Complaint

on behalf of Mr David P. Wilson under sentence of death and in the custody of the Alabama Department of Corrections, United States of America

Submission to

Dr Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions

Dr Alice Edwards, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Dr Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Dr Heba Hagrass, Special Rapporteur on the rights of persons with disabilities

Professor Margaret Satterthwaite, Special Rapporteur on the independence of judges and lawyers

Dr Livingstone Sewanyana, Independent Expert on the promotion of a democratic and equitable international order

Dr Matthew Gillett, Chair-Rapporteur, Working Group on Arbitrary Detention

Professor Robert McCorquodale, Chairperson, Working Group on Business and Human Rights

OHCHR-UNOG

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15th April 2024

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A. Author of Complaint

1. This is a Complaint submitted on behalf of Mr David Phillip Wilson who is currently in the custody of the Alabama Department of Corrections at William C. Holman Correctional Facility in Atmore, Alabama, United States of America. Between the 3rd and 5th December 2007, the Circuit Court of Houston County tried Mr Wilson for the murder of Mr Dewey Walker, who was discovered dead in his home on 13th April 2004. Mr Wilson was found guilty of capital murder on 5th December and was sentenced to death on 7th January 2008.[1]

2. Mr Wilson has therefore been subjected to the capital judicial process for 20 years (and counting) and under a sentence of death for 16 years (and counting).

3. The author of this Complaint is Professor Jon Yorke, Professor of Human Rights and Director of the Centre for Human Rights, College of Law, Social and Criminal Justice, Birmingham City University, The Curzon Building, 4 Cardigan Street, Birmingham, B4 7BD, United Kingdom.

4. Mr Wilson is currently represented by Professor Bernard Harcourt, Isidor and Seville Sulzbacher Professor of Law and Professor of Political Science, Columbia Law School, Jerome Greene Hall, Room 603, Columbia University, 435 West 116th Street, New York, NY 10027, United States of America. This Complaint is submitted with the consent of Professor Harcourt.[2]

5. The international law issues raised in this Complaint are presented for the consideration of the Special Procedures (including Special Rapporteurs, Working Groups, and an Independent Expert) for Communication deemed appropriate to the U.S. government. The Complaint also serves as information and evidence for consideration for mandate reporting to the Human Rights Council.

6. To supplement this Complaint it is the intention of the author to submit, on behalf of Mr Wilson, an Individual Complaint to the Working Group on Arbitrary Detention (WGAD). The arguments presented will claim violations concerning the arbitrary deprivation of Mr Wilson's liberty and life as designated under the WGAD's Categories I, III, and V.[3] This will form the basis of the submission of the author's *amicus curiae* brief, or other forms of legal intervention, to support the arguments presented in subsequent U.S. court submissions on behalf of Mr Wilson.

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[1] See, Wilson v. State, Court of Criminal Appeals of Alabama, 142 So.3d 732, November 5, 2010. 27. On 18th June 2004, a Houston County grand jury indicted Mr Wilson on two counts of capital murder – murder during a burglary, Code of Alabama, Capital Offences 1975, s. 13A-5-40(a)(4), and murder during a robbery, 1975, s. 13A-5-40(a)(2). Mr Wilson was arraigned on 12th October 2004 and pled not guilty to both charges.

[2] For the details of the case of Mr David P Wilson and the legal briefs which Professor Bernard Harcourt has submitted on his behalf, see the case page on the website of the Columbia Center for Contemporary Critical Thought, 'David Wilson v. John Q Hamm,' https://cccct.law.columbia.edu/content/david-wilson-vs-john-q-hamm

[3] The UN Working Group on Arbitrary Detention, https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention For the specific criteria for the categories of arbitrary deprivation of liberty adopted by the Working Group see, Fact Sheet No. 26 (Rev. 1): Working Group on Arbitrary Detention, https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-26-rev-1-working-group-arbitrary-detention

B. Synopsis of International Law Issues

7. The issues raised in this Complaint concern the status of international law in the United States and the consequences of the federal government's reservations, understandings, and declarations (RUDs) to the ratification of the International Covenant on Civil and Political Rights (ICCPR).[4] It then provides details of the human rights violations inflicted upon Mr Wilson by the State of Alabama and the federal government. In conclusion, a review is presented of the extent to which the domestic authorities have applied a good faith interpretation of the evolution of international law and whether they have meaningfully considered the significance for norm creation of the global state practice towards the abolition of the death penalty.

i. The United States Ratification of the International Covenant on Civil and Political Rights

a. In 1992 the United States submitted its deposit and RUDs for the ratification of the ICCPR.[5] Reservations 2 and 3 specifically concern the application of the death penalty and the understandings and declarations have implications for the procedural rights of capital defendants. Eleven member states filed their objections to the RUDs,[6] and the Human Rights Committee declared them to be 'incompatible with the object and purpose of the Covenant,' and recommended their removal.[7] Subsequent interpretation of the treaty has been provided through the Human Rights Committee's *General Comment No. 36 – Article 6: right to life*, and it affirmed that the ICCPR has a 'pro-abolitionist spirit.'[8] Hence the United States RUDs which provide for the application of the death penalty are contrary to the text and spirit of the ICCPR.

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[4] See, Declarations and Reservations, Chapter IV Human Rights 4. International Covenant on Civil and Political Rights, New York, 16th December 1966 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

[5] See, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53rd Sess., 1413th meeting, U.N. Doc. CCPR/C/79/add.50, 6th April 1995, and, US Senate Report on Ratification of The International Covenant on Civil and Political Rights, U.S. Senate Executive Report 102-23 (102d Cong., 2d Sess.) 24th March 1992.

[6] Eleven governments objected to the United States' RUDs, stating that there were against the object and purpose of the ICCPR, there were: Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Sweden. See, Declarations and Reservations, Chapter IV Human Rights 4. International Covenant on Civil and Political Rights, New York, 16th December 1966 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

[7] Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53rd Sess., 1413th meeting, U.N. Doc. CCPR/C/79/add.50, 6th April 1995, para. 14, and stating, 'The Committee recommends that the State party review its reservations, declarations and understandings with a view to withdrawing them, in particular reservations to article 6, paragraph 5, and article 7 of the Covenant,' para. 27.

