non-binding instruments such as the ECOSOC Safeguards, although not mentioned directly, are most certainly relevant and inform the discussion generally. The impact of domestic human rights regimes also play a small role, including the American Convention on Human Rights and the European Convention on Human Rights. The Convention on the Rights of the Child, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Finally, resolutions of the UN General Assembly, as well as General Comments of the HRC are referenced to.

A number of recommendations are made to States under review regarding the death penalty. These include recommendations to abolish the death penalty, ratify the Second Optional Protocol and to impose a de jure moratorium. These are examples of high level recommendations that aim primarily at

⁷⁹ Charlesworth (2015), p.8.

⁸⁰ FIACAT (2009), 'Universal Periodic Review: An Ambivalent Exercise,' Report and Recommendations, April 2008 – December 2009, p. 19.

<http://www.upr-info.org/-Articles-and-analyses-.html>.

⁸¹ Freedman, R. (2011). *New Mechanisms of the UN Human Rights Council*, Netherlands Quarterly of Human Rights, Vol. 29/3, pp. 289-323, p.300.

⁸² UPR Info (2014), *Beyond Promises: The Impact of the UPR on the Ground*, p.31.

the end result of the abolitionist agenda. However, there are also a number of more incremental recommendations made to States, including the adherence to minimum standards contained in the ICCPR, and to restrict the number of applicable crimes. Furthermore, recommendations are also made to continue with moratoriums already in place, and in some cases to conduct education and awareness raising. The variations of recommendations are vast, and indeed represent the many different reasons that States have in retaining the death penalty as a form of punishment.

Statistics show that abolition has not had great success within the UPR. Thus far, the first cycle (2008-2011) has been concluded, and the second cycle (2012-2016) is currently in progress. In both cycles, there have been in total 1605 recommendations regarding the death penalty, and only 370 have been accepted by States.⁸³ It should be noted that these statistics of acceptance are inflated due to the fact that States can partially accept recommendations, which may involve the ratification of a number of treaty regimes that include the Second Optional Protocol, for example. Study of the first cycle is particular relevant, given that the second cycle is at this stage uncompleted. 77% of recommendations relating to the death penalty from the first cycle were not implemented.⁸⁴

2.4 Observations and Conclusions

The death penalty in international law holds a complex status. The trend is certainly inexorable,⁸⁵ however it is slowing.⁸⁶ Given its broad ratification, the role of the ICCPR and its restrictions on the death penalty play a vital role in ensuring that retentionist States adhere to them minimum standards in applying the death penalty. However, as part 3 will demonstrate, significant hurdles arise in relation to the States under review failing to acknowledge certain realities, or even the correct standard of protection under international law. This broader weakness of the UPR is not lost on issues relating to the death penalty. Human rights mechanisms have often involved procedures that are collaborative and gentle in their approach. In essence, they adopt a practice of “naming and shaming” which seeks to bring about change by bringing human rights issues to the forefront. The UPR is no exception. For this reason, bringing about change in an area such as the death penalty, is difficult. The process is made even more complex by the slowing trend towards abolition. As more and more States become abolitionist de jure or de facto, the States that remain are only the most intransigent. Despite the limited success of the UPR in bringing about implemented change, it has been extremely effective at adducing concrete statements regarding the reasons and justifications for retention of the death

⁸³ UPR Info, <http://s.upr-info.org/1K8Wlq9>.

⁸⁴ UPR Info (2014), *Beyond Promises*, p.31.

⁸⁵ E/2015/49, para.129.

⁸⁶ E/2015/49, p.15; Sitaraman (2009) p.112.

penalty. What emerges is a unique insight into not only the hurdles facing retentionist States, but their recognition of the inevitability of abolition. The death penalty is a diplomatic inconvenience on retentionist States, and this informs the manner in which many States justify themselves in retaining the death penalty.

3. JUSTIFYING THE DEATH PENALTY

The UPR provides an unprecedented insight into the way States not only utilise the death penalty, but how they justify it. Due to the universal cooperation of States as part of the UPR, it is possible to conduct a comprehensive review of all States that still retain the death penalty.⁸⁷ The comments made by States in order to justify their use of the death penalty vary greatly. As outlined in Part 2, in refusing to comply with recommendations, States take a number of approaches.⁸⁸ Certain States give no reasons at all, making no comment on the death penalty despite a number of recommendations.⁸⁹ Other States seek to appease recommendations by relying on the death penalty's restricted use.⁹⁰ In unpicking the various reasons given by States, it will be possible to explore whether such justifications not only comply with international law, but also whether they comply with reality. As will be outlined in the analysis below, certain States are not accepting of certain realities, such as the execution of children, or the existence of a mandatory death sentences. Furthermore, one of the most common justifications for the retention of the death penalty is its already restricted use. However, such restrictions are not always compliant with the recognised standards of international law.

Establishing the reasons given by the 91 States that retain the death penalty is vital to developing a better approach to encouraging abolition. As outlined in Part 2, despite a strong trend towards abolition globally, such a trend has slowed.⁹¹ This is compounded by the fact that human rights issues in relation to the death penalty are becoming more acute, such as the length of time spent on death row, and the number of death row inmates.⁹² Given that only the most recalcitrant States are retaining the death penalty, the last step is a lengthy process requiring the international community to develop a more effective means to effect change. The UPR is an ideal framework for such progress to take

⁸⁷ E/2015/49, p.6.

⁸⁸ This includes claiming no such right exists, that the right is not culturally applicable, a denial of the facts or non-participation.

⁸⁹ Belize & Brunei, see Appendix 1.

⁹⁰ See Part 3.1.

⁹¹ E/2015/49, p.15; Sitaraman (2009) p.112.

⁹² As a natural consequence of increased moratoriums, persons on death row will spend longer periods of time in detention. Should the courts continue to hand down death sentences, the number on death row will continue to grow. See E/2015/49, para.115.

place. However, it is necessary for States to make such recommendations effectively. At present, this is not the case regarding the majority of recommendations for abolition.

3.1 Restricted Use

States rely on the restricted use of the death penalty as a justification for its retention. Indeed, it is the most frequent justification.⁹³ The basis for a State maintaining the restricted use of the death penalty spans from its imposition only in relation to the “most serious crimes”, to the method in which it is imposed. Such justifications are encouraging as they demonstrate a State’s willingness to place restrictions on the applicability of the death penalty. However, justifications regarding the restricted use of the death penalty are also often inaccurate or unjustified.

3.1.1 Most serious crimes

A large number of States rely on the death penalty applying only to the “most serious crimes” as an indication of compliance with international law. This restriction, as outlined in Part 2, is central to the death penalty’s adherence to human rights standards. Indeed, the ECOSOC’s Safeguards declare first and foremost that crimes which attract the death penalty must be intentional and carry lethal or extremely grave consequences.⁹⁴ However the justification that the death penalty is only applied to the “most serious crimes” is often inconsistent with international law, and in some cases reality. Despite this, it is regularly put forward as a justification by retentionist States within the UPR framework.

China maintained in its national report that the death penalty was only applied to the most serious crimes.⁹⁵ These crimes include a broad range of crimes against the state, drug related offences and other non-fatal crimes such as rape, burglary and kidnapping.⁹⁶ It should be noted that China abolished 13 economic related crimes as part of broader criminal justice reforms. China relied on this development as evidence of the restriction of the death penalty.⁹⁷ Cuba reiterated the application of the death penalty only in the most serious cases.⁹⁸ Similar to that of China, Cuba retains the death penalty for a number of non-fatal crimes, including robbery, rape, drug offences, and crimes against the state.⁹⁹ Cuba stated as part of its national report in the second cycle that its imposition of the death

⁹³ See Appendix 1.

⁹⁴ ECOSOC Safeguards.

⁹⁵ China Working Group, 3 March 2009, A/HRC/11/25, para.43.

⁹⁶ Death Penalty Worldwide, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=China>

⁹⁷ China National Report, 5 August 2013, A/HRC/WG.6/17/CHN/1, para.46.

⁹⁸ Cuba National Report, 4 November 2008, A/HRC/WG.6/4/CUB/1 para.39.

⁹⁹ <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Cuba>

penalty was “in line with UN provisions”.¹⁰⁰ A large number of States raised the death penalty’s restriction to “most serious crimes” as justification for its continued use, including Iraq,¹⁰¹ Jordan,¹⁰² Sri Lanka,¹⁰³ Malaysia,¹⁰⁴ Myanmar,¹⁰⁵ Oman,¹⁰⁶ Saudi Arabia,¹⁰⁷ Pakistan,¹⁰⁸ Iran,¹⁰⁹ Yemen¹¹⁰, USA,¹¹¹ Viet Nam,¹¹² Zambia,¹¹³ Sudan,¹¹⁴ and Singapore.¹¹⁵ In all these cases the death penalty is applied to a number of non-fatal crimes. Egypt stated that its legislation provides for the death penalty in only the most serious cases, including murder and rape.¹¹⁶ This was reiterated again as part of the second cycle, in which Egypt stated that the death penalty continued to be restricted to very serious crimes.¹¹⁷ Despite multiple regime changes, the crimes still cover a broad number of non-fatal offences, such as perjury, abduction, drug trafficking and possession of weapons and ammunition.¹¹⁸ Guinea states that it only applies the death penalty for the most serious crimes, including offences that cause public outrage.¹¹⁹ It is utilised in Guinea as a punitive measure for female genital mutilation.¹²⁰ In reality, kidnapping and arson are also subject to the death penalty.¹²¹

The mercurial nature of the threshold of “most serious crimes” is immediately apparent, and is further complicated by the adoption of language that varies from the chosen wording of the ICCPR. India defends its use of the death penalty in its state report, stating that it applies death penalty in the “rarest of rare” cases for crimes “that shock the conscience of society.”¹²² These crimes include, rape,

¹⁰⁰ Cuba National Report, 7 February 2013, A/HRC/WG.6/16/CUB/1, paras 97-99.

¹⁰¹ Iraq National Report, 18 January 2010, A/HRC/WG.6/7/IRQ/1, para.115; Iraq National Report, 22 August 2014, A/HRC/WG.6/20/IRQ/1, para.10.

¹⁰² Jordan National Report, 9 February 2009, A/HRC/WG.6/4/JOR/1, p.5; Jordan Working Group, 3 March 2009, A/HRC/11/29, para.17.

¹⁰³ Sri Lanka National Report, 2 May 2008, A/HRC/WG.6/2/LKA/1, para.59.

¹⁰⁴ Malaysia National Report, 19 November 2008, A/HRC/WG.6/4/MYS/1/Rev.1, para.89; Malaysia National Report, 6 August 2013, A/HRC/WG.6/17/MYS/1, para.45.

¹⁰⁵ Myanmar National Report, 10 November 2010, A/HRC/WG.6/10/MMR/1, para.37.

¹⁰⁶ Oman National Report, 18 November 2010, A/HRC/WG.6/10/OMN/1, paras 76, 77.

¹⁰⁷ Saudi Arabia Working Group, 26 December 2013, A/HRC/25/3, para.97.

¹⁰⁸ Pakistan Working Group, 4 June 2008, A/HRC/8/42, para.47.

¹⁰⁹ Iran Working Group Addendum, 4 June 2010, A/HRC/14/12/Add.1, para.18.

¹¹⁰ Yemen Working Group, 5 June 2009, A/HRC/12/13, para.9.

¹¹¹ United States of America National Report, 23 August 2010, A/HRC/WG.6/9/USA/1, para.61; United States of America National Report, 13 February 2015, A/HRC/WG.6/22/USA/1, para.49.

¹¹² Viet Nam National Report, 16 February 2009, A/HRC/WG.6/5/VNM/1, para.83.

¹¹³ Zambia National Report, 9 April 2008, A/HRC/WG.6/2/ZMB/1, para.23.

¹¹⁴ Sudan National Report, 11 March 2011, A/HRC/WG.6/11/SDN/1, para.124.

¹¹⁵ Singapore National Report, 2 February 2011, A/HRC/WG.6/11/SGP/1, para.120; Singapore Working Group, 11 July 2011, A/HRC/18/11, para.87.

¹¹⁶ Egypt National Report, 16 November 2009, A/HRC/WG.6/7/EGY/1, p.7; Egypt Working Group, 26 March 2010, A/HRC/14/17, para.93.

¹¹⁷ Egypt Working Group, 24 December 2014, A/HRC/28/16, para.118.

¹¹⁸ Egypt – Amnesty International Submission to UN UPR, 1 September 2009, p.3.

¹¹⁹ Guinea State Report 2010, para 124; Guinea Working Group 2010, para 11.

¹²⁰ Guinea Working Group 2010, para 22.

¹²¹ <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Guinea>.

¹²² India National Report, 8 March 2012, A/HRC/WG.6/13/IND/1, para.28.

kidnapping and drug trafficking.¹²³ Indonesia states that it only applies the death penalty to “very serious crimes”,¹²⁴ including robbery, economic crimes, treason and espionage.¹²⁵ The threshold of “most heinous crimes” was adopted by a number of States, including Tonga¹²⁶, Bangladesh,¹²⁷ Saint Kitts and Nevis,¹²⁸ Saint Lucia,¹²⁹ and Saint Vincent and Grenadines¹³⁰. Of these six States, only Tonga and Bangladesh apply the death penalty to non-fatal offences. The Democratic Republic of the Congo, (“DRC”) in making direct reference to the right to life, stated that such a right was only abrogated under exceptional circumstances.¹³¹ Such circumstances include crimes of armed robbery, drug possession and trafficking, crimes against the state, and some economic offences.¹³² Eritrea states that the death penalty applied only in extreme and limited cases.¹³³ It is certainly the case that many death penalty crimes in Eritrea require that the offending be of “exceptional gravity”, however their death penalty still applies to crimes such as robbery, crimes against the state, and economic crimes.¹³⁴

A large number of States rely on the restriction of the death penalty to only the “most serious crimes”, or variations thereof, as a justification for retaining the death penalty.¹³⁵ However, for nearly every State that has raised such a justification as part of the UPR, the reality is that the domestic laws and practice of the State are in contravention of international law. A number of States utilise the death penalty in relation to drug offending. This is particularly the case in the South-East Asian region.¹³⁶ However, drug offences do not satisfy the threshold of “most serious crimes” under international law.¹³⁷ Obtaining a clear and consistent definition of what satisfies the criteria of the “most serious

¹²³ <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=India>.

¹²⁴ Indonesia Working Group Addendum, 16 June 2008, A/HRC/8/23/Add.1, para.10; Indonesia Working Group Addendum, 5 September 2012, A/HRC/21/7/Add.1, p.3.

¹²⁵ <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Indonesia>.

¹²⁶ Tonga Working Group, 5 June 2008, A/HRC/8/48, para.34; Tonga Working Group Addendum, 3 June 2014, A/HRC/23/4/Add.1, para.14.

¹²⁷ Bangladesh Working Group, 3 March 2009, A/HRC/11/18, para.62.

¹²⁸ Saint Kitts and Nevis, 15 March 2011, A/HRC/17/12, para.10.

¹²⁹ Saint Lucia Working Group, 11 March 2011, A/HRC/17/6, para.38.

¹³⁰ Saint Vincent and the Grenadines Working Group, 11 July 2011, A/HRC/18/15, para.35.

¹³¹ Democratic Republic of the Congo National Report, 3 September 2009, A/HRC/WG.6/6/COD/1, para.36.

¹³² <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Democratic+Republic+of+the+Congo>.

¹³³ Eritrea Working Group Addendum, 8 March 2010, A/HRC/13/2/Add.1, p.2; Eritrea Working Group, 7 April 2014, A/HRC/26/13, para.94.

¹³⁴ <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Eritrea>.

¹³⁵ Lines R (2010) A Most Serious Crime? – The Death Penalty for Drug Offences and International Human Rights Law. *Amicus Journal* 21; as cited in Schabas W. (2010), *Death Penalty for Drug Offences*, Irish Centre for Human Rights, fn.13.

¹³⁶ States such as Indonesia, Singapore, Malaysia, Thailand, Vietnam, see OHCHR (2014), *Moving Away From the Death Penalty: Lessons in South-East Asia*, p.23.