[8] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, 3rd September 2019, p. 8.

b. The ICCPR is cited in various treaty body reviews of the United States.[9] The most recent review being under the Fifth Periodic Report to the Human Rights Committee on 3rd November 2023. The Committee *inter alia*, expressed regret concerning the lack of transparency of execution protocols and the prevalence of botched executions.[10] Many governments have made recommendations to the United States in the Universal Periodic Review for the restriction of the capital judicial process and the abolition of the death penalty. In the UPR Third Cycle in 2020, thirty (30) governments recommended (consistent with the ICCPR) that the United States restrict and abolish the death penalty, including ratifying the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.[11]

c. Therefore, the RUDs to the ICCPR do not prevent a Complaint from being submitted in compliance with the Special Procedure mandates. Nor does it prevent the mandate holders from Communicating with the government of the United States on the violations of the Covenant.

d. In reviewing this Complaint, the mandate holders will also consider the UN human rights treaties that are appropriate for assessing the issues raised under the Universal Declaration of Human Rights (UDHR),[12] the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[13] the Convention on the Rights of Persons with Disabilities (CRPD),[14] and the UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework (GPBHR).[15] This Complaint will also cite further relevant and supplementary provisions.

ii. The Right to an Effective Remedy for Human Rights Violations

e. Mr Wilson's ICCPR rights have been violated, including:

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[9] Most recently the Concluding observations on the fifth periodic report of the United States of America, CCPR/C/USA/CO/5, 3rd November 2023.
[10] Id. The Human Rights Committee, 'regrets the lack of information regarding the allegations of the use of untested lethal drugs to execute prisoners and about reported cases of excruciating pain caused by the use of these drugs and botched executions (arts. 2, 6, 7, 9, 14 and 26),' para 30, and in para. 31(d), called on the United States to 'Guarantee that all methods of execution fully comply with article 7 of the Covenant.'
[11] The thirty (30) governments which made recommendations on the United States Third Cycle UPR were, Romania, Paraguay, Austria, Chile, New Zealand, Italy, Namibia, Cambodia, Fiji, Belgium, Malta, Mexico, Timor-Leste, Switzerland, Norway, Portugal, Iceland, Argentina, Bulgaria, Canada, Spain, Finland, France, Germany, Ireland, Latvia, Liechtenstein, Lithuania, Sweden, and Netherlands. See the Matrix of Recommendations for the US Third Cycle, 9th November 2020, https://www.ohchr.org/en/hr-bodies/upr/us-index.
[12] Universal Declaration on Human Rights, Paris on 10th December 1948 during its 183rd plenary meeting United Nations General Assembly, General Assembly resolution 217 A.
[13] International Covenant on Economic, Social, Cultural Rights, 16th December 1966, General Assembly resolution 2200A (XXI).
[14] Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series, vol. 2515, New York, 13th December 2006
[15] The Guiding Principles on Business and Human Rights, Human Rights Council resolution 17/4 of 16th June 2011.

1. the right to an effective remedy (ICCPR article 2)
2. the right to life (article 6)
3. the prohibition of torture and inhumane punishment (article 7)
4. the prohibition of arbitrary arrest and detention (article 9)
5. the protection of the humanity and human dignity of those deprived of their liberty (article 10)
6. the right to a fair trial (article 14)
7. the prohibition against an arbitrary or unlawful interference with his privacy, family, and home (article 17).

f. These violations have been made worse due to the systematic failure of the state and federal governments to adequately protect Mr Wilson's rights to physical and mental health under the ICESCR and the CRPD, including:

1. the right to physical and mental health (ICESCR article 14)
2. non-discrimination (CRPD articles 4 and 5)
3. the right to life (CRPD article 10)
4. equal recognition before the law (CRPD article 12)
5. access to justice (CRPD article 13)
6. liberty, security of the person, and access to justice (CRPD article 14)
7. the prohibition of torture and inhumane punishment (CRPD article 15)

g. On 25th January 2024 Mr Kenneth Smith became the first person in the United States to be executed through a protocol mandating forced nitrogen gas asphyxiation.[16] The State of Alabama had subjected him to a torturous, cruel, and inhuman execution. Moreover, it is clear that if companies which manufacture the gasmask, tubes, nitrogen gas, and gas containers, entered into a contract with the state authorities they are to be considered complicit in this violation of human rights. Therefore, Mr Wilson should be protected against being subjected to an execution via nitrogen gas consistent with the Guiding Principles on Business and Human Rights[17] (GPBHR) as:

1. States and businesses should create a 'single, logically coherent and comprehensive template' for protecting human rights (GPBHR14)
2. States should adopt laws which ensure that businesses respect human rights (GPBHR 3)
3. Businesses are required to undertake a 'human rights due diligence' review which should include an assessment of the impact of business practice upon 'persons with disabilities' (GPBHR 4)

[16] United States: UN experts horrified by Kenneth Smith's execution by nitrogen in Alabama, Press Release: Special Procedures, 30th January 2024, https://www.ohchr.org/en/press-releases/2024/01/united-states-un-experts-horrified-kenneth-smiths-execution-nitrogen-alabama

[17] The Guiding Principles on Business and Human Rights, Human Rights Council resolution 17/4 of 16 June 2011.

h. Mr Wilson is entitled to the benefit of the United States applying a good faith interpretation of international law regarding the fact that it is now reasonably demonstrated that the death penalty violates a peremptory norm of general international law (*jus cogens*). Consistent with the interpretive methodology provided by the International Law Commission,[18] the ICCPR article 6(6) mandate for global abolition, the member state votes in the UN General Assembly *Resolution on the moratorium on the use of the death penalty*,[19] the UN Human Rights Council *Resolution on the question of the death penalty*,[20] and the abolitionist state total provided by Amnesty International,[21] the data shows that currently around three-quarters of the world's countries are abolitionist. This signifies a cross-regional value judgment of what constitutes global humanitarian values for the rejection of the death penalty and more specifically, in this instance, the rejection of the reasonable and good faith claim to the legal legitimacy of this punishment. It is therefore argued that in assessing Mr Wilson's case the evaluation of the substantive law issues as they pertain to human rights violations, should now be supplemented with an evaluation of the duty of the United States to observe the norms of the international legal order. An assessment is required of the extent to which the federal and state governments are acting to undermine the hierarchy of international law. For the United States to act consistently with international law, it should: (i) quash Mr Wilson's death sentence, and (ii) implement a national policy for creating the foreseeable abolition of the death penalty.

iii. Pre-trial (apprehension/arrest)

i. A violation of the ICCPR articles 9 and 17, and CRPD article 14, occurred when police officers from the Dothan Police Department arrived at Ms Linda Wilson's home without a warrant at 3am on the morning of the 14th April 2004. They entered to apprehend Mr Wilson. Due to the requirement of treating Mr Wilson as a vulnerable young adult suffering from Asperger's Syndrome and Attention Deficit and Hyperactivity Disorder (ADHD),[22] this was the beginning of collating information through an unfair and arbitrary process, generated through what is termed in the rules of evidence as the product of 'fruit from a poison tree.'[23] There is no evidence of the arresting authorities providing appropriate care and provisions for protecting Mr Wilson in his vulnerable state. It would have been appropriate under these circumstances for Mr Wilson to have had

[18] The International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), 2022, Yearbook of the International Law Commission, 2022, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf

[19] UNGA Resolution, Moratorium on the use of the death penalty, A/RES/77/222, 15th December 2022.

[20] HRC Resolution, Question on the use of the death penalty, A/HRC/RES/54/35, 17th October 2023.

[21] Amnesty International, Death Sentences and Executions 2022 (May 2023), Abolitionist for all crimes: 112 Abolitionist for ordinary crimes only: 9 Abolitionist in practice: 23 Total abolitionist in law or practice: 144 Retentionist: 55 (72% abolitionist).

[22] See, General comment No. 35 - Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, p. 9.

[23] Wong Sun v. United States, 371 U.S. 471, 484 (1963).

with him a 'person designated' or 'relevant third person'[24] or an 'appropriate adult'[25] to help ensure that he understood the circumstances of his apprehension and the resulting questions he would have to answer. His mental health diagnoses render probable the fact that due to the highly coercive nature of the apprehension of Mr Wilson, he would have been susceptible to communication and cognitive difficulties, and would have most likely misunderstood the quality and nature of what the interrogating authorities would have stated and asked of him. This renders a *prima facie* argument against the accuracy of what Mr Wilson included in his statement to the police. Due to the antagonistic environment depriving him of his liberty, without appropriate safeguarding measures and the protection of his mental health, it *prima facie* rendered the beginning of the violation of the right to a fair trial under ICCPR article 14. The concomitant violation of his healthcare rights amounted to an arbitrary deprivation of his liberty and life under ICCPR articles 6 and 9, and CRPD article 14.

iv. Pre-trial (suppression of evidence)

j. ICCPR article 14 violations occurred when the prosecution failed to disclose potentially exculpatory evidence which proved central to the State's case against Mr Wilson. The evidence in question is a letter in which Mr Wilson's co-defendant, Ms Catherine Corley, confesses to committing the murder. This evidence could have been used to impeach prosecution witnesses and would have revealed for the jury fundamentally important alternative perspectives of the cause of death of Mr Walker. The jury should have been able to consider such evidence in their deliberations to determine the factual and moral culpability of Mr Wilson. If having done so, it is very likely that the jury would not have been able to return a sufficient vote for a verdict of death. Therefore this violation significantly contributed to the conviction and death sentence of Mr Wilson which produced an arbitrary conviction in violation of ICCPR article 14, and subsequently constituted an arbitrary deprivation of his right to life under ICCPR article 6(1).

k. After eleven (11) requests over a 20 year period (2004-2023),[26] the state was instructed by Judge Keith Watkins of the United States District Court for the

[24] See, General comment No. 35 - Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014:

> 'For some categories of vulnerable persons, directly informing the person arrested is required but not sufficient…For certain persons with mental disabilities, notice of the arrest and the reasons should also be provided directly to persons they have designated or appropriate family members. Additional time may be required to identify and contact the relevant third persons, but notice should be given as soon as possible,' para 28, p. 9.

[25] See, Slavny-Cross, R., Allison, C., Griffiths, S., & Baron-Cohen, S. (2022). Autism and the criminal justice system: An analysis of 93 cases. Autism Research, 15(5), 904–914.

[26] Renewed Motion for Disclosure of Ongoing Brady Material, 7th November 2022, Brady Discovery 23rd February, 2024 - p. 19, identifying that this motion was the eleventh (11) request for the defence to receive a copy of the letter written my Ms Catherine Corley.

Middle District of Alabama to provide the defence with the letter written by Ms Corley. This court order raises the question as to whether the state prosecutors have acted with misconduct, and whether the trial court failed to protect Mr Wilson's right to a fair trial. It therefore needs to be assessed whether the defence received adequate time and was provided with an appropriate opportunity to access information and facilities for Mr Wilson's defence. The principle of equality of arms is central to the right to a fair trial under the ICCPR article 14, along with the duties and responsibilities under the UN *Guidelines on the Role of Prosecutors*[27] and the UN *Basic Principles on the Role of Lawyers*.[28] It is clear there is sufficient evidence to demonstrate that the State has failed to meet these fair trial standards.

vi. Capital Trial

l. The state prosecutor's misconduct in suppressing evidence is compounded by Mr Wilson receiving inadequate legal representation. Defence counsel failed to adequately prepare for the case, they spent an insufficient amount of time with Mr Wilson pre-trial, did not provide adequate examination of witnesses, and provided no closing argument. No 'theory of defence' was provided. A completely insufficient mitigation was presented including the calling of no witnesses to appropriately establish the effect of the mental health diagnoses and the medical history of Mr Wilson. The trial judge failed to properly inform the jury of the evidentiary standards for a capital offence. The jury was prevented from considering Ms Corley's letter confessing to the murder, which would have corroborated the testimony of the State's pathologist verifying the injuries consistent with Ms Corley's description. This would have raised significant concern over the lack of forensic evidence connecting Mr Wilson to the murder. Therefore these omissions demonstrate that the State has failed to guarantee the right to a fair trial for Mr Wilson. His rights have been violated under the ICCPR articles 14, and 6(1), the ICESCR article 14, and CRPD articles 4, 5, 10, 12, 13, 14 and 15.