¹³⁷ See Schabas W. (2010), *Death Penalty for Drug Offences*; Lines, R. (2007). *The Death Penalty for Drug Offences: A violation of International Law*, International Harm Reduction Association, London.

crimes” is a complex question,¹³⁸ and has been subject to change over time.¹³⁹ As outlined in part 2, the ECOSOC’s Safeguards state that such crimes “should not go beyond intentional crimes with lethal or other extremely grave consequences.”¹⁴⁰ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions adopted a clearer and more restrictive approach, stating that the death penalty should be limited to cases “where it can be shown that there was an intention to kill which resulted in the loss of life”.¹⁴¹ Far more recently, the Special Rapporteur has stated that international law prohibits the death penalty being applied to drug offences.¹⁴²

While the question of whether drug offences meet the criteria of “most serious crimes” treads a thin interpretative line, there is no question that political, economic and other non-fatal crimes fall well short. In a report by the Secretary-General, he declared that the most serious crimes were restricted to murder or intentional killings, and denounced the use of the death penalty for not only drug offences, but also political, economic, adultery and same-sex offences.¹⁴³ Despite Iran, Yemen and Pakistan maintaining that they only apply the death penalty to the “most serious crimes”, the reality is that in all three countries the death penalty is applied to conduct that should not be criminalised at all, namely apostasy, adultery and same-sex relations.¹⁴⁴ To impose the death penalty for such conduct is clearly in violation of the right to life under the ICCPR.¹⁴⁵ Under the UPR there is a cognitive dissonance in relation to the legal standard of “most serious crimes”. The fact that retentionist States rely on it as an indication of compliance with international human rights standards, despite applying the death penalty to a broad selection of non-fatal crimes, points to a stark misapprehension of its legal meaning.

It is also the case that statements by retentionist States within the UPR framework are not always frank regarding the full extent of the crimes that attract the death penalty. This stems from a larger issue of transparency when it comes to the practice of the death penalty worldwide.¹⁴⁶ The Democratic

¹³⁸ Roger Hood, *The Enigma of the Most Serious Offences*, Sino-British Seminar on the Application Standards and Limitations of the Death Penalty, Beijing, March 2005.

¹³⁹ Indeed, it is argued that the rejection of the death penalty by international criminal tribunals is evidence that not even the most serious of crimes, such as genocide, permits the death penalty. Prokosch, E. (2004). *The Death Penalty versus Human Rights*, in *Death Penalty: Beyond Abolition*, Council of Europe Publishing, Strasbourg, p.28; See also, Schabas (2002), p.110.

¹⁴⁰ ECOSOC Safeguards.

¹⁴¹ UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Report to Commission on Human Rights, E/CN.4/1997/60, 24 December 1996. para.91.

¹⁴² UN Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/11/2/Add.1, 29 May 2009, p.188.

¹⁴³ General Assembly, Report of the Secretary- General, Question of the death penalty, UN Doc. A/HRC/24/18, 1 July 2013, p.7.

¹⁴⁴ Iran Follow-up Report, 2012, para.74; <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Yemen>; <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=pakistan#f84-3>

¹⁴⁵ OHCHR (2014), *Moving Away From the Death Penalty*, p.10.

¹⁴⁶ OHCHR (2014), *Moving Away From the Death Penalty*, p.15.

People's Republic of Korea ("DPRK") stated that only five categories of offences carried the death penalty, and in restricted cases.¹⁴⁷ Establishing a concrete set of laws for which the death penalty is imposed under domestic laws in the DPRK is exceptionally difficult, particularly given the fact that it is believed to conduct extra-judicial killings.¹⁴⁸ However, some definite offences include crimes against the state, kidnapping, rape and drug offences.¹⁴⁹ Examples such as the DPRK, while extreme, are demonstrative of such a practice. A less severe example can be found in Dominica which did not disclose as part of its report that treason was also subject to the death penalty under its domestic law.¹⁵⁰ While Gambia stated that the death penalty was limited to murder and treason, when in fact it also applies to non-fatal crimes of treason.¹⁵¹ Furthermore, the crimes classified as murder in Gambia have a lower standard of intent than is required under international law.¹⁵² In a more severe case, Qatar stated that only murder is subject to the death penalty.¹⁵³ However, in Qatar the death penalty applies to a large number of offences that are non-fatal, including rape, drug offences and economic crimes.¹⁵⁴ Whether such inaccuracies are symptoms of an active desire to mislead, or simply an error in reporting, is difficult to establish. Regardless, it is a further example of the rift between the restrictions on the death penalty relied upon by States within the UPR, and reality.

A small number of States' reliance on the restriction of the death penalty to "most serious crimes" complies with both the law and reality.¹⁵⁵ For example, Jamaica retains the death penalty for the "most egregious" forms of murder.¹⁵⁶ This complies with international law and reality, given that no

¹⁴⁷ Democratic Peoples' Republic of Korea National Report, 27 August 2009, A/HRC/WG.6/6/PRK/1, para.34; Democratic Peoples' Republic of Korea National Report, 30 January 2014, A/HRC/WG.6/19/PRK/1, para.30.

¹⁴⁸ UN Human Rights Council, Report of the commission of inquiry on human rights in the Democratic Peoples' Republic of Korea, A/HRC/25/63, 7 February 2014; Amnesty International, Annual Report: North Korea 2013 <http://www.amnestyusa.org/research/reports/annual-report-north-korea-2013?page=show>; Reuters, North Korea execute official for blunder, 18 March 2010, available at:

<http://www.reuters.com/article/2010/03/18/us-korea-north-currency-idUSTRE62H0DT20100318>

¹⁴⁹ <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=North+Korea>

¹⁵⁰ Dominica Working Group, 5 May 2014, A/HRC/WG.6/19/L.7, para.15; Dominica Summary of Stakeholder Information, 14 January 2014, A/HRC/WG.6/19/DMA/3, para.13.

¹⁵¹ Gambia National Report, 20 January 2010, A/HRC/WG.6/7/GMB/1, para.12; Gambia Working Group, 24 March 2010, A/HRC/14/6, para.7; Gambia State Report, 24 July 2014, A/HRC/WG.6/20/GMB/1, paras 136-138; Gambia Working Group, 24 December 2014, A/HRC/28/6, p.5; <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Gambia>

¹⁵² The ECOSOC Safeguards state that the crimes must be intentional, whereas "the Criminal Code classifies as "murder" offenses which do not meet the usual requirement that the offender have an actual (as opposed to a deemed) intent to kill", see <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Gambia>

¹⁵³ Qatar Working Group, 27 June 2014, A/HRC/27/15, para.71.

¹⁵⁴ <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Qatar#a69-3>

¹⁵⁵ Jamaica, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and Grenadines all relied on the restriction of the death penalty to serious crimes.

¹⁵⁶ Jamaica Working Group, 4 January 2011, A/HRC/16/14, para.36.

further offences attract the death penalty.¹⁵⁷ However, the vast majority of justifications provided by States in the context of the UPR do not adhere with reality or international law. Particularly justifications such as that of Singapore, which is based on the fact that drug offences are culturally considered to be among the most serious crimes.¹⁵⁸ This type of cultural or contextual justification is common. However, the Special Rapporteur on extrajudicial, arbitrary or summary executions has stated that this sort of contextual consideration is invalid. The concept of most serious offences is not one that can bend according to culture.¹⁵⁹ To make interpretations in relation to culture would be directly contradictory to the universality of human rights.¹⁶⁰

3.1.2 Protected categories of persons

The ICCPR states clearly that pregnant women and children under 18 are protected from the application of the death penalty.¹⁶¹ This restriction is relied upon by a number of States throughout the UPR reporting framework. The ECOSOC Safeguards list as the third category the protection of minors, pregnant women, new mothers or the intellectually disabled.¹⁶²

The restriction of death penalty from being applied to children was the subject of a number of comments by States throughout the UPR. Bangladesh stated that persons under 18 were not subject to the death penalty.¹⁶³ The laws in Bangladesh are unclear regarding the protection of minors, and resulted in the UN Committee on the Rights of the Child expressing its concerns and the need for clarification formally.¹⁶⁴ A number of States indicated that the death penalty was not applied to children under the age of 18, including Algeria,¹⁶⁵ Botswana,¹⁶⁶ Belarus,¹⁶⁷ China,¹⁶⁸ North Korea,¹⁶⁹

¹⁵⁷ This is most likely assisted by the close monitoring of the Privy Council which also struck down the use of the mandatory death sentence in 2004; see Judicial Committee of the Privy Council *Privy Council, Lambert Watson v. The Queen*, Conclusion, Appeal No. 36 of 2003, 7 July 2004.

¹⁵⁸ A/HRC/WG.6/11/SGP/1, para.120.

¹⁵⁹ ICOMDP, (2013), *The Death Penalty and the "Most Serious Crimes": A country-by-country overview of the death penalty in law and practice in retentionist states*, p.5.

¹⁶⁰ Roger Hood, (2005), *The Enigma of the Most Serious Offences*.

¹⁶¹ ICCPR, Art. 6(5).

¹⁶² ECOSOC Safeguards; Economic and Social Council, Resolution regarding implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, 1989/64, 24 May 1989, para.1(d).

¹⁶³ Bangladesh Working Group, 8 July 2013, A/HRC/24/12, para.62.

¹⁶⁴ CRC, Concluding Observations: Bangladesh, UN Doc. CRC/C/BGD/CO/4, 26 June 2009, para 46-47.

¹⁶⁵ Algeria National Report, 20 March 2008, A/HRC/WG.6/1/DZA/1, para.46.

¹⁶⁶ Botswana National Report, 5 September 2008, A/HRC/WG.6/3/BWA/1, para 46.

¹⁶⁷ Belarus National Report, 22 February 2010, A/HRC/WG.6/8/BLR/1, para.89.

¹⁶⁸ China National Report, 10 November 2008, A/HRC/WG.6/4/CHN/1, para.43.

¹⁶⁹ A/HRC/WG.6/6/PRK/1, para.34.

Bahamas,¹⁷⁰ Egypt,¹⁷¹ Eritrea,¹⁷² Japan,¹⁷³ Kuwait,¹⁷⁴ Lebanon,¹⁷⁵ Malaysia,¹⁷⁶ Mongolia,¹⁷⁷ Niger,¹⁷⁸ Sudan,¹⁷⁹ Sri Lanka,¹⁸⁰ Thailand,¹⁸¹ USA,¹⁸² Viet Nam,¹⁸³ and Zambia.¹⁸⁴ Similar statements were made by Guinea,¹⁸⁵ India,¹⁸⁶ and Kenya,¹⁸⁷ however no specificity was provided regarding the exact age threshold. As a distinct outlier, Myanmar stated that it does not execute persons under 16 years of age.¹⁸⁸

A small number of States relied upon the fact that children were not subject to execution, despite this assertion not according with reality. In defending its use of the death penalty at the working groups of both the first and second cycles, Yemen stated that the death penalty was not applied to children.¹⁸⁹ In reality, the execution of minors does occur in Yemen, and may be due to inadequate birth records.¹⁹⁰ Saudi Arabia also stated that, in response to recommendations to cease executions of children, the death penalty did not apply to minors.¹⁹¹ This does not comply with reality, and there are reports of persons who were under 18 at the time of the offences, being executed in Saudi Arabia.¹⁹² This concern is reiterated in the concluding reports of the Committee on the Rights of the Child.¹⁹³ The United Arab Emirates¹⁹⁴ and Pakistan¹⁹⁵ also relied on the fact that children were not subject on the death penalty. Both States have executed persons who were under 18 at the time the offences were

¹⁷⁰ Bahamas Working Group, 3 December 2008, A/HRC/WG.6/3/L.2, para.15.

¹⁷¹ A/HRC/WG.6/7/EGY/1, p.8.

¹⁷² Eritrea National Report, 26 November 2009, A/HRC/WG.6/6/ERI/1, para.18.

¹⁷³ Japan Working Group, 14 December 2012, A/HRC/22/14, para.99.

¹⁷⁴ Kuwait Working Group, 16 June 2010, A/HRC/15/15, para.39.

¹⁷⁵ Lebanon National Report, 23 August 2010, A/HRC/WG.6/9/LBN/1, para.33.

¹⁷⁶ A/HRC/WG.6/4/MYS/1/Rev.1, para.90.

¹⁷⁷ Mongolia National Report, 20 August 2010, A/HRC/WG.6/9/MNG/1, para.20.

¹⁷⁸ Niger National Report, 7 November 2010, A/HRC/WG.6/10/NER/1, para.96.

¹⁷⁹ A/HRC/WG.6/11/SDN/1, para.75.

¹⁸⁰ A/HRC/WG.6/2/LKA/1, para.59.

¹⁸¹ Thailand National Report, 19 July 2011, A/HRC/WG.6/12/THA/1, para.33; Thailand Working Group, 8 December 2011, A/HRC/19/8, para.43.

¹⁸² A/HRC/WG.6/9/USA/1, para.63; A/HRC/WG.6/22/USA/1, para.49.

¹⁸³ Viet Nam Working Group Addendum, 16 September 2009, A/HRC/12/11/Add.1, para.21.

¹⁸⁴ A/HRC/WG.6/2/ZMB/1, para.24.

¹⁸⁵ Guinea State Report 2010, para 55.

¹⁸⁶ A/HRC/WG.6/13/IND/1, para.28.

¹⁸⁷ Kenya Working Group, 17 June 2010, A/HRC/15/8, para.105.

¹⁸⁸ A/HRC/WG.6/10/MMR/1, para.37.

¹⁸⁹ A/HRC/12/13, para.53.

¹⁹⁰ Amnesty International, Clemency Urged for Man Facing Imminent Execution in Yemen, 18 January 2011, available at: <https://www.amnesty.ie/news/clemency-urged-man-facing-imminent-execution-yemen>.

¹⁹¹ Saudi Arabia Working Group Addendum, 28 February 2014, A/HRC/25/3/Add.1, para.15.

¹⁹² Amnesty International, Iran: Youth at risk of hanging amid disturbing rise in juvenile executions, 15 July 2014, available at: <https://www.amnesty.org/en/press-releases/2014/07/iran-youth-risk-hanging-amid-disturbing-rise-juvenile-executions/>.

¹⁹³ CRC, Concluding Observations: Saudi Arabia, UN Doc. CRC/C/SAU/CO/2, 17 March 2006, para 32.

¹⁹⁴ United Arab Emirates National Report, 16 September 2008, A/HRC/WG.6/3/ARE/1, p.11.

¹⁹⁵ A/HRC/8/42, p.13.

committed.¹⁹⁶ More significantly, Yemen, Saudi Arabia and Iran actually execute children under the age of 18.¹⁹⁷ Perhaps most brazenly, in response to recommendations to cease executing children, Iran stated that the death penalty is carried out subject to its reservation to article 37 of the Convention on the Rights of the Child.¹⁹⁸ This approach is consistent with Iran's persistence at executing children despite global condemnation.¹⁹⁹ It must be noted that despite Iran's reservation to the CRC, it holds no such reservation in relation to Article 6 of the ICCPR, which clearly forbids the execution of children.

The protection of pregnant women varies greatly. This is due to the fact that their protection as expectant mothers is considered temporary by some States. China confirmed in its national report of the first cycle that the death penalty was not applied to pregnant women.²⁰⁰ Similar justifications were made by the DPRK,²⁰¹ Algeria,²⁰² Egypt,²⁰³ India,²⁰⁴ Kuwait,²⁰⁵ Sri Lanka,²⁰⁶ Thailand,²⁰⁷ and Zambia.²⁰⁸ More definite time periods were provided by Eritrea which stated that a new mother could be executed as soon as two months after birth,²⁰⁹ four months in Iraq,²¹⁰ and 36 months in Viet Nam.²¹¹ More progressively, Cuba stated that it does not impose the death penalty on persons who are pregnant at the time of sentencing, and such cases are commuted to life.²¹² Belarus stated that it does not apply the death penalty to women at all.²¹³ Whether or not the ICCPR prohibits the execution of a woman solely during pregnancy, or whether such a restriction extends weeks, months, or indefinitely after birth, is unclear.²¹⁴

Although not nearly as ubiquitous as restrictions in relation to children and pregnant women, the death penalty was also justified in the UPR through its non-application to the mentally ill and elderly.

¹⁹⁶ UNGA, A/HRC/18/20, A Question of the Death Penalty, 4 July 2011, para 28. See also, U.N. CRC, Concluding Observations: Pakistan, para. 99, U.N. Doc. CRC/C/PAK/CO/3-4, Oct. 15, 2009.

¹⁹⁷ UNGA, A/HRC/18/20, A Question of the Death Penalty, 4 July 2011, para 63.

¹⁹⁸ A/HRC/14/12/Add.1, para.7.

¹⁹⁹ World Coalition Against the Death Penalty, Iran executes four juvenile offenders in one week, 28 April 2014, available at: <http://www.worldcoalition.org/iran-executions-juvenile-offenders-children-rights.html>

²⁰⁰ A/HRC/WG.6/4/CHN/1, para.43.

²⁰¹ A/HRC/WG.6/6/PRK/1, para.34.

²⁰² A/HRC/WG.6/1/DZA/1, para.46.

²⁰³ A/HRC/WG.6/7/EGY/1, p.8.

²⁰⁴ A/HRC/WG.6/13/IND/1, para.28.

²⁰⁵ A/HRC/15/15, para.39.

²⁰⁶ A/HRC/WG.6/2/LKA/1, para.59.

²⁰⁷ A/HRC/WG.6/12/THA/1, para.33; A/HRC/19/8, para.43.

²⁰⁸ A/HRC/WG.6/2/ZMB/1, para.24.

²⁰⁹ A/HRC/WG.6/6/ERI/1, para.18.

²¹⁰ A/HRC/WG.6/20/IRQ/1, para.10.