m. The capital trial only lasted 3 days, including jury selection, with a further day for the judge to sentence Mr Wilson to death. This was a completely insufficient time to review all the factual issues involved before a state should put someone to death, and this constituted a *prima facie* violation of the ICCPR articles 14 and 6(1), and CRPD articles 4, 5, 10, 12, 13, 14 and 15.

vii. Death Sentence

[27] Guidelines on the Role of Prosecutors, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 7th September 1990
[28] Basic Principles on the Role of Lawyers, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 7th September 1990

n. Consequently, it has not been reasonably proven that Mr Wilson was sentenced to death for a murder of which he:

i. intended to commit, and;
ii. inflicted the bodily harm which caused the death.

o. The capital sentence imposed upon Mr Wilson on 7th January 2008 is a violation of ICCPR article 6(2) which provides a temporary provision of the death penalty for the 'most serious crimes.' The Human Rights Committee has stated that the scope of the punishment is to be confined to 'intentional killing.'[29] It has not been reasonably demonstrated that Mr Wilson had such intention and there is no forensic evidence to prove that he killed the victim. The death sentence is therefore arbitrary in violation of ICCPR article 6(1) as it fails to satisfy the confined criteria of article 6(2) and constitutes a further violation of articles 7 and 10.

viii. Execution Method (Nitrogen Gas)

p. The State of Alabama now seeks to complete the arbitrary deprivation of Mr Wilson's life though a new method of forced nitrogen gas asphyxiation. Following the 25th January 2024 execution of Mr Kenneth Smith in which Alabama became the first state to use forced nitrogen gas inhalation as an execution method,[30] they will now seek to impose this method upon Mr Wilson.

q. The eyewitness accounts of the execution of Mr Smith, and the review of them by healthcare professionals, demonstrate that this method poses an intolerable risk that Mr Wilson will be subjected to torturous, cruel, and inhuman punishment. It is likely that if Mr Wilson is forced to breath nitrogen gas into his body, that he will die whilst experiencing seizures, the sensation of choking, and great pressure within and upon his internal organs. It took Mr Smith nearly half-an-hour to die. This was not an amount of time envisaged by the State. The precise time is incalculable, but through the eyewitness accounts[31] the execution began at either 7:57 or 7:58pm and death occurred somewhere between 8:15 and 8:25pm. So death occurred at a minimum time of 17 minutes (between 7:58pm and 8:15pm), or somewhere within this minimum and the maximum time of 28 minutes (between 7:57 and 8: 25pm). Both of these lengths of time are in violation of the international standards determining that executions must be confined to the ECOSOC *Safeguards* standard of, 'minimum possible suffering',[32] and following the Human Rights Council's decision in *Ng v.*

[29] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, p. 8.
[30] See, Alabama Schedules A Second Execution for Kenneth Smith, Using Nitrogen Gas for the First Time in U.S. History, Death Penalty Information Center, https://deathpenaltyinfo.org/news/alabama-schedules-a-second-execution-for-kenneth-smith-using-nitrogen-gas-for-the-first-time-in-u-s-history
[31] For example, Kim Chandler, Alabama executes a man with nitrogen gas, the first time the new method has been used, AP News, 26th January 2024, https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900
[32] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC 1984/50, Safeguard 9.

Canada,[33] that 12 minutes to die is an excessive duration for an execution. Therefore, the length of time for Mr Smith to die violated his human rights, and provides a reasonable deduction that Mr Wilson's rights will also be violated under the ICCPR articles 6, 7, and 10, the CAT articles 1 and 2, and the CRPD articles 10, 12, 13, 14 and 15.

ix. 'Method-of-execution' challenges

r. The jurisprudence of the U.S. Supreme Court denies a meaningful review for the consideration of execution methods in violation of ICCPR article 2. The trilogy of judgments in *Baze v. Rees*,[34] *Glossip v. Gross*[35] and *Bucklew v. Precythe*[36] creates the parameters of 'method-of-execution' challenges but imposes upon the defendant a requirement to produce a hitherto insurmountably high level of evidence. A perverse burden of proof has been created for the inmate to meet and it thus renders an unfair imbalance between the prosecutor and the inmate during the proceedings. The U.S. Supreme Court has never granted a 'method-of-execution' challenge in favour of a death row inmate (either 'facially' – being applied to all death row inmates, or 'as-applied' meaning it implicates the specific facts concerning a person facing an imminent execution). By the U.S. Supreme Court's own admission, it is practically impossible to be successful in a method-of-execution challenge.[37] This is a preposterous legal phenomenon, especially due to the growing global opinion on the torture and inhumanity inherent in executions. It renders the U.S. Supreme Court's reasoning quixotic and a *prima facie* violation of international law and the principes of humanity. Hence, Mr Wilson's human rights are therefore nullified through a federal judicial process that is at variance with ICCPR articles 2(1) and 2(3), which allows for the wider violations of the ICCPR articles 6, 7, and 10, the CAT articles 1 and 2, and the CRPD articles 10, 12, 13, and 14.

s. The perversity of the *Baze-Glossip-Bucklew* trilogy is not confined to facial and as-applied challenges. An additional pertinacity turns upside-down the rules of evidence and places the ultimate burden of proving the legality of execution methods upon the person to be executed. In order to establish a claim challenging a method of execution, the defendant must first provide evidence and convince the court that there exists a less cruel method of execution which can be readily used. Therefore the *Baze-Glossip-Bucklew* trilogy places on the inmate the burden of establishing a constitutional method of execution which goes directly against international law. International law places the burden of

[33] Chitat Ng v. Canada, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994)
[34] Baze v. Rees, 553 U.S. 35 (2008).
[35] Glossip v. Gross, 135 S. Ct. 2726 (2015).
[36] Bucklew v. Precythe, 139 S. Ct. 1112 (2019).
[37] Chief Justice Roberts affirms that the Supreme Court, 'has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishments,' Baze v. Rees, 553 U.S. 35, 48 (2008).

proving the legality of execution methods upon the State. This is because under international law (from the Charter of the United Nations onwards) the state is the monopoly holder of legitimate violence, and thus is to be solely assessed on the legality of the penological justifications for the available execution methods. International law places a high burden for the State to meet, but the U.S. Supreme Court's jurisprudence nullifies the protective elements of international law. Therefore, this corpus of reasoning is fundamentally perverse, arbitrary, capricious, and a violation of the right to a fair trial under ICCPR article 14, the CRPD articles 4, 5, 12, 13, and 14 and is thus an arbitrary deprivation of the right to life under 6(1), and CRPD article 10, and constitutes torture under ICCPR article 7, CRPD article 15, and CAT articles 1 and 2, and a violation of human dignity under ICCPR article 10.

t. It is the duty of the State to protect individuals from human rights violations imposed through business practice and commercial enterprise. Following the transparency of lethal injection drugs made possible by the European Union resolution and the Council of Europe recommendation[38] prohibiting the trade in execution technologies,[39] there has been a focus on trade involved in contributing to the protocol for forced nitrogen gas asphyxiation. This has included the suppliers of the gasmasks and the provisions for nitrogen gas and the storage of the gas. The State has a duty to ensure that companies do not contribute to human rights violations and business enterprises also have a duty to ensure they perform human rights due diligence checks on their products and services. The companies which supply the gasmask, tubes, nitrogen gas, and gas storage equipment, violated the GPBHR, and subsequently, the human rights standards protecting against torture and inhuman punishment under the ICCPR articles 7, 10, CAT articles 1 and 2, and CRPD articles 4, 5, 12, 13, and 14.

x. Duration Under the Death Sentence

u. Mr Wilson has been incarcerated and subjected to Alabama's capital judicial process for two decades. He was arrested for a capital offence in 2004, sentenced to death in 2008, and therefore this is his 20th year subjected to numerous human rights violations, and specifically, the 16th year under sentence of death, in violation of ICCPR articles 2, 6, 7, 10, 14, and 17, the CAT articles 1 and 2, the ICESCR article 14, and the CRPD articles 4, 5, 10, 12, 14, and 15.

v. The jurisprudence of the U.S. Supreme Court denies an effective and meaningful challenge to the time spent under the capital judicial process in violation of ICCPR article 2. An unreasonable corpus of decisions was established under the U.S. Supreme Court's denial of *certiorari* in *Lackey v*

[38] Recommendation CM/Rec (2021) 2 of the Committee of Ministers to member States on measures against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment (adopted by the Committee of Ministers on 31st March 2021 at the 1400th meeting of the Ministers' Deputies.
[39] Regulation (EU) 2019/125 of the European Parliament and of the Council of 16th January 2019 concerning trade in certain goods which could be used for capital punishment, torture and other cruel, inhuman or degrading treatment or punishment.

Texas.[40] This case would have considered aspects of time and temporality in the capital judicial process. Mr Wilson's rights under the Covenant are therefore nullified through a federal process which is at variance with articles 2(1) and (3). It thus creates an unreasonable procedural barrier preventing a meaningful assessment of the temporal impact of the violations under articles 6, 7, 10 and 14. As Mr Wilson suffers from diagnosed mental health conditions, the temporal assessment should also be conducted whilst considering the violations of the CRPD articles 4, 5, 10, 12, 13, 14, and 15.

w. Justice Gorsuch in providing the judgment in *Bucklew* attempted to taint the assessment of execution methods (in this case, lethal injection) with the application of the doctrine of finality, and in so doing imposed a restriction on the analysis of the duration of time between the sentence of death and the execution.[41] This was rejected by Justice Sotomayor in dissent who stated that the capital judicial process needed to ensure adequate time to review execution methods.[42] The cumulative factors for the temporal assessment contributed to by all the parties in the capital judicial process, needs to be fully and adequately considered. Otherwise, it would deny the right to equal access to justice and be an arbitrary violation of the right to life under ICCPR articles 6, 7, and 10, in violation of articles 2(1) and (3), and renders a violation of CAT articles 1 and 2, the UDHR article 3 and 5, and the CRPD articles 4, 5, 10, 12, 13, 14, and 15.

x. The Delay of Abolition

x. The attempt to develop new execution technologies, in this case through forced nitrogen gas asphyxiation, is a violation of ICCPR article 6(6) and the fulfilment of article 6(1) for the prohibition of the arbitrary deprivation of life. Under article 6(6) States shall not invoke any process to, 'delay or to prevent the abolition of capital punishment.' The only justification under the ICCPR for the continuation of the death penalty in Mr Wilson's case, and subsequently in all future death penalty cases, is through the United States' attempt to endorse a continued application of ICCPR article 6(2) for the temporary allowance of the punishment for the most serious crimes. However, in so doing for the past 32 years (since ratification in 1992) the government is in violation of article 6(6) as it has not adopted an official policy for foreseeable national abolition which is recommended by the UN Secretary General.[43] It is therefore an illegitimate continuation of the limited exception in article 6 which fails to recognise the temporal restriction placed upon executions.

y. Alabama's development of a new execution method constitutes an official penological policy to continue to kill people which in the future will include Mr Wilson. Therefore this action by Alabama constitutes a national violation of ICCPR article 6(6) as the U.S. State seeks to perpetuate the possibility of the

[40] Lackey v Texas, 514 U.S. 1045 (1995).
[41] Bucklew v. Precythe, 139 S.Ct. 1112 (2019).
[42] Id.
[43] Report of the Secretary-General, Question of the death penalty, A/HRC/54/33, 14 August 2023, p. 2.

death penalty. The continuation of the death penalty in the States of the Union implicates the federal government's obligations under the ICCPR. It indicts the overall United States practice as a violation of the ultimate threshold provision of article 6(6).

xi. Good Faith Interpretation of Treaties

z. Consistent with the violation of the ICCPR article 6(6), the United States has failed to demonstrate a good faith interpretation to uphold the spirit, aims, and objectives of the ICCPR. It has therefore contravened the 'Vienna Regime.' This includes the Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) and particularly, article 31 (1) (replicated in both treaties):

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[44]

aa. Also of relevance is the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations* (1970), which states:

> Every State has the duty to fulfil in good faith its obligations under the generally recognised principles and rules of international law.
>
> Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.[45]

bb. It is therefore argued that the United States engagement with the death penalty following UN treaty body reviews has been inconsistent with good faith and perhaps could be argued to be in 'bad faith.' It is clear that the actions of Alabama in Mr Wilson's case has hitherto constituted a practical rejection of the obligation to provide an effective remedy under ICCPR article 2. It thus constitutes an arbitrary deprivation of the right to life under article 6(1).

xii. The Death Penalty as a Violation of Jus Cogens

cc. The growing state practice in the *de jure* and *de facto* abolition of the death penalty provides for the interpretation that the death penalty is now a violation of the peremptory norm of general international law (*jus cogens*). The International Law Commission's *Draft conclusions on identification and legal*

[44] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).
[45] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA 1883rd plenary meeting, 24 October 1970.

consequences of peremptory norms of general international law (jus cogens) 2022[46] now provides a guiding methodology for UN Special Procedures to state the *jus cogens* violations of the death penalty (either as a new norm or in violation of the right to life or the prohibition of torture). The appropriate clarifying methodology to determine *jus cogens*, is found, *inter alia*, in Draft Conclusions 7 and 8,[47] which provide interpretive criteria for demonstrating a new peremptory norm against the death penalty. This argument is consistent with the presentation by the Academic Network for the Abolition of the Death Penalty and Cruel Punishment (REPECAP) at the World Congress Against the Death Penalty in Berlin in 2022.[48] Therefore there are considerable grounds for arguing that the United States is now in violation of this new international standard.

xiii. Complaint Submission

dd. These sources provide the legal standards through which international law protects the human rights of Mr Wilson. It is argued the United States has violated these standards during:

(a) pre-trial investigations and disclosures
(b) the capital trial and sentence
(c) his duration on death row
(d) there is an intolerable risk that future violations will occur in the execution through forced nitrogen gas asphyxiation, and
(e) in each of (a)-(d) above, the state and federal governments have failed to adequately protect the physical and mental health of Mr Wilson. This has occurred for 20 years and continues to this day.

ee. Furthermore, it is proposed that the United States has previously acted inconsistent with a good faith application of international law on the question of the death penalty. This Complaint details below the violations and lack of meaningful compliance of the United States with UN treaties, treaty body reviews, UN Special Procedure communications, and the obligations under the Universal Periodic Review and the Sustainable Development Goals.

C. Special Procedure Mandates

8. It is submitted in this Complaint that Mr Wilson's case demonstrates relevant issues implicating review under the mandates of the UN Special Procedures, listed below:

[46] International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) 2022, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf
[47] Id.
[48] REPECAP, Declaration on the Abolition of the Death Penalty as a Peremptory Norm of General International Law (*jus cogens*), On the Occasion of the 8th World Congress Against the Death Penalty, Berlin, 15-18 November 2022 https://www.academicsforabolition.net/en/blog/abolition-of-the-death-penalty

- Dr Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions[49]
- Dr Alice Edwards, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment[50]
- Dr Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[51]
- Dr Heba Hagrass, Special Rapporteur on the rights of persons with disabilities[52]
- Professor Margaret Satterthwaite, Special Rapporteur on the independence of judges and lawyers[53]
- Dr Livingstone Sewanyana, Independent Expert on the promotion of a democratic and equitable international order[54]
- Dr Matthew Gillett, Working Group on Arbitrary Detention[55]
- Professor Robert McCorquodale, Working Group on Business and Human Rights[56]

9. This submission to the above Special Procedures is made consistent with certain mandate holder's previous statements made in death penalty cases in the United States.[57] For the state focus, previous mandate holders have submitted letters to the U.S. Secretary of State and the Office of the Governor of Alabama in the Complaints submitted on behalf

[49] Resolution adopted by the Human Rights Council on 16 July 2020 44/5. Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/RES/44/5, 22 July 2020.
[50] Resolution adopted by the Human Rights Council on 3rd April 2023, 52/7. Torture and other cruel, inhuman or degrading treatment or punishment: mandate of the Special Rapporteur, A/HRC/RES/52/7, 13th April 2023.
[51] Resolution adopted by the Human Rights Council on 26th September 2019, 42/16. The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/RES/42/16, 7th October 2019.
[52] Resolution adopted by the Human Rights Council on 13th July 2023, 53/14. Special Rapporteur on the rights of persons with disabilities, A/HRC/RES/53/14, 17th July 2023.
[53] Resolution adopted by the Human Rights Council on 13th July 2023, 53/12. Mandate of Special Rapporteur on the independence of judges and lawyers, A/HRC/RES/53/12, 18th July 2023.
[54] Resolution adopted by the Human Rights Council on 11th October 2023, 54/4. Mandate of Independent Expert on the promotion of a democratic and equitable international order, A/HRC/RES/54/4, 12th October 2023.
[55] Resolution adopted by the Human Rights Council on 6th October 2022, 51/8. Arbitrary detention, A/HRC/RES/51/8, 12th October 2022.
[56] Resolution adopted by the Human Rights Council on 12th July 2023, 53/3. Business and human rights, A/HRC/RES/53/3, 17th July 2023.
[57] Both the mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, have submitted following numerous complaints concerning the death penalty in the United States, and these include: UA G/SO 214 (33-27) G/SO 214 (53-24) USA 19/2013; AL USA 13/2014; UA USA 18/2014; UA USA 20/2014; AL USA 13/2015; UA USA 17/2015; UA USA 4/2017; UA USA 4/2018; UA USA 28/2020; UA USA 11/2021; UA USA 12/2021; UA USA 4/2022.

of Mr Thomas 'Tommy' Arthur on 3rd November 2016,[58] Mr Doyle Lee Hamm on 15th February 2018,[59] and Mr Alan Eugene Miller in 2022.[60]

10. Most recently, following the submission of this author's Complaint (with Dr Joel Zivot) in Mr Kenneth Smith's case (also Alabama), the Special Procedure mandates (Dr Morris Tidball-Binz, Dr Alice Edwards, Professor Margaret Satterthwaite, and Dr Tlaleng Mofokeng) provided a Communication in the case for the raising of awareness of the human rights violations he would experience whilst being subjected to forced nitrogen gas asphyxiation[61] (your concerns were subsequently proven right). Following your statement, the Spokesperson for the UN High Commissioner for Human Rights, Ravina Shamdasani affirmed the UN's alarm at the impending execution,[62] and then proceeding Alabama's killing of Mr Smith, you provided your unequivocal condemnation of this inhumane act of the state.[63]