²¹¹ A/HRC/12/11/Add.1, para.21.

²¹² A/HRC/WG.6/4/CUB/1, para.39.

²¹³ A/HRC/WG.6/8/BLR/1, para.89.

²¹⁴ Schabas (2002), p.135.

China stated an age limit at 75,²¹⁵ Sudan at 70,²¹⁶ Belarus at 65,²¹⁷ and Mongolia at 60 years of age.²¹⁸ In relation to the restriction against the execution of the mentally ill, Kuwait,²¹⁹ Thailand,²²⁰ and the USA²²¹ all cited this prohibition in support of the restricted use of the death penalty.

In relation to a State's obligations in not executing children or pregnant women, the justifications of States as part of the UPR largely adhere to both the legal requirements and reality. As Jordan stated as part of its national report, it "goes without saying that it does not apply to minors or pregnant women".²²² It is indeed unsurprising that such vital protections of international human rights would be consistently adhered to by States. The Convention on the Rights of the Child is widely ratified,²²³ and this is made clear through the compliance of States in ensuring that persons under 18 are not subject to the death penalty.²²⁴ Indeed, in some cases, the age threshold is higher than required under international law, such as in Cuba.²²⁵ Furthermore, it is to be expected that the death penalty's application to pregnant women is non-existent in the modern world.²²⁶

3.1.3 Rare application

The limited application of the death penalty was cited by a number of States. The majority of States that still retain the death penalty have not conducted executions for over 10 years, resulting in their categorization as de facto abolitionist. It is therefore unsurprising that such States would rely on the passage of time to justify their compliance with human rights standards. In the context of the UPR, a number of de facto abolitionist States relied on their de facto abolitionist status in order to highlight their restricted use of the death penalty. These States include Guinea,²²⁷ Lesotho,²²⁸ Mali,²²⁹

²¹⁵ A/HRC/WG.6/17/CHN/1, para.46.

²¹⁶ A/HRC/WG.6/11/SDN/1, para.124.

²¹⁷ A/HRC/WG.6/8/BLR/1, para.89.

²¹⁸ A/HRC/WG.6/9/MNG/1, para.20.

²¹⁹ Kuwait National Report, 3 November 2014, A/HRC/WG.6/21/KWT/1, para.39.

²²⁰ A/HRC/WG.6/12/THA/1, para.33; A/HRC/19/8, para.43.

²²¹ A/HRC/WG.6/9/USA/1, para.63; A/HRC/WG.6/22/USA/1, para.49.

²²² A/HRC/WG.6/4/JOR/1, p.5.

²²³ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

²²⁴ The prohibition against the execution of juveniles is widely recognised a norm of jus cogens. See Part 4.5.

²²⁵ A/HRC/WG.6/4/CUB/1, para.39.

²²⁶ E/2015/49, p.39.

²²⁷ Since 2002; Guinea National Report, 3 March 2010, A/HRC/WG.6/8/GIN/1, para.124.

²²⁸ Since 1995; Lesotho National Report, 22 February 2010, A/HRC/WG.6/8/LSO/1, para.50; Lesotho Working Group, 13 April 2015, A/HRC/29/9, para.28.

²²⁹ Since 1979; Mali National Report, 14 April 2008, A/HRC/WG.6/2/MLI/1, para.53.

Mauritania,²³⁰ Sri Lanka,²³¹ Madagascar,²³² Malawi,²³³ Oman,²³⁴ the Republic of Korea,²³⁵ Saint Lucia,²³⁶ Tonga,²³⁷ Trinidad and Tobago,²³⁸ and Zambia.²³⁹ In all of these cases the periods of time cited by the States accurately reflect the passage of time since the death penalty was employed. On the other hand, Liberia stated that it had not conducted executions since 1980,²⁴⁰ when in fact its last execution was in 2000.²⁴¹ This is the only date provided by a de facto abolitionist State that does not comply with reality.

However, it is not simply de facto abolitionist States who rely on their limited use of the death penalty as justification for its retention. A small number of States rely on the limited number of executions conducted. These include Bahrain,²⁴² which stated that the death penalty is rarely applied; Saint Kitts and Nevis,²⁴³ which stated that it has only imposed the death sentence three times over 30 years; Bangladesh,²⁴⁴ which relied on its low rate of application, despite executing 41 people in 2007-2015;²⁴⁵ and Ethiopia, which stated that it had only imposed the death sentence three times in the last 15 years.²⁴⁶

Of particular interest are States which relied on the passage of time since the death penalty was carried out, and yet have since conducted more recent executions, post-dating the UPR. Gambia stated as part of its first cycle national report that it had not conducted executions since 1995, which at the time classified it as a de facto abolitionist State.²⁴⁷ Despite this, Gambia executed nine people in 2012,²⁴⁸ and yet continued to rely the death penalty's rare use in its second cycle in 2014.²⁴⁹ Nigeria also said it applied the death penalty rarely during the first cycle, having not conducted an execution

²³⁰ Since 1987; Mauritania Working Group, 4 January 2011, A/HRC/16/17, para.47.

²³¹ Since 1976; A/HRC/WG.6/2/LKA/1, para.59.

²³² Since 1958; Madagascar National Report, 3 November 2009, A/HRC/WG.6/7/MDG/1, para.46; Madagascar Working Group, 26 March 2010, A/HRC/14/13, para.34.

²³³ Since 1994; Malawi Working Group, 7 May 2015, A/HRC/WG.6/22/L.1, para.54.

²³⁴ Since 2001; A/HRC/WG.6/10/OMN/1, paras 76, 78.

²³⁵ Since 1998; Republic of Korea National Report, 13 August 2012, A/HRC/WG.6/14/KOR/1, para.71.

²³⁶ Since 1995; A/HRC/17/6, para.38.

²³⁷ Since 1982; A/HRC/8/48, para.34.

²³⁸ Since 1999; Trinidad and Tobago National Report, 19 July 2011, A/HRC/WG.6/12/TTO/1, para. 53.

²³⁹ Since 1997; A/HRC/WG.6/2/ZMB/1, para.24.

²⁴⁰ Liberia Working Group, 4 January 2011, A/HRC/16/3, para.51.

²⁴¹ E/2015/49, para.18.

²⁴² Bahrain National Report, 11 March 2008, A/HRC/WG.6/1/BHR/1, para.6.

²⁴³ A/HRC/17/12, para.11.

²⁴⁴ Bangladesh National Report, 17 February 2013, A/HRC/WG.6/16/BGD/1, para.51.

²⁴⁵ <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Bangladesh>

²⁴⁶ Ethiopia National Report, 4 August 2009, A/HRC/WG.6/6/ETH/1, para.46.

²⁴⁷ A/HRC/WG.6/7/GMB/1, para.12; A/HRC/14/6, para.7.

²⁴⁸ Amnesty International, Public Statement, The Gambia: The Gambian government must not carry out any further executions of death row prisoners, 5 September 2012, AFR 27/009/2012, <https://www.amnesty.org/download/Documents/16000/afr270092012en.pdf>

²⁴⁹ A/HRC/WG.6/20/GMB/1, paras 136-138; A/HRC/28/6, p.5.

in three years.²⁵⁰ However, subsequent to this statement, it resumed executions in 2013,²⁵¹ despite describing the rarity as tantamount to a moratorium.²⁵² Afghanistan,²⁵³ Jordan,²⁵⁴ Kuwait²⁵⁵ and India²⁵⁶ also relied on the rare application of the death penalty, culminating in a subsequent relapse in use.

By and large, States that rely on the rare application of the death penalty do indeed restrict its use greatly. Only a small number of States who relied on the death penalty's abeyance as a justification for retention ultimately resumed executions. It is for this reason that the status of de facto abolitionist is such an effective and accurate means of assessing the future behaviour of States.²⁵⁷

3.1.4 Subject to moratorium

The existence of a moratorium was acknowledged by some States, and rejected by others. Furthermore, some moratoriums were deemed by the State to be official, while the majority were acknowledged as de facto moratoriums.

Jamaica stated that a de facto moratorium has existed since 1988, and relied on this as part of the first cycle in response to recommendations for abolition.²⁵⁸ Algeria confirmed that a moratorium was in place, and recalled its co-authorship of the UNGA moratorium resolution.²⁵⁹ Similar justifications were raised by Antigua and Barbuda,²⁶⁰ the DRC,²⁶¹ Grenada,²⁶² Guinea,²⁶³ Kenya,²⁶⁴ Liberia,²⁶⁵ Niger,²⁶⁶ Sierra Leone,²⁶⁷ Sri Lanka,²⁶⁸ and Zimbabwe.²⁶⁹ Guatemala also stated that it put in place a

²⁵⁰ Nigeria National Report, 5 January 2009, A/HRC/WG.6/4/NGA/1, para.75.

²⁵¹ Amnesty International, Nigeria Executions: "They almost executed him secretly", 28 June 2013, available at: <https://www.amnesty.org/en/latest/news/2013/06/nigeria-death-penalty-feature/>.

²⁵² A/HRC/WG.6/4/NGA/1, para.75.

²⁵³ Afghanistan Working Group, 11 May 2009, A/HRC/WG.6/5/L.8, para.84.

²⁵⁴ A/HRC/WG.6/4/JOR/1, p.5; <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Jordan>

²⁵⁵ A/HRC/15/15, para.39; <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kuwait>

²⁵⁶ A/HRC/WG.6/13/IND/1, para 28; <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=India>

²⁵⁷ E/2015/49, para.13.

²⁵⁸ A/HRC/16/14, para.37.

²⁵⁹ Algeria Working Group, 16 April 2008, A/HRC/WG.6/1/DZA/4, p.11.

²⁶⁰ Antigua and Barbuda Working Group, 6 October 2011, A/HRC/WG.6/12/L.3, para.34.

²⁶¹ Democratic Republic of the Congo National Report, 30 January 2014, A/HRC/WG.6/19/COD/1, para.26.

²⁶² Grenada National Report, 19 April 2010, A/HRC/WG.6/8/GRD/1, para.58.

²⁶³ A/HRC/15/4, para.11.

²⁶⁴ Kenya National Report, 22 February 2010, A/HRC/WG.6/8/KEN/1, para.37; A/HRC/15/8, para.13

²⁶⁵ Liberia National Report, 18 February 2015, A/HRC/WG.6/22/LBR/1, para.34.

²⁶⁶ Niger Working Group, 25 March 2011, A/HRC/17/15, para.43.

²⁶⁷ Sierra Leone National Report, 14 February 2011, A/HRC/WG.6/11/SLE/1, para.95; Sierra Leone Working Group, 11 July 2011, A/HRC/18/10, para.29.

²⁶⁸ A/HRC/WG.6/2/LKA/1, para.59; Sri Lanka Working Group Addendum, 21 February 2013, A/HRC/22/16/Add.1, p.2.

²⁶⁹ Zimbabwe National Report, 19 July 2011, A/HRC/WG.6/12/ZWE/1, para.47.

de facto moratorium.²⁷⁰ It maintains that no one faces the death penalty and all sentences are commuted in line with Inter-American Court of Human Rights cases.²⁷¹ The Maldives rely on their long running moratorium as justification for the death penalty remaining on their books.²⁷² Indeed, it describes its moratorium as one of the longest standing,²⁷³ a title it holds jointly with Papua New Guinea. Gambia, despite the lifting of its moratorium in 2012, stated as part of the working group of the second cycle that it had again put in place a moratorium.²⁷⁴

A number of States indicated that the death penalty was subject to an official moratorium. Mali states that a moratorium is in place²⁷⁵ and that death sentences are systematically commuted to life.²⁷⁶ Mongolia also relied on its official moratorium²⁷⁷ and stated that it is the first steps towards abolition.²⁷⁸ Russia maintains an official moratorium on the death penalty, and this ban on executions has been reinforced by the domestic courts.²⁷⁹ Official moratoriums were also relied upon by Lebanon,²⁸⁰ Tajikistan,²⁸¹ Tanzania,²⁸² and Tunisia.²⁸³ Only one State that relied on the existence of a moratorium did so without adequate basis, namely Equatorial Guinea which stated during both cycles the existence of a moratorium on executions.²⁸⁴ However in reality it carried out 9 executions in 2014, and a moratorium, official or otherwise, is not believed to be in place.²⁸⁵

A small group of States reject that a moratorium does exist or should exist. Japan in particular stated that “it would be very cruel to first give the expectation to the prisoners that they will not be executed, and later inform them that they will be executed.”²⁸⁶ Papua New Guinea rejected the existence of a moratorium, stating it is “slightly erroneous to state that a moratorium existed, if such a statement was taken to imply that the death penalty had not been invoked”, particularly in light of the fact that courts

²⁷⁰ Guatemala Working Group, 29 May 2008, A/HRC/8/38, para.23; Guatemala Working Group, 31 December 2012, A/HRC/22/8, para.98.

²⁷¹ Guatemala National Report, 7 August 2012, A/HRC/WG.6/14/GTM/1, para.74.

²⁷² Maldives Working Group, 4 January 2011, A/HRC/16/7, para.27

²⁷³ Maldives National Report, 17 April 2015, A/HRC/WG.6/22/MDV/1, para.59.

²⁷⁴ A/HRC/28/6, para.101.

²⁷⁵ A/HRC/WG.6/2/MLI/1, para.53.

²⁷⁶ Mali Working Group, 12 March 2013, A/HRC/23/6, para.15.

²⁷⁷ A/HRC/WG.6/9/MNG/1, para.20.

²⁷⁸ A/HRC/WG.6/9/MNG/1, para.11.

²⁷⁹ Russia National Report, 10 November 2008, A/HRC/WG.6/4/RUS/1, para.43; Russia National Report, 6 February 2013, A/HRC/WG.6/16/RUS/1, para.31.

²⁸⁰ A/HRC/WG.6/9/LBN/1, para.30.

²⁸¹ Tajikistan National Report, 19 July 2011, A/HRC/WG.6/12/TJK/1, para.86.

²⁸² Tanzania National Report, 19 July 2011, A/HRC/WG.6/12/TZA/1, para.17.

²⁸³ Tunisia State Report, 17 March 2008, A/HRC/WG.6/1/TUN/1, para.6.

²⁸⁴ Equatorial Guinea Working Group, 4 January 2010, A/HRC/13/16, para.66; Equatorial Guinea Working Group, 7 July 2014, A/HRC/27/13, para.25.

²⁸⁵ <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Equatorial+Guinea>

²⁸⁶ Japan Working Group, 30 May 2008, A/HRC/8/44, para.59.

continue to grant death sentences.²⁸⁷ Guyana also rejected the existence of an official or unofficial moratorium, despite no executions since 1997.²⁸⁸

Certain states may wish to deny any suggestion that limbs of their justice system are ineffectual, thereby conceding that its retention is no longer necessary. However, a large number of States that rarely utilise the death penalty are willing to acknowledge that a moratorium, de facto or official, is in existence.

3.1.5 Method

The methods in which the death penalty is imposed is rarely raised as a justification within the UPR. States adopt a number of different methods of execution. There is little agreement internationally on which forms of execution adhere to the prohibition of cruel, inhuman and degrading treatment, however there is no doubt that such a principle is a central element of human rights.²⁸⁹ It is perhaps due to this uncertainty that so few States rely on the method employed as justification for the retention of the death penalty.

One of the few justifications that stands out is Iran's comments defending its retention of stoning as a method of execution. Iran stated that such methods were not in breach of human rights. It argued that stoning was not a method of execution, but rather a means of punishment, as 50% of those who receive the sentence survive.²⁹⁰ In the context of the UPR, Iran stated that the death penalty fully observed article 6 of the ICCPR,²⁹¹ however the use of stoning is one of the few methods of execution to be firmly established as contrary to human rights.²⁹² Accordingly, Somalia accepted a recommendation as part of the UPR to abolish the use of stoning.²⁹³ Yemen stated that Stoning does not take place, and accepted recommendations regarding its restriction.²⁹⁴

In its final comments to the working group, the DPRK confirmed that public executions were utilised.²⁹⁵ This is reiterated in the Commissions of Inquiry on Human Rights in the DPRK, which stated that public executions were conducted to "provide a warning", and the presence the family of the condemned was required.²⁹⁶ This practice is contrary to international law. The Human Rights

²⁸⁷ E/2015/49, para.16.

²⁸⁸ Guyana Working Group Addendum, 13 September 2010, A/HRC/15/14/Add.1, para.49.

²⁸⁹ UN General Assembly, Interim report of the Special Rapporteur on torture, 9 August 2012, A/67/279, para.33.

²⁹⁰ Iran Follow-up Report, 2012, para.58.

²⁹¹ A/HRC/14/12/Add.1, para.7.

²⁹² A/69/288, para.45.

²⁹³ E/2015/49, para.126.

²⁹⁴ A/HRC/12/13, para.51.

²⁹⁵ Democratic Peoples' Republic of Korea Working Group, 4 January 2010, A/HRC/13/13, para.88.