11. Whilst Alabama continued to impose torture and an arbitrary deprivation of Mr Smith's life, the actions you took helped raised awareness of the inhumane practice which Alabama has created, and further supported the global effort to focus on this issue and maintain the transparency of the human rights violations. Your statements created an important corpus of information which can be used to try to stop future executions by nitrogen gas asphyxiation. Indeed, in *Smith v. Hamm*, whilst the U.S. Supreme Court denied *certiorari* to consider the 'method-of-execution' challenge, Justice Sonia Sotomayor used your press releases to affirm in her dissenting judgment that, 'The world is watching.'[64]

12. Due to the numerous international human rights violations which Mr Wilson has experienced, this Complaint is submitted to help ensure that the world 'will be watching,' and will see again how awfully Alabama treats people in the capital judicial system. This time the State wants to kill a person who suffers from significant mental and physical health problems, and they have placed him on death row following an unfair and arbitrary process.

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[58] 4 Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Reference: UA USA 13/2016.

[59] Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Reference: UA USA 4/2018.

[60] Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Reference: UA USA 18/2022.

[61] Press Release: United States: UN experts alarmed at prospect of first-ever untested execution by nitrogen hypoxia in Alabama, 3rd January 2024, https://www.ohchr.org/en/press-releases/2024/01/united-states-un-experts-alarmed-prospect-first-ever-untested-execution

[62] Press Briefing Notes: US: Alarm over imminent execution in Alabama, 16th January 2024, https://www.ohchr.org/en/press-briefing-notes/2024/01/us-alarm-over-imminent-execution-alabama

[63] United States: UN experts horrified by Kenneth Smith's execution by nitrogen in Alabama, 30th January 2024, https://www.ohchr.org/en/press-releases/2024/01/united-states-un-experts-horrified-kenneth-smiths-execution-nitrogen-alabama

[64] Smith v. Hamm, 601 U.S. __ (2024) p. 4. (Justice Sotomayor, dissenting from the denial of application for stay and denial of certiorari).

D. State Violations Assessed under International Law

13. The below facts of the case, trial, and subsequent appeals are pertinent for assessing the international human rights standards and for identifying the United States obligations. Raised in this Complaint are the substantive human rights violations to which Mr Wilson is being subjected. It also includes the procedural violations through which the United States federal government and the State of Alabama have prevented a meaningful and fair assessment of Mr Wilson's case.

i. Police Misconduct, Arbitrary Detention, and the Illegal Questioning of Mr Wilson

14. On 13th April 2004, Mr Dewey Walker was found dead in his home in Dothan, Houston County, Alabama.[65] The police questioned Mr Matthew Marsh who was known to own a car of the description a witness had seen driving around the neighbourhood at the time of the offence. Mr Marsh admitted to having some of Mr Walker's possessions and his van, but denied involvement in the homicide and implicated three people - Mr Michael Jackson, Mr David Wilson, and Ms Catherine Corley.

15. At around 3am on 14th April 2004, police officers from the Dothan Police Department entered the home of Ms Linda Wilson and apprehended her son. Mr David Wilson, who had recently turned 20 years old (date of birth - 7th March 1984), who suffers from Asperger's Syndrome and Attention Deficit and Hypersensitive Disorder (ADHD), was woken and startled by the police intrusion. The police officers did not have an arrest warrant, they did not specifically provide a Miranda warning, and they did not provide reasonable adjustments to consider Mr Wilson as a vulnerable young adult due to his mental and physical health diagnoses. He was not provided an accompanying adult to help safeguard his rights. Therefore it cannot be meaningfully and fairly demonstrated that he would have been able to provide informed consent to be taken to the police station. This is because the police did not provide any mental health safeguarding in the obtaining of any such consent.

16. At the police station Mr Wilson was questioned in the Criminal Investigation Department (CID) room. Parts of the initial interrogation were not recorded. The police proceeded to record a line of questioning for about 30 minutes, after which the recording stopped, but the interrogation continued for another 10 to 15 minutes. The total interrogation lasted for around 90 minutes.

17. The lack of the full tape recording of the interrogation provided a *prima facie* opportunity for the police to frame the narrative of the evidence. It would have been easier for them to have achieved this due to Mr Wilson's mental and physical health conditions which placed him at a clear disadvantage. Without providing safeguards to

[65] The facts of the case are cited from the habeas corpus petition filed by one of Mr Wilson's previous attorneys, Anne E. Borelli. See, Wilson v. Dunn, Petition for Writ of Habeas Corpus by a Prisoner in State Custody Under Sentence of Death, The United States District Court for the Middle District of Alabama, Southern Division, Case 1:19-CV-WKW-CEC, April 22, 2019.

treat Mr Wilson as a vulnerable adult, his cognitive difficulties were not adequately considered. Thus there was not a fair evaluation of whether his statement was an accurate rendition of the facts or the product of the unreasonable pressure of the circumstance.

18. We are asked to trust a police officer who entered Mr Wilson's house without a warrant, did not provide mental health safeguards, and did not ensure that the interrogation was adequately recorded. At the trial Sergeant Luker provided inconsistent testimony on the extent to which Mr Wilson's oral statement was completely replicated on the tape recording. He stated at trial, 'the tape is exactly in the same lines of what he [Mr Wilson] told us during the other time [the non-recorded questioning].' However, in the recording Mr Wilson did not state that he killed Mr Walker or that he intended to kill him, but at the trial Sergeant Luker stated the defendant, 'changed it all up' meaning he had changed the plan to kill the victim.

19. Sergeant Luker appears to want the court to: (a) trust that the police did not leave anything out which would have been of relevance to the trial; and (b) there was something of relevance left out which was the affirmation that Mr Wilson had the requisite *mens rea* to commit the crime, and that he also inflicted the lethal blows. But it cannot be both. Therefore, this reveals *prima facie* doubt about the accuracy and trustworthiness of Sergeant Luker's testimony.