²⁹⁶ A/HRC/25/CRP.1, para.759.

Committee found that public executions are in violation of human dignity.²⁹⁷ Furthermore, the Special Rapporteur on torture, cruel, inhuman or degrading treatment or punishment states that public executions “have a dehumanizing effect on the victim and a brutalizing effect on those who witness the execution”.²⁹⁸

The methods in which Japan detains its death row inmates has been the subject of significant international scrutiny, and the UPR process is no exception. Japan does not inform condemned of their execution until the very day it is to take place. Japan justified this at the working group in 2008 as a procedure based on concern that the inmates would be traumatised if they were informed in advance.²⁹⁹ Furthermore, the inmates are almost permanently kept in solitary confinement for decades, which Japan justified as practice in order to “ensure emotional stability” and that was not in contravention of human rights.³⁰⁰ Japan’s method of detaining death row inmates and informing them of their execution on the day is most certainly contrary to international human rights standards.³⁰¹

Ethiopia, in its national report, relied on its use of shooting as a form of execution as evidence of its restrictive application of the death penalty. It further stated that it did not employ hanging or “any other inhuman means”.³⁰² Firing squad is acknowledged by the Human Rights Committee as the “fastest way of execution” and containing the least amount of suffering.³⁰³ However, a Special Rapporteur has argued that there is no method of execution that is capable of overcoming cruel or unusual punishment.³⁰⁴ Therefore, all justifications regarding the method used could be considered contrary to international law. Ethiopia’s justification aside, it is clear that Iran, the DPRK and Japan’s justifications regarding their method of employing the death penalty do not comply with international law.

3.1.6 Improved practice

Improving the way in which States make recommendations regarding the death penalty is vital in ensuring that the levels of acceptance and implementation are not among the lowest of the issues dealt with in the UPR. Perhaps the most complex issue confronting States within the context of the UPR is the need to make recommendations that are more than simply symbolic or ritualised. States must look carefully at the unique issue confronting any given State and make recommendations accordingly. By

²⁹⁷ Schabas (2002), p.376.

²⁹⁸ OHCHR, “UN Special Rapporteurs condemn ongoing executions in Iran”, press release, 28 June 2012, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12301&LangID=E>.

²⁹⁹ A/HRC/8/44, para.59.

³⁰⁰ A/HRC/22/14, para.69.

³⁰¹ A/67/279, para. 48.

³⁰² A/HRC/WG.6/6/ETH/1, paras 46, 50-51.

³⁰³ A/67/279, para.40.

³⁰⁴ A/67/279, para.41.

taking in to account the unique circumstances of each State, recommendations that are more likely to be accepted can be made. The World Coalition on the Death Penalty recommends that States make “step by step” recommendations.³⁰⁵ An example of such a recommendation would be to encourage a retentionist State to restrict the application of the death penalty to the “most serious crimes”. Despite this advice, a number of States make sweeping recommendations to abolish the death penalty, regardless of the domestic realities of that State. Such recommendations are more likely to be rejected. In essence, the best recommendations are progressive, incremental and contextually relevant.³⁰⁶

An example of such a nuanced recommendation can be found in Belgium’s recommendation to Kuwait in the first cycle. Belgium recommended that as long as it imposes the death penalty it should ensure it “is only imposed for the most serious offences”.³⁰⁷ This incremental recommendation recognises that Kuwait applies the death penalty to a number of non-fatal crimes. Through its acceptance, this recommendation has demonstrated that Kuwait recognises the need to limit the application of the death penalty to such crimes.

Iran received 27 recommendations, three of which it accepted. These three recommendations take a similar incremental approach, recognising the issues in Iran most in need of redress. Belgium recommended that Iran respect minimum standard and adhere to the ICCPR.³⁰⁸ Another recommendation was regarding ceasing the death penalty’s application to apostasy.³⁰⁹ The third was the abolition of the death penalty applying to children.³¹⁰ These three recommendations were all accepted in the first cycle and show that incremental suggestions are effective. In the second cycle Iran accepted recommendations to ban executions for juveniles and to ensure due process for the death penalty

The rare application of the death penalty in Uganda was recognised in the recommendation to continue commuting death penalty sentences to life after three years.³¹¹ This recommendation was not only incremental and contextual, but also the only accepted recommendation by Uganda. Cuba accepted recommendations in the first cycle to maintain efforts in not applying the death penalty.³¹² This gentle and incremental approach has ensured that at least one concession has been firmly committed to by Cuba.

³⁰⁵ UPR Info (2014), Beyond Promises, p.68.

³⁰⁶ McMahon proposes SMART recommendations (specific, measurable, achievable, relevant and time-bound), UPR Info (2014), Beyond Promises, p.8.

³⁰⁷ A/HRC/15/15, para.79.54.

³⁰⁸ Iran Working Group, 15 March 2010, A/HRC/14/12, para.90.39.

³⁰⁹ A/HRC/14/12, para.90.8

³¹⁰ A/HRC/14/12, para.90.40.

³¹¹ Uganda Working Group, 22 December 2011, A/HRC/19/16, para.111.37.

³¹² Cuba Working Group, 3 March 2009, A/HRC/11/22, para.130.42.

3.2 Adequate Review Mechanisms

The importance of fair trial mechanisms and due process in death penalty cases is a customary norm³¹³ and must be “scrupulously observed”.³¹⁴ The ECOSOC Safeguards state that “Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after a legal process which gives all possible safeguards to ensure a fair trial” equal to the standard contained in Article 14 of the ICCPR.³¹⁵ The right to pardon and appeal also form part of the Safeguards as well as Article 14 of the ICCPR.³¹⁶ For this reason, a large number of States raise their compliance with fair trial standards by citing the existence of safeguards such as the right to appeal and availability of clemency.

Antigua and Barbuda stated before the working group of the first cycle that it recognises the importance of checks and balances.³¹⁷ The existence of safeguards and/or clemency was also recognised by Bangladesh,³¹⁸ Botswana,³¹⁹ Eritrea,³²⁰ Gambia,³²¹ India,³²² Iraq,³²³ Japan,³²⁴ Lesotho,³²⁵ Libya,³²⁶ Maldives,³²⁷ Saint Kitts and Nevis,³²⁸ Swaziland,³²⁹ Thailand,³³⁰ Trinidad and Tobago,³³¹ Uganda,³³² Yemen,³³³ and Zimbabwe.³³⁴ The right to consular assistance is described by the Inter-American Commission as “a fundamental component of the due process standards”.³³⁵ It is for this

³¹³ Schabas (2002), p.369.

³¹⁴ E/2015/49, para.39.

³¹⁵ ECOSOC Safeguards, para.5.

³¹⁶ ECOSOC safeguards, paras 6-7.

³¹⁷ A/HRC/WG.6/12/L.3, para.34.

³¹⁸ A/HRC/11/18, para.62; A/HRC/WG.6/16/BGD/1, para.51.

³¹⁹ A/HRC/WG.6/3/BWA/1, para.44.

³²⁰ A/HRC/WG.6/6/ERI/1, para.18.

³²¹ A/HRC/WG.6/7/GMB/1, para.13; A/HRC/14/6, para.7; A/HRC/WG.6/20/GMB/1, paras 136-138; A/HRC/28/6, p.5.

³²² A/HRC/WG.6/13/IND/1, para.28.

³²³ Iraq National Report, 18 January 2010, A/HRC/WG.6/7/IRQ/1, para.115; A/HRC/14/14, para.11; A/HRC/WG.6/20/IRQ/1, para.10.

³²⁴ A/HRC/8/44, para.9

³²⁵ A/HRC/WG.6/8/LSO/1, para.50; Lesotho Working Group, 16 June 2010, A/HRC/15/7, para.14; A/HRC/29/9, para.28.

³²⁶ Libya National Report, 24 August 2010, A/HRC/WG.6/9/LBY/1, para.91.

³²⁷ A/HRC/WG.6/22/MDV/1, para.59.

³²⁸ A/HRC/17/12, paras 11-12.

³²⁹ Swaziland National Report, 19 July 2011, A/HRC/WG.6/12/SWZ/1, para.73.

³³⁰ A/HRC/WG.6/12/THA/1, para.33.

³³¹ A/HRC/WG.6/12/TTO/1, paras 50-52.

³³² Uganda National Report, 22 July 2011, A/HRC/WG.6/12/UGA/1, paras 53, 57.

³³³ A/HRC/12/13, para.9.

³³⁴ A/HRC/WG.6/12/ZWE/1, para.47.

³³⁵ Inter-American Commission on Human Rights, as cited in E/2015/49, para.98.

reason that the U.S., as part of the UPR working group of the first cycle, accepted a recommendation by Mexico to comply with the Avena decision of the ICJ.³³⁶

Given a general lack of transparency in states that apply the death penalty,³³⁷ it is difficult to accurately assess whether or not such statements comply with reality. Within the UPR framework, a number of States did rely on the use of adequate review mechanisms, despite the fact that such mechanisms were either inadequate under international law, or simply not actually in existence. The fact that a State retains a mandatory death sentence, for example, would contradict justification of procedural fairness. The Human Rights Committee has delivered a numbers of decisions stating that the imposition of a mandatory death sentence is prohibited.³³⁸ Despite this, a number of States that utilise a mandatory death sentence stated within the UPR that the death penalty adhered to fair trial and due process standards. These States include, Malaysia,³³⁹ Singapore,³⁴⁰ Saudi Arabia,³⁴¹ Gambia,³⁴² Tanzania,³⁴³ Pakistan,³⁴⁴ Iran,³⁴⁵ Myanmar,³⁴⁶ and Kuwait.³⁴⁷ Guyana also stated that its use of the mandatory sentences applied to a small number of crimes.³⁴⁸ Furthermore, Singapore stated during the working group of the first cycle that there is no international consensus regarding the restriction of mandatory death sentences.³⁴⁹ The Special Rapporteur on extrajudicial, summary and arbitrary executions points to an increasing consensus among States that mandatory executions are an “arbitrary deprivation of life”.³⁵⁰ The Special Rapporteur on torture has stated that it “violates due process and constitutes inhumane treatment.”³⁵¹

A number of other States maintained that fair trial standards were utilised despite the absence of such standards in reality. The Human Rights Committee has expressed concern in relation Ethiopia’s fair trial standards.³⁵² Despite this, Ethiopia stated at the working group of the first cycle that fair trial rights were in place.³⁵³ Egypt maintained during both cycles that fair trial procedures, including the

³³⁶ United States of America Working Group, 4 January 2011, A/HRC/16/11, para.55.

³³⁷ E/2015/49, para.30.

³³⁸ E/2015/49, para.39.

³³⁹ A/HRC/WG.6/4/MYS/1/Rev.1, paras 89-90; A/HRC/WG.6/17/MYS/1, para.45.

³⁴⁰ A/HRC/18/11, para.87.

³⁴¹ A/HRC/25/3, para.96; A/HRC/25/3/Add.1, para.14.

³⁴² A/HRC/WG.6/7/GMB/1, para.13; A/HRC/14/6, para.7; A/HRC/WG.6/20/GMB/1, paras 136-138; A/HRC/28/6, p.5.

³⁴³ A/HRC/WG.6/12/TZA/1, para.17.

³⁴⁴ A/HRC/8/42, para.47.

³⁴⁵ A/HRC/14/12/Add.1, para.18.

³⁴⁶ A/HRC/WG.6/10/MMR/1, para.37.

³⁴⁷ A/HRC/15/15, para.39. A/HRC/WG.6/21/KWT/1, para.39.

³⁴⁸ Guyana National Report, 19 January 2015, A/HRC/WG.6/21/GUY/1, para.33.

³⁴⁹ A/HRC/18/11, para.87.

³⁵⁰ A/67/275, paras. 61-65.

³⁵¹ A/67/279, para 59.

³⁵² HRC, Concluding Observations of the Human Rights Committee: Ethiopia, CCPR/C/ETH/CO/1, 19 August 2011, para.19.

³⁵³ Ethiopia Working Group, 4 January 2010, A/HRC/13/17, para.8.

right to appeal were accorded.³⁵⁴ However, Egypt has recently conducted mass trials of civilians by military courts in relation to political crimes that are sometimes carried out in absentia.³⁵⁵ In response to recommendations during the UPR, Indonesia states that the death penalty was only carried out after all legal resorts are exhausted.³⁵⁶ As recently as April 2015 Indonesia is reported to have executed two prisoners despite outstanding legal challenges before the courts.³⁵⁷ Furthermore, China made a number of statements regarding the right to appeal in open court, and increased evidentiary safeguards.³⁵⁸ However, in reality China treats its death penalty statistics as a state secret, and the system does not meet international standards of transparency.³⁵⁹

The importance of death penalty's compliance with internationally recognised fair trial standards is apparent in the number of statements made by States as part of the UPR process. Although it is difficult to establish the extent to which such statements comply with reality, a number of States relying on fair trial standards as part of the UPR do actually comply with international law.

3.2.1 Improved practice

Ensuring that States impose meaningful fair trial procedures and safeguards to the imposition of the death penalty is an effective way of ensuring incremental compliance with international standards. Barbados received a recommendations regarding the abolition of the mandatory death penalty.³⁶⁰ Egypt rejected all recommendation regarding the abolition of the death penalty, however it did accept Belgium's recommendation relating to ensuring that it respects the minimum standards relating to the death penalty.³⁶¹ Iraq accepted the recommendations of Belgium³⁶² and Canada³⁶³ to respect the minimum standards restricting the death penalty's application. All of the above recommendations are examples effective recommendations that address contextual issues and are incremental and therefore more likely to be accepted.

³⁵⁴ A/HRC/WG.6/7/EGY/1, p.8; A/HRC/28/16, para.118.

³⁵⁵ Egypt – Amnesty International, 1 September 2009, p.5.

³⁵⁶ A/HRC/8/23/Add.1, para.10; A/HRC/21/7/Add.1, p.3.

³⁵⁷ CNN, Australia recalls ambassador after Indonesia executes prisoners, 29 April 2015, available at: <http://edition.cnn.com/2015/04/28/asia/indonesia-firing-squad-executions/>

³⁵⁸ A/HRC/WG.6/4/CHN/1, para.44; A/HRC/WG.6/17/CHN/1, paras 44-45; China Working Group, 4 December 2013, A/HRC/25/5, para.84.

³⁵⁹ A/HRC/25/33, para 31; E/2015/49, para.119.

³⁶⁰ Barbados Working Group, 12 March 2013, A/HRC/23/11, para.102.69.

³⁶¹ A/HRC/14/17, para.95.34.

³⁶² A/HRC/14/14, para.81.48

³⁶³ A/HRC/14/14, para.81.47

3.3 Culturally Appropriate or Necessary

In justifying the retention of the death penalty, some States rely on the cultural necessity, based on religious reasons, or the prevalence of serious crime. The imposition of the death penalty crosses continents and cultures, and the justification for it “is deeply enmeshed in the religious and cultural values of many societies”.³⁶⁴ Within the context of the UPR, States rely on religious and cultural reasons for the need to deter certain crimes.

Religion undoubtedly plays a role in the justification and imposition of the death penalty, and the same can be seen in justifications given by States during the UPR proceedings. However, many of these justifications do have a basis in reality, or in law. Afghanistan stated that its imposition of the death penalty was in line with other Islamic countries.³⁶⁵ While it is true in some predominately Islamic countries the death penalty persists, there are many others that are considering steps towards, or indeed already applying, moratoriums.³⁶⁶ Libya also stated that the use of the death penalty was required by Islam.³⁶⁷ However, this is interpretation that is challenged by some Islamic scholars.³⁶⁸ Indeed, it is argued that “Islamic teaching is not compatible with the death penalty.”³⁶⁹ Religion as a justification was not solely restricted to Islam, with Botswana stating that the death penalty was retained due to Christian values. However, today the Christian churches are “among the organizations with the longest and most continuous advocacy against the death penalty.”³⁷⁰ Religious justifications for the retention of the death penalty are often resorted to by States that are “profoundly undemocratic and repressive”.³⁷¹

The deterrent effect of the death penalty is one of the key issues that some States cling to in continuing to justify the use of the death penalty,³⁷² and this is no exception in the case of the UPR. Benin stated that it was afraid of becoming a safe-haven for gangsters should the death penalty be abolished.³⁷³ Cuba expressed concern regarding the need to deter terrorists in order to preserve their

³⁶⁴ Sitaraman (2009), p.112.

³⁶⁵ A/HRC/WG.6/5/L.8, para 84.

³⁶⁶ M. Marazziti, World Religions and the Death Penalty, in OHCHR, (2014), Moving Away from the Death Penalty, p.177.

³⁶⁷ A/HRC/WG.6/9/LBY/1, paras 91-92.

³⁶⁸ M Cherif Bassiouni, as cited in IBAHRI, (2008), The Death Penalty under International Law, available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=5482860b-b9bc-4671-a60f-7b236ab9a1a0>

³⁶⁹ M. Marazziti, World Religions and the Death Penalty, in OHCHR, (2014), Moving Away from the Death Penalty, p.178.

³⁷⁰ M. Marazziti, World Religions and the Death Penalty, in OHCHR, (2014), Moving Away from the Death Penalty, p.180.

³⁷¹ Schabas (2002), p.366.

³⁷² C Hoyle and R Hood, Deterrence and Public Opinion, in OHCHR, (2014), Moving Away from the Death Penalty, p.69.

³⁷³ Benin Working Group, 28 May 2008, A/HRC/8/39, para.54.

revolutionary state.³⁷⁴ Similar justifications were raised by Egypt,³⁷⁵ Eritrea,³⁷⁶ Gambia,³⁷⁷ Iran,³⁷⁸ Iraq,³⁷⁹ Japan,³⁸⁰ Kuwait,³⁸¹ Lesotho,³⁸² Malaysia,³⁸³ Nigeria,³⁸⁴ Saudi Arabia,³⁸⁵ Singapore,³⁸⁶ Tonga,³⁸⁷ and Viet Nam.³⁸⁸ Other justifications by States are purely contextual, and relate to the necessity of the death penalty to due to the prevalence of certain crimes, such as terrorism, drug offences or, in the case of Guinea, female genital mutilation.³⁸⁹ Singapore maintains that drug offending has been stopped from taking root due to the deterrent effect of the death penalty.³⁹⁰ Iraq states that instability and terrorism necessitate the retention of the death penalty for deterrence purposes.³⁹¹ Only Saint Kitts and Nevis, in stating that its concern regarding the increasing crime rate necessitated retention, recognised that the death penalty “may not be a deterrent”.³⁹² Assessing the efficacy of the death penalty as a deterrent is complex question. Many studies, including a prominent study in America, were unable to conclude whether or not the death penalty had any tangible impact.³⁹³ The deterrent value of the death penalty is essentially a chimera, and is solely relied upon by States because “they believe it can be deduced from human nature.”³⁹⁴

3.4 Popular Support

The deterrent value of the death penalty and its popular support are two concepts that are intrinsically linked. The public’s belief in the death penalty’s ability to deter crime plays a critical role in their

³⁷⁴ A/HRC/11/22, para.126.

³⁷⁵ A/HRC/WG.6/7/EGY/1, p.7.

³⁷⁶ A/HRC/13/2/Add.1, p.2.

³⁷⁷ A/HRC/WG.6/7/GMB/1, para.11.

³⁷⁸ A/HRC/14/12/Add.1, para.18.

³⁷⁹ A/HRC/14/14, para.11; A/HRC/WG.6/20/IRQ/1, para.10.

³⁸⁰ A/HRC/8/44, para.9; A/HRC/22/14, para.15.

³⁸¹ A/HRC/15/15, para.39.

³⁸² A/HRC/29/9, para.28

³⁸³ Malaysia Working Group, 3 March 2009, A/HRC/11/30, para.56.

³⁸⁴ Nigeria National Report, 30 July 2013, A/HRC/WG.6/17/NGA/1, para.51.

³⁸⁵ Saudi Arabia Working Group, 4 March 2009, A/HRC/11/23, para.82.

³⁸⁶ A/HRC/WG.6/11/SGP/1, para.120.

³⁸⁷ A/HRC/23/4/Add.1, para.14.

³⁸⁸ A/HRC/12/11/Add.1, para.20.

³⁸⁹ Guinea Working Group, 14 June 2010, A/HRC/15/4, para.22.

³⁹⁰ A/HRC/WG.6/11/SGP/1, para.120.

³⁹¹ A/HRC/WG.6/20/IRQ/1, para.10.

³⁹² A/HRC/17/12, para.9.

³⁹³ C Hoyle and R Hood, Deterrence and Public Opinion, in OHCHR, (2014), *Moving Away from the Death Penalty*, pp72-73.

³⁹⁴ C Hoyle and R Hood, Deterrence and Public Opinion, in OHCHR, (2014), *Moving Away from the Death Penalty*, p.82.

continued support for its imposition.³⁹⁵ Within the context of the UPR many States justified the retention of the death penalty on the basis of popular support.

During the working group of the first cycle, Japan stated that “the majority of Japanese people considers the death penalty to be unavoidable in case of extremely vicious crimes”.³⁹⁶ During the second cycle Japan reiterated that abolition or retention should be based on domestic public opinion and that the death penalty retained popular support.³⁹⁷ Singapore,³⁹⁸ Malaysia,³⁹⁹ Barbados,⁴⁰⁰ Bahamas,⁴⁰¹ Jamaica,⁴⁰² Guyana,⁴⁰³ and Uganda⁴⁰⁴ all cited strong support for the retention of the death penalty. Botswana relied on a decade old report to inform the working group that a majority of the population supported the death penalty.⁴⁰⁵ A number of other States cited a significant split in public opinion, including Dominica,⁴⁰⁶ the DRC,⁴⁰⁷ Libya,⁴⁰⁸ and Mongolia.⁴⁰⁹

Some States during the UPR express a clear willingness to achieve abolition, however popular support is often cited as a roadblock. Trinidad and Tobago stated that "it was a great challenge for a Government to risk giving the impression that it was not adequately combatting crime".⁴¹⁰ Zambia stated quite clearly that it could not seek to abolish the death penalty due to popular support, and that it was “eager to respect the wishes of the people in this regard, despite the fact that the position of the government may be different”.⁴¹¹ Despite willingness to move towards abolition, several other States also expressed concern regarding public opinion, such as Cameroon,⁴¹² Madagascar,⁴¹³ Saint Kitts and

³⁹⁵ C Hoyle and R Hood, *Deterrence and Public Opinion*, in OHCHR, (2014), *Moving Away from the Death Penalty*, pp.69-70.

³⁹⁶ A/HRC/8/44, para.9.

³⁹⁷ A/HRC/22/14, paras 15, 67.

³⁹⁸ A/HRC/18/11, para.87.

³⁹⁹ A/HRC/11/30, para.56.

⁴⁰⁰ Barbados Working Group, 9 January 2009, A/HRC/10/73, para.48.

⁴⁰¹ Bahamas National Report, 12 September 2008, A/HRC/WG.6/3/BHS/1, para.66; Bahamas Working Group, 25 January 2013, A/HRC/WG.6/15/L.6, para.20.

⁴⁰² A/HRC/16/14, para.37.

⁴⁰³ A/HRC/15/14, para.18; A/HRC/15/14/Add.1, paras 31-32; A/HRC/29/16, para.100.

⁴⁰⁴ A/HRC/WG.6/12/UGA/1, para.53.

⁴⁰⁵ Botswana Working Group, 13 January 2009, A/HRC/10/69, para.22.

⁴⁰⁶ Dominica Working Group, 4 January 2010, A/HRC/13/12, para.33; A/HRC/WG.6/19/L.7, para.15.

⁴⁰⁷ Democratic Republic of the Congo Working Group, 7 July 2014, A/HRC/27/5, para.75.

⁴⁰⁸ Libya National Report, 5 May 2015, A/HRC/WG.6/22/LBY/1, para.76.

⁴⁰⁹ A/HRC/WG.6/9/MNG/1, para.97.

⁴¹⁰ Trinidad and Tobago Working Group, 14 December 2011, A/HRC/19/7, paras 19, 52.

⁴¹¹ Zambia Working Group Addendum, 26 February 2013, A/HRC/22/13/Add.1, para.33.

⁴¹² Cameroon Working Group, 3 March 2009, A/HRC/11/21, para.38; Cameroon Working Group, 5 July 2013, A/HRC/24/15, para.58.

⁴¹³ Madagascar Working Group Addendum, 8 June 2010, A/HRC/14/13/Add.1, paras 18-20.

Nevis,⁴¹⁴ Saint Lucia,⁴¹⁵ Chad,⁴¹⁶ Russia,⁴¹⁷ and Tanzania.⁴¹⁸ While some States rely on popular support as a justification for the retention of the death penalty, a similar number of States cite it as a considerable roadblock to abolition, despite the presence of political will.

Belarus noted during its first cycle that support for the death penalty was 80%,⁴¹⁹ whereas during its second cycle it had decreased to 70%.⁴²⁰ This is likely due to the strong political leadership on the issue, and the desire to bring about change. During its first cycle, Belarus expressed a clear willingness to achieve abolition through a public awareness campaign.⁴²¹ Indeed, a number of States expressed their willingness to conduct debate, discourse and awareness raising, including Antigua and Barbuda,⁴²² Burkina Faso,⁴²³ Kenya,⁴²⁴ Mali,⁴²⁵ and Tunisia.⁴²⁶ Popular support for the death penalty often occurs in States that maintain strict control over the dissemination of information regarding its imposition.⁴²⁷ The lack of transparency results in a population that is not fully informed of the methods used by the State, or the death penalty's efficacy. It is often stated that "popular enthusiasm for capital punishment is a mile wide but an inch deep".⁴²⁸ As a result of this, public opinion is easily shifted, and should not be viewed as a barrier to abolition.⁴²⁹ This perspective is made quite clear by Netherlands, which responded to a recommendation by Egypt to consider reimplementing of the death penalty in light of an opinion poll showing the majority of Dutch citizens in support of reintroduction.⁴³⁰ The Netherlands responded that "the Government is not run by opinion polls, even if it may be interesting to look at them".⁴³¹

Popular support for the death penalty should not result in a roadblock to abolition. Belarus showed clear indications of a willingness to support abolition, however despite commitments to educating the public, it conceded that no abolition could occur without a change in public opinion.⁴³² Where the

⁴¹⁴ A/HRC/17/12, para.9.

⁴¹⁵ A/HRC/17/6, para.38.

⁴¹⁶ Chad Working Group, 3 January 2014, A/HRC/25/14, para.104.

⁴¹⁷ Russia Working Group Addendum, 5 June 2009, A/HRC/11/19/Add.1/Rev.1, p.2. Russia Working Group Addendum, 2 September 2013, A/HRC/24/14/Add.1, p.6.

⁴¹⁸ A/HRC/WG.6/12/TZA/1, para.17; Tanzania Working Group, 8 December 2011, A/HRC/19/4, para.23.

⁴¹⁹ A/HRC/WG.6/8/BLR/1, para.93.

⁴²⁰ Belarus Working Group, 22 May 2015, A/HRC/WG.6/22/L.1, para.11.

⁴²¹ Belarus Working Group, 21 June 2010, A/HRC/15/16, para.54.

⁴²² A/HRC/WG.6/12/L.3, para.34.

⁴²³ Burkina Faso National Report, 6 February 2013, A/HRC/WG.6/16/BFA/1, paras 55, 87.

⁴²⁴ A/HRC/15/8, paras 49, 104.

⁴²⁵ A/HRC/23/6, para.15.

⁴²⁶ Tunisia Working Group, 9 July 2012, A/HRC/21/5, para.39.

⁴²⁷ Schabas (2002), p.376.

⁴²⁸ Schabas (2002), p.365.

⁴²⁹ C Hoyle and R Hood, Deterrence and Public Opinion, OHCHR, (2014), *Moving Away from the Death Penalty*, pp.80-81.

⁴³⁰ Netherlands Working Group, 13 May 2008, A/HRC/8/31, para.23.

⁴³¹ A/HRC/8/31, para.39.

⁴³² A/HRC/15/16, para.54.

political will exists, it falls to strong leadership to guide the population towards abolition,⁴³³ and history has shown that this process can be quite easily achieved. Once abolition occurs, the rate at which the public favour the retention of the death penalty diminishes dramatically.⁴³⁴ What is vitally important is that states ensure its population are fully informed about the death penalty, including the imposition of mandatory sentences. It is also important that the death penalty is imposed and implemented transparently, and that education and public debate take place.⁴³⁵ In reality public opinion need not stand in the way of politicians taking concrete legislative action.⁴³⁶

3.4.1 Improved practice

The issue of popular support is a significant hurdle to the abolition of the death penalty in a large number of retentionist States, as demonstrated above. Encouraging public debate in retentionist countries is vital to ensuring that abolition can have acceptance among the public, giving politicians a mandate for abolition.⁴³⁷ Despite the ubiquity of States struggling with issues of popular support, very few States makes recommendations encouraging States to conduct debate and education regarding the death penalty. Botswana received a large number of recommendations to sign the Second Optional Protocol which it did not accept. However, Uruguay recommended that Botswana “[h]old a public debate on the death penalty, in which all aspects of the issue should be highlighted in a holistic manner” and “[m]eanwhile, provide information to concerned families, so that they can know in advance the date of execution of their relatives”.⁴³⁸ In the second cycle Ghana accepted one recommendation by the UK requesting the holding of an early referendum regarding the abolition of the death penalty.⁴³⁹ This was the only recommendation out of 18 that was accepted, demonstrating that one of the real issues faced by Ghana is widespread popular support for the death penalty. Despite a large number of States expressing popular support as a roadblock to abolition, such recommendations as the above were uncommon.

3.5 Limited Resources and Capacity

A number of States that retain the death penalty are developing nations and lack the resources or capacity to effectively institute human rights to an international standard. The small number of States

⁴³³ OHCHR (2014), *Moving Away From the Death Penalty*, p.18.

⁴³⁴ C Hoyle and R Hood, *Deterrence and Public Opinion*, in OHCHR, (2014), *Moving Away from the Death Penalty*, p.81.

⁴³⁵ OHCHR (2014), *Moving Away From the Death Penalty*, p.18.

⁴³⁶ Schabas (2002), p.376.

⁴³⁷ OHCHR (2014), *Moving Away From the Death Penalty*, p.18.

⁴³⁸ Botswana Working Group, 22 March 2013, A/HRC/23/7, paras 115.59-60.

⁴³⁹ Ghana Working Group, 13 December 2012, A/HRC/22/6, para.123.8.

relied upon limited resources or capacity as a restriction on the imposition of a moratorium, or moves towards abolition.

Papua New Guinea, a member of the Pacific Small Island Developing States,⁴⁴⁰ stated during its review that it had resource and capacity restraints that restricted its moves towards abolition.⁴⁴¹ Nauru, another State that is also a member of the same informal group, based its unwillingness to ratify human rights treaties on the burden of travel costs and reporting requirements.⁴⁴² Saint Lucia⁴⁴³ and Kenya⁴⁴⁴ also stated that limited resources restricted human rights, and in the case of Kenya, this was stalling the national campaign to promote abolition. The capacity and financial restrictions of developing States inhibit their ability adhere to human rights, and this is certainly a relevant and significant factor.⁴⁴⁵

3.6 Consensus, Incompatibility and Sovereignty

A number of States raised issues relating to a lack of international consensus regarding the prohibition of the death penalty, the incompatibility of abolition with domestic laws, and the fact that the death penalty is a criminal justice and sovereign matter. All three issues were raised by a number of States as part of the UPR.

States that relied upon a lack of consensus regarding a prohibition of the death penalty drew on a lack of international consensus. Egypt stated at the conclusion of the working group that “there was no international consensus on the abolition of the death penalty.”⁴⁴⁶ A similar statement was made by a number of States, Pakistan,⁴⁴⁷ Saint Lucia,⁴⁴⁸ Singapore,⁴⁴⁹ Jamaica,⁴⁵⁰ Viet Nam,⁴⁵¹ Japan,⁴⁵² Iran,⁴⁵³

⁴⁴⁰ Smith, R. (2011), *Equality of Nations Large and Small: Testing the Theory of the Universal Periodic Review in the Asia-Pacific*, 12 *Asia-Pac. J. on Hum. Rts. & L.* 36., p.46.

⁴⁴¹ Papua New Guinea Working Group Addendum, 30 September 2011, A/HRC/18/18/Add.1, p.2.

⁴⁴² Nauru Working Group, 8 March 2011, A/HRC/17/3, para.20.

⁴⁴³ A/HRC/17/6, para.38.

⁴⁴⁴ Kenya Working Group, 26 March 2015, A/HRC/29/10, para.56.

⁴⁴⁵ Smith (2011), p.46.

⁴⁴⁶ A/HRC/28/16, para.164.

⁴⁴⁷ A/HRC/8/42, para.47.

⁴⁴⁸ A/HRC/17/6, para.38.

⁴⁴⁹ A/HRC/WG.6/11/SGP/1, para.120; A/HRC/18/11, para.87.

⁴⁵⁰ A/HRC/16/14, para.36.

⁴⁵¹ A/HRC/12/11/Add.1, para.20.

⁴⁵² A/HRC/8/44, para.9.

⁴⁵³ A/HRC/14/12/Add.1, para.18.

Brunei,⁴⁵⁴ Bahrain,⁴⁵⁵ Malaysia,⁴⁵⁶ Bahamas,⁴⁵⁷ and Saudi Arabia.⁴⁵⁸ Looking at the list of countries that relied on such justifications for retaining the death penalty, it is immediately apparent that they are in like-company. Every single State has a poor record of complying with human rights in relation to the imposition of the death penalty. All of the above States apply the death penalty to crimes which are not “most serious crimes”, and on prohibited persons.⁴⁵⁹ In reality, while there is no total prohibition against the death penalty, it is subject to severe restriction. Egypt commented in the working group that the ICCPR does not prohibit the death penalty, but sets conditions for applying it.⁴⁶⁰ This is not correct,⁴⁶¹ and indeed the ICCPR is clearly drafted so as to create restrictions on the DP beyond merely its use, but also its proliferation. Indeed, Article 6 of the ICCPR is viewed as abolitionist in nature due to the drafting States recognising the inevitability of abolition.⁴⁶² As a consequence, Article 6 must be read restively in relation to the death penalty, and not seen as permissive of its continued existence and proliferation.⁴⁶³

The incompatibility of abolition with domestic laws is raised by a small number of States. The Maldives stated in its report submitted in the second cycle that abolition conflicted with the constitution.⁴⁶⁴ Similar justifications were raised by Belize,⁴⁶⁵ Iran,⁴⁶⁶ Saint Vincent and Grenadines,⁴⁶⁷ Antigua and Barbuda,⁴⁶⁸ Afghanistan⁴⁶⁹ and Bahrain.⁴⁷⁰ Relying on the incompatibility of state laws in justifying the retention of the death penalty is a circular argument. It is fallacious to suggest that a constitution which provides for the death penalty also necessitates its use. Amendment of such laws is also a possibility, in some cases through a referendum. Furthermore, this justification was used as a basis to refuse acceding to the Second Optional Protocol. The onus of inconsistency cannot be reversed in relation to the Second Optional Protocol due to the existence of Article 1, which allows States to become a party to the protocol despite not being fully abolitionist.⁴⁷¹ Furthermore, justification based on the inconsistency of state legislation does not comply with the principle of

⁴⁵⁴ Brunei Working Group Addendum, 10 September 2014, A/HRC/27/11/Add.1, p.3.

⁴⁵⁵ Bahrain Working Group Addendum, 12 October 2012, A/HRC/21/6/Add.1/Rev.1, p.2.

⁴⁵⁶ Malaysia Working Group Addendum, 4 March 2014, A/HRC/25/10/Add.1, p.3.

⁴⁵⁷ A/HRC/WG.6/15/L.6, para.20.

⁴⁵⁸ A/HRC/25/3, para.97.

⁴⁵⁹ See Part 3.1.1 and Part 3.1.2.

⁴⁶⁰ A/HRC/28/16, para.164.

⁴⁶¹ Schabas (2004), p.418.

⁴⁶² Schabas (2002), p.66.

⁴⁶³ OHCHR (2014), *Moving Away From the Death Penalty*, p.9.

⁴⁶⁴ A/HRC/WG.6/22/MDV/1, para.58.

⁴⁶⁵ Belize Working Group, 4 June 2009, A/HRC/12/4, p.2.

⁴⁶⁶ A/HRC/14/12/Add.1, para.7.

⁴⁶⁷ A/HRC/18/15, para.35.

⁴⁶⁸ Antigua and Barbuda National Report, 19 July 2011, A/HRC/WG.6/12/ATG/1, para.2.

⁴⁶⁹ Afghanistan National Report, 20 November 2013, A/HRC/WG.6/18/AFG/1, para.72.

⁴⁷⁰ A/HRC/21/6/Add.1/Rev.1, p.2.

⁴⁷¹ E/2015/49, para.52.

Vienna conventions Article 27 states “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

Finally, the issue of abolition as a domestic criminal justice question, rather than one of human rights, was also raised during the course of the UPR. The Bahamas stated that it was part of a “like-minded group” of States that insist that the death penalty is a domestic criminal justice issue.⁴⁷² This justification closely mirrors the note verbale that was submitted to the Secretary General in response to UNGA resolution 67/176 entitled “Moratorium on the use of the death penalty”.⁴⁷³ The note verbale states, inter alia, that the death penalty “is first and foremost an issue of the criminal justice system”.⁴⁷⁴ A number of other States within the context of the UPR raised this justification, including Libya,⁴⁷⁵ Equatorial Guinea,⁴⁷⁶ Indonesia,⁴⁷⁷ Pakistan,⁴⁷⁸ Singapore,⁴⁷⁹ Trinidad and Tobago,⁴⁸⁰ Malaysia,⁴⁸¹ and Nigeria.⁴⁸² It is unsurprising that all of these States names appear on the note verbale. The argument that the death penalty is solely for domestic criminal law is invalid. Indeed, today it has evolved into an issue that is entirely within the scope of international human rights. Furthermore, it is inapposite to suggest that domestic criminal justice do not coexist, and indeed the implication “that if it is one it cannot also be the other... is a false antithesis.”⁴⁸³

3.7 Conclusion

The UPR demonstrates that, within the international community, the “[f]amilial difference over capital punishment may turn out to be less one of temperament than of timing.”⁴⁸⁴ An exhaustive analysis of the comments made by States appears to reinforce this conclusion. It demonstrates that States are willing to apply restrictions to the death penalty. Furthermore, it shows that many retentionist States acknowledge the importance of progression towards eventual abolition. While it cannot be said that these trends are universal, they are certainly widespread. Furthermore, although in

⁴⁷² A/HRC/WG.6/15/L.6, para 85.

⁴⁷³ A/67/841.

⁴⁷⁴ A/67/841, p.3.

⁴⁷⁵ A/HRC/WG.6/9/LBY/1, para.92.

⁴⁷⁶ A/HRC/13/16, para.66.

⁴⁷⁷ A/HRC/8/23/Add.1, para.9.

⁴⁷⁸ A/HRC/8/42, para.47.

⁴⁷⁹ A/HRC/WG.6/11/SGP/1, para.120.

⁴⁸⁰ A/HRC/WG.6/12/TTO/1, para.48.

⁴⁸¹ A/HRC/25/10/Add.1, p.3.

⁴⁸² A/HRC/WG.6/17/NGA/1, para.51

⁴⁸³ OHCHR (2014), *Moving Away From the Death Penalty*, p.83.

⁴⁸⁴ Warren (2004), p.335.

a large number of cases such restrictions do not necessarily comply with reality or international law, it is still indicative of a willingness to engage constructively on the issue.

In order to engage this willingness, States must improve the way in which they make recommendations to retentionist States. An incremental approach can avoid sweeping recommendations to abolish the death penalty which are more likely to be rejected. States need to focus their recommendations to the contextual issues confronting the State under review. These include the prevalence of popular support, or the need for more effective safeguards. Making recommendations both relevant to the State at hand and addressing the issue incrementally will result in a greater level of acceptance. Ensuring that more death penalty recommendations are accepted will ultimately result in a higher level of implementation. This is clear from studies of the statistics from the first cycle, where 55% of accepted recommendations resulted in some level of implementation, compared to 19% for recommendations that were noted.⁴⁸⁵ The use of incremental recommendations does not necessitate abandoning long term recommendations for abolition, and States are still able to recommend both separately. Ensuring that States accept more recommendations can not only result in a higher level of implementation, but will also assist in the development of *opinio juris*.⁴⁸⁶

It must also be noted that non-interaction is a problem in relation to a small number of States. Brunei demonstrated almost total avoidance of the issue. India received no recommendations on the death penalty during the first cycle, whereas Jordan made no mention of the death penalty during the second cycle. It cannot be coincidence all three States were among the few during this period to demonstrate a regression by expanding their application of the death penalty.⁴⁸⁷

No recommendations were made to Palau, which in turn also made no comments regarding its retention of the death penalty. A similar issue arises in relation to Taiwan and the State of Palestine, which do not have standing to appear before the UPR due to non-recognition of the UN. This is a failure of the international community to ensure that the population of both States are in receipt of the same level of human rights protection and oversight as others. It is particularly concerning given the State of Palestine's dramatic increase in the use of the death penalty in the last few years, including reports of extra-judicial killings.⁴⁸⁸

⁴⁸⁵ UPR Info (2014), *Beyond Promises*, p.29.

⁴⁸⁶ This is discussed in more detail in Part 4.5.

⁴⁸⁷ Regression is explored in more detail in Part 4.4.

⁴⁸⁸ The Guardian, *Hamas executed 23 Palestinians under cover of Gaza conflict, says Amnesty*, 27 May 2015, available at: <http://www.theguardian.com/world/2015/may/27/hamas-executed-palestinians-under-cover-gaza-conflict-amnesty>. Last accessed 16 July 2015.

4. INEVITABILITY OF ABOLITION

The international community has been progressing inexorably towards abolition.⁴⁸⁹ The evidence arising from the UPR, human rights' newest method of achieving progress on the ground, challenges long held views on the way States justify retaining the death penalty. Tried and tested justifications such as its deterrent effect,⁴⁹⁰ the right of national sovereignty, or religious or cultural necessity⁴⁹¹ are in actual fact rarely employed within the UPR. What emerges when studying the language used by retentionist States, is a culture of deference for human rights standards and their applicability to death penalty. In the strongest cases, States offer an overt acceptance of its temporary nature. Furthermore, States show a willingness to accept standards outside of their avowed soft and hard law obligations. The justifications most commonly employed describe its restricted use and a use that is compliant with human rights standards. However, closer analysis shows that these representations do not hold up to reality. The UPR thereby poses a dilemma. It is demonstrative of a clear *opinio juris*, however it also often reveals entirely inconsistent state practice.

4.1 Language of the UPR

The approach by retentionist States to the issue of the death penalty is conciliatory in the context of the UPR. In defending the use of the death penalty, the vast majority of States use language that demonstrates a clear willingness to not only restrict the death penalty, but to move towards its ultimate abolition. This sort of language in dealing with the death penalty was apparent during the 11 years of negotiation for the right to life in the ICCPR⁴⁹² and is mirrored by the discussion regarding the right to life as part of the drafting of the UDHR.⁴⁹³ Discussing a process that involves the taking of a human being's life is likely to hold retentionist States back from defending the process too vociferously. This solemnity is a recognition of the human rights complexities that the death penalty raises. It is also likely due to their recognition that the death penalty is a temporary measure that will culminate in abolition.

A cursory examination of the statements made by the 91 retentionist States regarding the death penalty is revealing. Only 19 States raised the perceived positive consequences of the death penalty, namely its role as a deterrent. Contrast this with 78 State comments regarding the restricted use of the

⁴⁸⁹ Schabas (2002), Preface.

⁴⁹⁰ Sitaraman (2009), p.112.

⁴⁹¹ IBAHRI, (2008), *The Death Penalty under International Law*, p.13.

⁴⁹² Schabas (2002), pp.77, 93.

⁴⁹³ Schabas (2004), p.420.

death penalty. Furthermore, 13 States commented that international law did not prohibit the use of the death penalty, whereas 33 States relied upon the existence of procedural fairness in applying the death penalty. Nine States maintained that the death penalty was not a human rights issue, compared to 44 States that accepted recommendations regarding the improvement of death penalty's adherence to human rights standards. Finally, six States cited that a moratorium was inconsistent with domestic legislation, compared with 22 States that confirmed official and unofficial moratoriums were in place. The statistics speak volumes, however the actual language used by individual States is of particular interest in determining how the death penalty is perceived.

In responding to the recommendations of States during the working group of the second cycle, Barbados, although unwilling to announce an official moratorium, referred quite furtively to the death penalty's almost 30 years of abeyance.⁴⁹⁴ It went on to comment that such an extended period "made a very strong statement".⁴⁹⁵ Barbados felt that such comments "spoke louder" than an officially announced moratorium.⁴⁹⁶ Such surreptitious means of expressing support for the end of the death penalty is likely due to the fact that the government does not possess popular support for its abolition. Bangladesh adopted clearly conciliatory language in its response to recommendations of the first cycle working group, stating that it was not in a position to impose a moratorium "at this stage".⁴⁹⁷ Antigua and Barbuda utilised similar language, referring to the existence of a moratorium and commenting that it "clearly indicated the direction to which Antigua and Barbuda was leaning".⁴⁹⁸ Burkina Faso stated that it was "considering abolishing the death penalty and no executions had in fact taken place". Lesotho stated that it had not conducted an execution since 1995 and recognised during both cycles that there existed an international trend towards abolition.⁴⁹⁹ Even Egypt which has shown the greatest resistance to change regarding the death penalty demonstrated a clear willingness to restrict the application of the death penalty during the first cycle of the UPR.⁵⁰⁰ Egypt was the author of the note verbale to the Secretary-General noting the persistent objection of States to the moratorium resolution. Egypt also took it upon itself to make a number of recommendation to states encouraging their continued use of the death penalty as their sovereign right. The contrite language adopted by Ethiopia in addressing the increase of prisoners on death row demonstrates its willingness to curb the use of the death penalty.⁵⁰¹ Furthermore, the delegation in responding to the

⁴⁹⁴ A/HRC/23/11, para.38.

⁴⁹⁵ A/HRC/23/11, para.38.

⁴⁹⁶ A/HRC/23/11, para.92.

⁴⁹⁷ Bangladesh Working Group Addendum, 9 June 2009, A/HRC/11/18/Add.1, p.4.

⁴⁹⁸ A/HRC/WG.6/12/L.3, para.34.

⁴⁹⁹ A/HRC/WG.6/8/LSO/1, para.50; A/HRC/15/7, para.20; A/HRC/29/9, para.28.

⁵⁰⁰ A/HRC/WG.6/7/EGY/1, p.8.

⁵⁰¹ A/HRC/WG.6/6/ETH/1, para.47.

recommendations of the working group stated that the limited use show that the death penalty is “practically abolished” given only 3 executions in 15 years.⁵⁰²

During its first cycle working group, Bangladesh responded to calls for a moratorium stating that it was not in a position to do so “at this stage”.⁵⁰³ This is a clear example of the language adopted by States in addressing the issue of the death penalty. Rather than a clear rejection of the suggestion of a moratorium, the vast majority of States adopt positive language, setting a scene that suggests while not currently attainable, abolition or restriction of the death penalty is the desired goal. Similarly, Botswana expressed tacit support for abolition by declaring its “openness towards organizations advocating” against the death penalty.⁵⁰⁴ The concept of abolition as a goal to be worked towards was reiterated by a number of States. Congo noted in its national report that abolition of the death penalty was a “challenge to be met”.⁵⁰⁵ Trinidad and Tobago stated that discussions are taking place regarding further restriction of the death penalty, which was described as being in abeyance. It went on to state that due to a spike in crimes, “timing for repeal is not optimal”. This suggests that abolition is desirable, however due to an increase in violent crimes “it was a great challenge for a Government to risk giving the impression that it was not adequately combatting crime”.⁵⁰⁶ Dominica expressed willingness to adopt a moratorium, stating that it was possible but restricted by popular support.⁵⁰⁷ Chad stated that “when the time was right” it would consider options regarding the formalising of abolition.⁵⁰⁸ Viet Nam stated that “when conditions allow, we will consider ratifying the 2nd Optional Protocol”.⁵⁰⁹ Gambia sought to moderate expectations of abolition in the near future, by stating that it was to remain in force for “some time”.⁵¹⁰ While a statement of intention to continue with the death penalty, the language it Gambia suggests that it view the death penalty as a temporary measure or a means to an end. Guinea made similar comments in response to recommendation during the first cycle for a moratorium, stating that such action was “premature”,⁵¹¹ thereby suggesting that despite not being able to implement such suggestions, a moratorium was the ultimate goal of Guinea. Proof positive of this interpretation of Guinea’s choice of language in the first cycle can be found in its commitments of the second cycle. Guinea clearly stated that it intends “to secure the abolition of the

⁵⁰² A/HRC/13/17, para.8.

⁵⁰³ A/HRC/11/18/Add.1, p.4.

⁵⁰⁴ A/HRC/10/69, para.42.

⁵⁰⁵ Republic of the Congo National Report, 23 February 2009, A/HRC/WG.6/5/COG/1, para.141.

⁵⁰⁶ A/HRC/WG.6/12/TTO/1, para.53; A/HRC/19/7, para. 19, 52.

⁵⁰⁷ A/HRC/13/12, para.67.

⁵⁰⁸ A/HRC/25/14, para.104.

⁵⁰⁹ A/HRC/12/11/Add.1, para.20.

⁵¹⁰ A/HRC/WG.6/7/GMB/1, para.56.

⁵¹¹ Guinea Working Group Addendum, 15 September 2010, A/HRC/15/4/Add.1, para.22.

death penalty by means of a national campaign.”⁵¹² Consideration for abolition was also noted by Suriname,⁵¹³ Swaziland,⁵¹⁴ Tajikistan,⁵¹⁵ Thailand,⁵¹⁶ USA,⁵¹⁷ and Zimbabwe.⁵¹⁸

The language adopted by states in addressing their retention of the death penalty demonstrates a willingness to not only consider restriction of the death penalty, but also to make progressive steps towards abolition. There is no doubt that some statements made are equivocal, and the expression of a mere willingness to consider an issue cannot infer an acceptance by the State. However, it is certainly informative, and complements an analysis of the more overt statements of support made by other States.

4.2 Overt Acceptance

The acknowledgement of States regarding the importance of the rarity with which the death penalty is applied is a strong indicator of their willingness to abolish and restrict the death penalty. Retentionist States not only refer to the need to restrict the death penalty, but also move towards its suspension and ultimate abolition. A large number of States in the context of the UPR make comments that clearly demonstrate an acceptance of restriction and abolition of the death penalty.

Commitments to ratify the Second Optional Protocol are a clear acceptance of a need to secure abolition of the death penalty. Mongolia issued an official moratorium, and has stated that it is a step towards abolition. Subsequently, recommendations to ratify the Second Optional Protocol were fully implemented.⁵¹⁹ Madagascar has acceded to the Second Optional Protocol and indicated that it is in the process of organising debate on the issue.⁵²⁰ The DRC stated that it was advocating for the abolition of the death penalty and the signing of the Second Optional Protocol.⁵²¹ Niger stated that it had adopted strategies to accede to the Second Optional Protocol.⁵²² Tanzania stated that it has not been able to sign the Second Optional Protocol due to public opinion, however it continues to educate public regarding the global trend towards abolition.⁵²³

⁵¹² Guinea National Report, 30 October 2014, A/HRC/WG.6/21/GIN/1, para.114.

⁵¹³ Suriname National Report, 16 February 2011, A/HRC/WG.6/11/SUR/1, para.14.

⁵¹⁴ A/HRC/WG.6/12/SWZ/1, para.73; Swaziland Working Group, 12 December 2011, A/HRC/19/6, para.48.

⁵¹⁵ A/HRC/WG.6/12/TJK/1, paras 86, 88.

⁵¹⁶ Thailand Working Group Addendum, 6 March 2012, A/HRC/19/8/Add.1, p.4.

⁵¹⁷ A/HRC/WG.6/22/USA/1, para.51.

⁵¹⁸ A/HRC/WG.6/12/ZWE/1, para.47.

⁵¹⁹ A/HRC/WG.6/9/MNG/1, para.20; Mongolia Working Group, 4 January 2011, A/HRC/16/5, para.11.

⁵²⁰ A/HRC/14/13/Add.1, para.20.

⁵²¹ A/HRC/WG.6/6/COD/1, para 36.

⁵²² A/HRC/17/15, para.9

⁵²³ A/HRC/19/4, para.23; Tanzania Working Group Addendum, 12 March 2012, A/HRC/19/4/Add.1, p.3.

Many states also express a commitment to eventual abolition and the implementation of a moratorium. Russia stated clearly that a total moratorium is respected and that it is working towards abolition.⁵²⁴ During the first cycle, Kenya stated that a de facto moratorium exists. During the working group, Kenya listed its moratorium as an "achievement of human rights" and stated that they are committed to abolition.⁵²⁵ Libya stated that "[a]bolition of the death penalty remains a goal of Libyan society", and in the second cycle it reaffirmed that it was striving to restrict the application of the death penalty.⁵²⁶ Cameroon stated that its convictions were towards abolition, and that the death penalty "would eventually be abolished".⁵²⁷ Benin stated that although the death penalty has not been abolished it, "like many other countries, is moving towards a moratorium."⁵²⁸ Somalia stated that it "does not want this practice to add to more loss of life" and therefore "is considering putting a moratorium on the death penalty"⁵²⁹ Algeria not only declared that it would continue its nearly 20 year moratorium, but also co-authored a UNGA resolution calling for moratoriums to be implemented globally.⁵³⁰ The Bahamas acknowledged that popular support for the death penalty was a constraint on its "human rights environment".⁵³¹ Belarus states that abolition is supported by the leaders of the country,⁵³² and the death penalty will remain on the statute book "only for the time being".⁵³³ The Central African Republic stated that a draft bill of abolition was being considered, and that the death penalty is to be removed from the criminal code before the end of the transition period.⁵³⁴ Ghana expressed a clear and open willingness to review the death penalty as part of the first cycle, however reiterated the necessity of a referendum.⁵³⁵ During the second cycle Ghana expressed a willingness to maintain the moratorium and stated that it accepted recommendations to abolish the death penalty.⁵³⁶ Guyana stated that it was working with Amnesty International to build popular support for a moratorium.⁵³⁷ Iraq hoped that security and stability would be "paving the way for the abolition of capital punishment".⁵³⁸ Sierra Leone stated that abolition was on the legislative agenda and that all sentences have been commuted to life.⁵³⁹ Sri Lanka stated that it a moratorium is in place and has not

⁵²⁴ A/HRC/WG.6/4/RUS/1, para.43; Russia Working Group, 3 March 2009, A/HRC/11/19, para.76.

⁵²⁵ A/HRC/15/8, paras 13, 49

⁵²⁶ A/HRC/WG.6/9/LBY/1, para.92; A/HRC/WG.6/22/LBY/1, para.76.

⁵²⁷ A/HRC/24/15, para.58.

⁵²⁸ Benin National Report, 9 April 2008, A/HRC/WG.6/2/BEN/1, para.46.

⁵²⁹ Somalia National Report, 11 April 2011, A/HRC/WG.6/11/SOM/1, para.51.

⁵³⁰ A/HRC/WG.6/1/DZA/4, para.11.

⁵³¹ A/HRC/WG.6/3/BHS/1, para.73.

⁵³² A/HRC/WG.6/8/BLR/1, para.94.

⁵³³ A/HRC/WG.6/8/BLR/1, para.90.

⁵³⁴ Central African Republic Working Group, 6 January 2014, A/HRC/25/11, para.96.

⁵³⁵ Ghana National Report, 8 April 2008, A/HRC/WG.6/2/GHA/1, para.31.

⁵³⁶ A/HRC/22/6, para.10.

⁵³⁷ A/HRC/WG.6/21/GUY/1, para.10.

⁵³⁸ A/HRC/WG.6/7/IRQ/1, para.116.

⁵³⁹ A/HRC/18/10, para.29.

executed in over 30 years. In refusing all five recommendations it stated that it was already a de facto abolitionist State and that the death penalty was under review.⁵⁴⁰

A number of States confirmed their support for abolition, and were working to change public opinion. Mali stated that it was seeking to have a bill to abolish the death penalty approved, but due to public opinion stalling the bill, Mali is conducting education.⁵⁴¹ Lebanon stated that it has implemented an effective moratorium and was conducting an awareness campaign.⁵⁴² Nigeria stated as part of the second cycle that it would continue efforts to amend constitution and abolish the death penalty.⁵⁴³ Zambia stated as part of the first cycle that a report addressing the death penalty was before the government. In the second cycle it stated that popular support was a roadblock to abolition. "Eager to respect the wishes of the people in this regard, despite the fact that the position of the government may be different".⁵⁴⁴ Tunisia has stated a clear desire to abolish the death penalty. An official moratorium exists and all death sentences are commuted to imprisonment. Moratorium has led to debate and it is hoped that this will result in abolition "once and for all".⁵⁴⁵

Whether confirming a desire to accede to the Second Optional Protocol, educate the population, or setting total abolition as a future goal, a large number of States are willing to commit to ending the use of the death penalty. A large number of retentionist States view the death penalty as a transitional measure, an obstacle to be overcome, or a totally defunct practice.

4.3 Above and Beyond Accepted Obligations

Recently the UN Secretary-General, in a report to the Economic and Social Council, stated:

“That the [S]afeguards may be considered the general law applicable on the subject of capital punishment, even for those States that have not assumed any treaty obligations whatsoever with respect to the imposition of the death penalty, is borne out in the universal periodic review mechanism of the Human Rights Council... Even States that are not subject to conventional obligations with respect to capital punishment have participated in the

⁵⁴⁰ A/HRC/WG.6/2/LKA/1, para.59.

⁵⁴¹ A/HRC/WG.6/2/MLI/1 para.54; A/HRC/23/6, para.15.

⁵⁴² A/HRC/WG.6/9/LBN/1, para.30-31

⁵⁴³ Nigeria Working Group, 16 December 2013, A/HRC/25/6, para.130.

⁵⁴⁴ A/HRC/WG.6/2/ZMB/1, para.5; A/HRC/22/13/Add.1, para.33.

⁵⁴⁵ A/HRC/WG.6/1/TUN/1, para 6; A/HRC/21/5, para. 81.

universal periodic review process as if they were subject to international norms concerning the death penalty."⁵⁴⁶

Although the ECOSOC Safeguards are soft law obligations, compared to binding treaty obligations that apply to parties of the ICCPR and its Second Optional Protocol, they are also capable of assuming the status of a customary norm through the existence of state practice and *opinio juris*. As the Secretary-General points out, the UPR not only gives us a clear understanding of state practice in relation to the death penalty, but also a record of their spoken opinion regarding the necessity of applying such laws. In a number of cases, States express a clear willingness to comply with obligations outside of their avowed treaty regime.

4.3.1 ICCPR

The ICCPR is widely ratified, and of the 91 States that still retain the death penalty on its books, only 17 are not State Parties to the ICCPR. Of this relatively small number that are bound by the covenant, 15 of them have demonstrated through their statements during the UPR that they adhere to the principles set out in article 6, namely the right to life.

Despite only being a signatory to the ICCPR, China confirmed that the death penalty applied only to the most serious crimes, and not to children or pregnant women.⁵⁴⁷ Further in line with the restrictive language of Article 6, China confirmed the restriction of the crimes applicable to the death.⁵⁴⁸ These restrictions were implemented by China in the form of abolishing 13 economic crimes.⁵⁴⁹ China adhered to the restrictive and abolitionist focus of article 6 by indicating its willingness to move toward abolition.⁵⁵⁰ Similarly, Antigua and Barbuda, which is not a party to the ICCPR, stated that in relation to the death penalty "it was concerned and would certainly educate the public towards the realization of its abolition." Furthermore, it stated that it was leaning towards abolition due to a nearly 20 year moratorium and was considering commuting death sentences to life.⁵⁵¹ In practice, Antigua and Barbuda stated that it had abolished mandatory sentences,⁵⁵² thereby complying with article 6 prohibiting the arbitrary deprivation of life, and also the restriction to the "most serious crimes". Comoros stated that a draft code abolishing the death penalty was being considered. The State described this as a major step due to it being Islamic.⁵⁵³ At the conclusion of the second cycle, Comoros accepted nine recommendations for abolition and adoption of Second Optional Protocol.

⁵⁴⁶ E/2015/49, para.61.

⁵⁴⁷ A/HRC/WG.6/4/CHN/1, para.43.

⁵⁴⁸ A/HRC/11/25, para.67.

⁵⁴⁹ A/HRC/WG.6/17/CHN/1, para.46.

⁵⁵⁰ A/HRC/11/25, para.67.

⁵⁵¹ A/HRC/WG.6/12/L.3, para.34.

⁵⁵² A/HRC/WG.6/12/ATG/1, para.2.

⁵⁵³ Comoros National Report, 8 November 2013, A/HRC/WG.6/18/COM/1, paras 116-117.

Cuba described the retention of the death penalty as only in “most serious cases” and by a competent court, and not applicable to protected persons. Furthermore, Cuba stated it “has incorporated the safeguards established by the United Nations”⁵⁵⁴ and that “[p]hilosophically speaking, Cuba is against application of the death penalty. We are in favour of eliminating it when suitable conditions exist.”⁵⁵⁵

Malaysia, despite not being a party to the ICCPR recognises almost all of the restrictions, explicitly referring to compliance with Art. 6(2).⁵⁵⁶ It stated in the second cycle that debate was increasing regarding abolition and also noted a conscious initiative or trend against the implementation or execution of the death penalty.⁵⁵⁷ Myanmar is also not a party to the ICCPR however it accepted obligations in line with article 6, including restriction to most serious crimes, non-retrospective application and fair trial standards.⁵⁵⁸ Nauru, despite only being a signatory to the ICCPR, accepted three recommendations regarding the restriction of the death penalty.⁵⁵⁹ Oman stated a clear willingness to comply with the restriction of crimes to the most serious.⁵⁶⁰ Qatar despite not being a party to the ICCPR, accepted a recommendation to continue progress towards fair trial rights, equality of arms, presumption of innocence, right to appeal and right to pardon. Furthermore, in the second cycle Qatar stated that the death penalty only applied to murder.⁵⁶¹ Saint Kitts & Nevis⁵⁶² and Saint Lucia⁵⁶³ show a willingness to only apply the death penalty to the most heinous crimes. Tonga also stated that it applied the standard of most heinous crimes, and explicitly confirmed that the domestic courts were upholding the ICCPR standards despite non-ratification.⁵⁶⁴ Saudi Arabia, despite not being a party to the ICCPR, stated that the death penalty was only applied to the most serious crimes and applied fair trial rights that are consistent with international standards.⁵⁶⁵ Similarly, Singapore, recognised restriction to most serious crimes. It also applies fair trial standards and due judicial process.⁵⁶⁶ United Arab Emirates, as part of the second cycle, accepted recommendations regarding the restriction against the execution juveniles, reducing the number of crimes and respecting minimum standards.⁵⁶⁷

The above 15 States all clearly demonstrate a willingness to place restrictions on the death penalty, including its application to prohibited persons, the types of crimes, and the existence of procedural

⁵⁵⁴ A/HRC/WG.6/4/CUB/1, para.39.

⁵⁵⁵ Cuba Working Group Addendum, 10 June 2009, A/HRC/11/22/Add.1, p.8.

⁵⁵⁶ A/HRC/WG.6/4/MYS/1/Rev.1, paras 89-90; A/HRC/WG.6/17/MYS/1, para.45.

⁵⁵⁷ A/HRC/WG.6/17/MYS/1, para.47.

⁵⁵⁸ A/HRC/WG.6/10/MMR/1, para.37.

⁵⁵⁹ A/HRC/17/3, fn.7.

⁵⁶⁰ A/HRC/WG.6/10/OMN/1, paras 76-78.

⁵⁶¹ Qatar Working Group, 15 March 2010, A/HRC/14/2., pg.15.

⁵⁶² A/HRC/17/12, paras 10-12.

⁵⁶³ A/HRC/17/6, para.38.

⁵⁶⁴ A/HRC/8/48, para.34; Tonga National Report, 9 January 2013, A/HRC/WG.6/15/TON/1, para.136.

⁵⁶⁵ A/HRC/25/3, para.97.

⁵⁶⁶ A/HRC/WG.6/11/SGP/1, para.120; A/HRC/18/11, para.87.

⁵⁶⁷ United Arab Emirate Working Group, 21 March 2013, A/HRC/23/13.

safeguards. In some cases States recognise the ultimate goal of abolition that is certainly within the purpose of Article 6. However, as outlined in Part 3, a large number of States do not comply in practice with their statements at the UPR, particularly in relation to the most serious crimes. This is likely due to the fact that some retentionist States are not in agreement of what constitutes the most serious crimes. Of the above mentioned States, only Russia, Comoros and Cuba were not listed as part of note verbale against the 2013 UNGA resolution regarding a moratorium on the death penalty.⁵⁶⁸ The note states, inter alia, that “the question of whether to retain or abolish the death penalty and the types of crimes for which the death penalty is applied should be determined by each State, taking fully into account the sentiments of its own people, state of crime and criminal policy”.⁵⁶⁹ Despite this inconsistency in the practice of States in relation to the most serious crimes, there is clear consistency regarding the prohibition against the execution of children, pregnant women and to a lesser extent, the imposition of fair trial standards.

4.3.2 Second Optional Protocol

Despite not being a party to the Second Optional Protocol of the ICCPR, some States have demonstrated a willingness to comply with its obligations. During the working group of the second cycle, Burkina Faso stated that it was aware of the need to ratify the Second Optional Protocol.⁵⁷⁰ Russia stated that it was already “in full compliance with the basic obligation contained in the Second Optional Protocol... even though it has not acceded to [it].”⁵⁷¹ The Republic of the Congo accepted recommendation for abolition and thereby recognised the goal of the Second Optional Protocol despite not being a party.⁵⁷²

Bizarrely, two States referred to their accession to the Second Optional Protocol in error. Ghana stated in its report of the first cycle that it had signed and ratified the Second Optional Protocol.⁵⁷³ This appears to have been included in error, with the Second Optional Protocol mistaken in the place of Ghana’s accession to the First Optional Protocol. However, the delegation saw fit to clearly include the words relating to the purpose of the protocol, namely the abolition of the death penalty. This is indicative of the willingness of States to adhere to treaty regimes outside of their avowed obligations. Nauru stated that, “[i]t is very unlikely that the Parliament would introduce the death penalty, as Nauru is a signatory to the Second Optional Protocol to the ICCPR, and it is likely something that neither the Nauruan population nor the international community would tolerate.”⁵⁷⁴ Nauru is not in

⁵⁶⁸ A/67/841, pp.4-5

⁵⁶⁹ A/67/841, p.4.

⁵⁷⁰ Burkina Faso Working Group, 8 July 2013, A/HRC/24/4, para.11.

⁵⁷¹ A/HRC/24/14/Add.1, p.6.

⁵⁷² Republic of the Congo Working Group, 6 January 2014, A/HRC/25/16, para.70.

⁵⁷³ A/HRC/WG.6/2/GHA/1, para.17.

⁵⁷⁴ Nauru National Report, 5 November 2010, A/HRC/WG.6/10/NRU/1, fn.7.

fact a party to the Second Optional Protocol, however, their state report indicates a clear willingness to comply nonetheless.

4.4 Regression

There are few examples of regression within the UPR. Despite a majority of States demonstrating a willingness to restrict the death penalty, a small handful of States expanded the application by either increasing the number of applicable crimes, or simply resuming executions after a significant period of abeyance.

Brunei exhibited the most severe regression. By increasing the number of crimes that attracted the death penalty and including stoning as a punishment,⁵⁷⁵ Brunei demonstrates that not only was it willing to expand the death penalty to include non-criminal offences, such as adultery and same-sex relations, but also to apply a prohibited method of punishment to those offences.⁵⁷⁶ Liberia came under heavy criticism, despite acceding to the Second Optional Protocol, for its introduction of the Armed Robbery Act in 2008, which applied the death penalty to such crimes.⁵⁷⁷ Bangladesh introduced the death penalty for human trafficking offences.⁵⁷⁸ Kenya, India, Papua New Guinea, Nigeria and the USA all created new offences for which the death penalty is applicable.⁵⁷⁹

A number of States also resumed executions. Jordan resumed executions despite a moratorium.⁵⁸⁰ Syria stated that the death penalty was almost suspended, however continued executions in 2014.⁵⁸¹ India, Indonesia Pakistan, Kuwait and Nigeria all resumed executions despite several years of disuse.⁵⁸²

⁵⁷⁵ BBC News, Brunei introduced tough Islamic penal code, 30 April 2014, available at: <http://www.bbc.com/news/world-asia-27216798>.

⁵⁷⁶ See 3.1.5

⁵⁷⁷ A/HRC/16/3, para.51.

⁵⁷⁸ E/2015/49, p.14.

⁵⁷⁹ E/2015/49, pp.14-15.

⁵⁸⁰ A/HRC/11/29, para.17

⁵⁸¹ Syria Working Group, 24 January 2012, A/HRC/19/11, para.46.

⁵⁸² E/2015/49, p.15.

4.5 Customary Law

A number of human rights elements that relate directly to the death penalty are already widely accepted as part of customary international law, including the right to life,⁵⁸³ the prohibition against the execution of children,⁵⁸⁴ and the right to a fair trial.⁵⁸⁵ Indeed, some argue that they are to be considered norms of *jus cogens*,⁵⁸⁶ particularly in relation to the execution of children,⁵⁸⁷ and even the right to life.⁵⁸⁸ Whether or not the right to life itself is a customary norm does not circumvent issues relating to its interpretation and the scope of the right.⁵⁸⁹ Whether or not the total abolition of the death penalty is a customary norm is a more complex question. Whether it equates to a norm of *jus cogens* even more so. However, rather than total abolition, the progressive restriction of the death penalty, as interpreted in Article 6 of the ICCPR, may be capable of such status.

4.5.1 Customary norm

Establishing the existence of a customary law requires the establishment of two factors, state practice and *opinio juris*. While state practice is objective and must be consistent among States, *opinio juris* is a requirement that the States act according to a belief in a legal obligation.⁵⁹⁰ Such belief can be demonstrated through the tacit or explicit words or actions of a State. Brian Lepard proposes that a “customary international law norm arises when states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct”⁵⁹¹ This particular construction of customary law seeks to minimize the role played by state practice, particularly in light of the norm’s moral content.⁵⁹² Whenever a State in the context of the UPR claims that they adhere to certain human rights standards, they are contributing to the universal acceptance of that standard. This is particularly relevant to death penalty.

⁵⁸³ The right to life contained in the ICCPR was recognised as an embodiment of customary international law when it was codified. This is clear in the travaux préparatoires. See, Hartman, J. (1983). Hartman, Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. Rev. 655, 671-72.

⁵⁸⁴ Schabas (2002), p.85.

⁵⁸⁵ Schabas (2002), p.213.

⁵⁸⁶ A customary norm from which no derogation is permitted.

⁵⁸⁷ The IACtHR stated in the case of Michael Domingues v United States that the prohibition of the execution of persons under the age of 18 at the time the offence was committed is a norm of *jus cogens*.

⁵⁸⁸ Schabas (2002), p.376.

⁵⁸⁹ Schabas (2002), p.97.

⁵⁹⁰ *Libya v. Malta*, (1985) I.C.J. Rep. 13. By a Special Agreement of 23 May 1976, para.27.

⁵⁹¹ Lepard, B. (2010). Customary International Law. A New Theory with Practical Applications. Cambridge, Cambridge University, pp.97–98.

⁵⁹² Lepard (2010), p.256.

The restriction of the death penalty is contained in the Article 6 of the ICCPR, and its total abolition is provided for in the Second Optional Protocol. Article 38 of the Vienna Conventions on the Law of Treaties states that “[n]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.” In the context of the UPR, comments made, and recommendations accepted by States may be capable of binding them. Given that they are comments made publicly and in a working group that contains the international community, it is possible for legal obligations to be created.⁵⁹³

Glancing at the statistics of the acceptance of death penalty recommendations at the UPR, it is easy to conclude that retentionist States broadly reject the restriction or abolition of the death penalty.

However, a deeper analysis reveals a strong undercurrent of support. Part 3 and 4 demonstrate the existence of consistent *opinio juris* from retentionist States that the death penalty should be subject to restriction. The vast majority of these States confirm that the death penalty does not apply beyond the most serious crimes,⁵⁹⁴ is not applied to children or pregnant women⁵⁹⁵ and is subject to fair trial standards and adequate safeguards. All of these restrictions are codified in Article 6 the ICCPR, and reiterated in the ECOSOC Safeguards. Furthermore, States that are not a party to the ICCPR also apply many of these restrictions to their use of the death penalty.⁵⁹⁶ In some cases these States have directly cited its adherence with the standards of the ICCPR.⁵⁹⁷ Furthermore, the language used by retentionist States throughout the course of the UPR show a deference to this goal of restriction, and in many cases show a clear willingness to impose moratoriums and move towards abolition.⁵⁹⁸

Perhaps the most challenging aspect of establishing a customary norm regarding abolition or restriction of the death penalty is found in the practice of States. Despite broad verbal acceptance of the principles of restriction, in practice the death penalty is applied to a number of offences which are not generally accepted as “most serious crimes”. Furthermore, a number of States have registered their persistent objection to the death penalty being subject to restriction and moratorium.⁵⁹⁹ The fact that retentionist States often apply the death penalty to crimes that are not the “most serious” does not necessarily run contrary to establishment of custom. Kirgis states that “a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.”⁶⁰⁰ The fact that the practice of States does not always accord with their reality is not necessarily capable of defeating the weight of the *opinio*

⁵⁹³ International Court of Justice – Nuclear Test Case (Australia v. France), ICJ, 20 December 1974, paras 43, 50.

⁵⁹⁴ See Part 3.1.1

⁵⁹⁵ See Part 3.1.2

⁵⁹⁶ See Part 4.3.1.

⁵⁹⁷ Cuba, Tonga and Saudi Arabia, See Part 4.3.1.

⁵⁹⁸ See 3.1.4, 4.1, & 4.2.

⁵⁹⁹ See Part 4.5.2.

⁶⁰⁰ Lepard, (2010), p.25.

juris. As established in the case of *Nicaragua v United States* by the ICJ⁶⁰¹, the court stated that the establishment of a norm need not conform entirely to the rule, but rather that it is generally consistent. This can be seen in the fact that although not all States restrict the use of the death penalty to the most serious crimes as its interpretation has developed, they do show a willingness to restrict the death penalty's application according to their own values. This is a clear recognition that the death penalty must be subject to restriction. A good example of a customary norm being challenged by contradictory state practice is the prohibition against torture. Lepard argues that in such cases, rather than putting excessive weight on state practice, a method must be adopted that looks at the "belief of states about the desirability of such a norm."⁶⁰² This is particularly the case for norms which are ethical or moral in nature.⁶⁰³

4.5.2 Persistent objections

The persistent objection of States is a further road block to any conclusion that abolition is a customary norm. Throughout the UPR process Egypt made a number of recommendations to States encouraging them to "continue exercising its sovereign right of implementing its penal code in conformity with universally agreed human rights standards, including the application of the death penalty."⁶⁰⁴ The recommendation was made on nine occasions throughout both cycles and was accepted by six States.⁶⁰⁵ Egypt's recommendations show that it views *opinio juris* as important, and this is clearly demonstrated in its authorship of the note verbale regarding the UNGA resolution for a moratorium.⁶⁰⁶ While this most recent note contained the signatures of 47 States, this has decreased from 58 since its first submission in 2008.⁶⁰⁷ Furthermore, no note verbale has been submitted in response to the most recent resolution in 2014.⁶⁰⁸ The note verbale, while stating that the death penalty is a domestic legal issue, does not directly address the need to restrict the death penalty. It also concedes that all States apply the death penalty in "compliance with their international obligations".⁶⁰⁹ While the note is clear in its rejection of the existence of a norm requiring abolition, it is silent in relation to the need to restrict the death penalty generally. Regardless, the persistent objection of a

⁶⁰¹ Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. United States of America*); Merits, International Court of Justice (ICJ), 27 June 1986.

⁶⁰² Brian Lepard, *The Necessity of Opinio Juris in the Formation of Customary International Law*, Panel Discussion, 12 July 2013, University of Geneva p.9, available at: <https://law.duke.edu/cicl/opiniojuris/schedule/>.

⁶⁰³ *Ibid.*, p.10.

⁶⁰⁴ Central African Republic Working Group, 4 June 2009, A/HRC/12/2., para.39.

⁶⁰⁵ Accepted by Malaysia, Afghanistan, Bangladesh, China, Viet Nam, Central African Republic; see <http://www.upr-info.org/database/>

⁶⁰⁶ A/67/841.

⁶⁰⁷ E/2015/49, p.22.

⁶⁰⁸ UNGA Res 69/186.

⁶⁰⁹ A/67/841 p.4.

number of States will result in the rule no longer applying to them, but does not necessarily entirely stall the normative process. As the International Law Commission states, the persistent objector rule allows that “the convoy of the law’s progressive development [to] move forward without having to wait for the slowest vessel.”⁶¹⁰

4.5.3 Jus Cogens

Should the abolition or restriction of the death penalty be considered a norm of jus cogens, even a persistent objection would not be capable of preventing the enforcement of the norm.⁶¹¹ Article 53 of the Vienna Conventions on the Law of Treaties defines norm of jus cogens as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁶¹² As such, in order to become a norm of just cogens, the restriction of the death penalty must essentially “create obligations and/or rights for at least a great majority of states”.⁶¹³ What truly distinguishes a norm of jus cogens is the requirement that it is non-derogable. There being 168 State Parties and 7 Signatories to the ICCPR is a strong indication of its broad acceptance by States. Furthermore, by looking at the manner in which retentionist States show deference to the restriction of the death penalty, it is clear that they view such principles as important and applicable. Indeed, even States not a party to the ICCPR almost universally apply such principles.⁶¹⁴ Article 4 of the ICCPR states that no derogation is permitted from the right to life in Article 6. Therefore, the right to life, which contains restrictions on the death penalty, is capable of creating a norm of jus cogens that is consistent with its underlying intention. In other words, the requirement to progressively restrict the death penalty with a view to abolition. Article 6 does not permit the use of the death penalty so much as it ensures its restriction with a view to abolition. As Fausto Pocar states, Article 6, while tolerating the existence of the death penalty, does so “within certain limits and in view of future abolition”. He further states that Article 6 “may by no means be interpreted as implying for any State party an authorization to delay its abolition or to introduce or reintroduce it.”⁶¹⁵ This abolitionist bent that Article 6 possesses is also interpreted as restricting retentionist States from expanding the application of the death penalty. The Human Rights Committee found that an “[e]xtension of the scope of application of the death penalty raises questions as to the

⁶¹⁰ Gunaratne, R. Who is a Persistent Objector?, available at: <https://ruwanthikagunaratne.wordpress.com/2011/04/22/persistent-objector/>.

⁶¹¹ Schabas (2002), p.376.

⁶¹² Vienna Convention on the Law of Treaties, Art. 53.

⁶¹³ Connie de la Vega & Jennifer Brown, Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?, 32 U.S.F. L. REV. 735, p. 760 (1998)

⁶¹⁴ See Part 4.3.1.

⁶¹⁵ Fausto Pocar, *Kindler v Canada*, Dissenting opinion; as cited in Schabas, (2002), p.104.

compatibility with article 6 of the Covenant".⁶¹⁶ This perspective was reiterated by the Special Rapporteur on extrajudicial, summary or arbitrary executions who stated that increasing the scope of the death penalty goes against the spirit of article 6.⁶¹⁷ While many States showed a willingness to restrict the use of the death penalty, only a very small number of States demonstrated regressive steps against the trend of abolition throughout the course of the UPR.⁶¹⁸

Detailed analysis of the UPR shows that not only is progressive restriction of the death penalty part of the spirit of article 6, but that it is almost universally recognised by retentionist States. Given the *opinio juris* demonstrated by retentionist States throughout the course of the UPR, it can be concluded that not only is the progressive restriction of the death penalty a customary norm, but also a norm of *jus cogens*. The result of this finding restricts States from not only imposing the death penalty beyond the restrictions contained in article 6 of the ICCPR, but also from increasing the application of the death penalty. However, given the comparatively limited ratification of the Second Optional Protocol, it is unlikely that total abolition of the death penalty could be considered a norm of *jus cogens*, or indeed a customary norm at all.

5. CONCLUSION

The ability of the UPR to bring about change is perhaps not as prosaic as it would first appear. While at a glance the high levels of non-implementation of death penalty recommendations within the UPR paint a grim picture, it is in fact more complex. It is argued that the best way to measure the success of the UPR in achieving human rights progress is through the implementation of recommendations.⁶¹⁹ To some extent this is certainly true, and the need for improved practice in making recommendations to retentionist States is vital to ensuring that they receive greater acceptance and implementation. However, this conclusion also ignores the UPR's capability of adducing strong *opinio juris* in an area like the death penalty that is fraught with a lack of transparency.

The UPR reveals how the death penalty is truly viewed by retentionist States. Rather than vehement defence of the death penalty and the praising of the virtues and importance of executions, in fact what we see is conciliatory, pragmatic and contrite language. To some extent this is an attempt by States to appease criticisms, but also to improve its standing in the eyes of the international community. It is

⁶¹⁶ 'Preliminary Observations on the Third Periodic Report of Peru', UN Doc. CCPR/C/79/Add. 67, para. 15; as cited in Schabas (2002), p.104.

⁶¹⁷ Schabas (2002), p.104.

⁶¹⁸ See Part 4.4

⁶¹⁹ Sweeney, G. & Saito, Y. (2009). An NGO assessment of the new mechanisms of the UN Human Rights Council, *Human Rights Law Review*, Vol.9, No.2, p.203.

possible to distil a clear and consistent willingness by retentionist States to restrict the death penalty with a view to its abeyance and ultimate total abolition. Indeed, the language adopted by States as part of the UPR is near universal in its restrictive and temperate nature. Retentionist States not only speak of the death penalty in way that points to abolition, but also overtly accept it. For example, many States are willing to move towards abolition, although found their efforts are stalled by public support for the death penalty.⁶²⁰

To date it has not been possible to conclude with certainty that customary law prohibits the death penalty.⁶²¹ However, through the looking glass of the UPR we are able to explore the true disposition of retentionist States. It is clear that progress towards abolition is not only inexorable, but almost universally acknowledged through either practice, or *opinio juris*. Although it cannot be said that a total prohibition on the death penalty enjoys the status of a customary norm, the restriction with the view to abolition may not only be considered a customary norm, but a norm of *jus cogens* from which no derogation is permitted. On this basis, States are prohibited from expanding the application of the death penalty, and furthermore, must progressively restrict its application with a view to abolition.

International human rights law is “probably the most significant single impetus” that has contributed to abolition worldwide.⁶²² Because of its importance, developing norms regarding abolition are crucial in bolstering arguments against its proliferation. When the scrutiny of the international community is applied to the death penalty through the conduit of the UPR, it becomes apparent that the death penalty is no longer an implacable ritual, but in fact a pragmatic one. It is a mechanism that is increasingly acknowledging its own irrelevance and inhumanity and will inevitably fade into obscurity.

⁶²⁰ Burkina Faso, DRC, Guyana, Kenya, Lebanon, Madagascar, Malawi, Mali, Russia, Saint Lucia, Tunisia, Tanzania, Zambia

⁶²¹ Schabas (2004), p.419.

⁶²² Schabas (2004), p.444.

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7. APPENDICES

1. Spreadsheet of States that retain the death penalty including their responses.