20. The recorded interrogation reveals Mr Wilson claimed that Mr Marsh instigated the crime, and he persuaded Mr Wilson to join him to steal items from Mr Walker's house. While in the house, Mr Walker returned home. The account Mr Wilson provides indicates that Mr Walker obtained a knife and Mr Wilson then swung a baseball bat at Mr Walker's arm to try to make him release the knife. He accidently hit Mr Walker in the head and then restrained Mr Walker to force him to drop the knife. Then Mr Wilson left and returned to Mr Marsh's house.

21. At Mr Marsh's residence, one of the co-defendants, Ms Corley stated she wanted to go to Mr Walker's house but Mr Wilson did not accompany her inside. Ms Corley entered the house on her own, and there was no corroborative testimony at trial to determine the facts of what may have occurred during this time in which she entered the property.

22. Due to the information provided by Mr Wilson, Sergeant Luker obtained a search warrant, which was informed by further information from questioning Ms Corley.

ii. Police Misconduct and the Unfair Benefit of the Fruit from the Poison Tree

23. In cross-examination, counsel did not adequately question and interrogate the inconsistencies in Sergeant Luker's claims about: (a) whether Mr Wilson was arrested by the police at his home, and (b) whether the moment of arrest was at the police station (as stated above). What is clear is that the police did not have an arrest warrant and the authorities gave no meaningful choice over whether or not Mr Wilson could accompany them to the police station. They arrived at 3:59am and Sergeant Luker then read Mr Wilson his Miranda rights at 4:12am.

24. There is no evidence that the police treated Mr Wilson as a vulnerable adult consistent with his mental health diagnosis. Furthermore, there is no evidence that the police ensured that Mr Wilson was accompanying adult to help ensure that he understood the what was occurring. Therefore there was a total disregard for his health and wellbeing at the moment of apprehension, questioning, and arrest. This compounds the argument that what occurred was an arbitrary deprivation of his liberty in violation of his healthcare rights. The mental and physical health issues provide the basis to significantly challenge the extent to which Mr Wilson was able to comprehend what was happening when the police arrived at his home, and it is highly likely that his Asperger's Syndrome and ADHD prevented him from adequately understanding what was occurring. This could have detrimentally affected his ability to provide an informed and autonomous assessment of the situation he was in. Thus it cannot be reasonably be established that Mr Wilson provided an informed consent to be questioned and provide an accurate recollection of the events about which he was questioned.

25. The standard of voluntariness as recognised in *Brown v Illinois*,[66] requires additional safeguarding in the circumstances of police questioning and arrest, and as is detailed below, this is a central standard of the international law on the right to liberty for those suffering from physical and mental health disabilities.

26. Due to Mr Wilson's Asperger's Syndrome and ADHD, and the early hours of the morning entering into his home without providing mental health safeguards, it is very unlikely he would have autonomously and intelligently waived his wights or provide a legally enforceable statement to be used to deny him of his liberty. What transpired was the attaining of evidence under highly coercive circumstances and should have been considered inadmissible as 'fruit of the poisonous tree.'[67] The extent and potency of the 'poison' is increased in the case of someone with mental health problems. This is because any waiver of rights must be 'knowing and intelligent,' under *Moran v. Burdine*,[68] and the mental health issues of the person deemed to have waive his rights must inform this determination.[69]

27. The police collected physical evidence but conducted no forensic testing. This rendered the only piece of evidence to place Mr Wilson at the scene of the crime to be his own statement to the police. This was obtained without adequate protection of his physical and mental health.

iii. Prosecutorial Misconduct, Discovery Violations, and the Withholding of Exculpatory Evidence

28. During the preparations for the trial, the District Attorney obtained a letter from Ms Corley in which she confesses that she 'hit Mr Walker with a baseball bat until he fell.' Sergeant Luker then seized other handwriting samples from Ms Corley's prison cell, and the District Attorney then engaged the services of a handwriting expert from the

[66] Brown v. Illinois, 422 U.S. 590 (1975).
[67] Wong Sun v. United States, 371 U.S. 471, 484 (1963).
[68] Moran v. Burdine, 475 U.S. 412, 421 (1986).
[69] Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989).

United States Postal Service (USPS). The expert found that the handwriting samples were probably from the same person. This means that the letter containing the confession and the letters from Ms Corley's cell were under a balance of reasonable probabilities all written by the co-defendant.

29. There is a substantial difference between what Ms Corley stated to the police, which was turned over to the defence, and what she stated in her letter, which was not. In Ms Corley's disclosed statement she claims she did not go into the kitchen to look at Mr Walker's body. However, the letter she wrote states that she herself was the person who not only saw Mr Walker alive, but who also committed the murder.

30. What is also important is that the pathologist's testimony at trial is not consistent with the extent of the physical injuries described by Mr Wilson in his statement. He claimed he only caused one accidental hit on Mr Walker's head, and then restrained him (gripping him around the throat) until he released the knife. But the confession by Ms Corley that she hit him until he fell is consistent with the forensic evidence provided by the state at trial. The pathologist concluded that there were over 100 impact wounds inflicted whilst Mr Walker was still alive and which subsequently resulted in his death. Ms Corley confessed to inflicting wounds consistent with the pathologist's testimony, but the state presented a 'theory of the crime' that only Mr Wilson inflicted these wounds.

31. The findings of the USPS handwriting expert were written into a police report which was disclosed to defence counsel. However, copies of the letter which Ms Corley wrote and the report of the USPS handwriting expert, were not disclosed to the defence. Hence the information which the defence were presented with was merely a partial appraisal from the police.

32. Most recently, Mr. Wilson's current attorney, Professor Harcourt, moved for the disclosure of the confession letter of Ms Corley, and the US District Court for the Middle District of Alabama ordered the letter's disclosure in 2023. In this letter, Professor Harcourt discovered that Ms Corley confesses to be involved in two murders. Since then, Professor Harcourt has filed additional motions for further Brady discovery based upon new information from the confession letter.[70]

33. The confession of someone other than the defendant is undeniably important information which the defence should have received for the guarantee of equality of arms, access to information, and the right to a fair trial. It speaks directly to both the *actus reus* (guilty act) and the *mens rea* (guilty mind) associated with the crime. This evidence could have been used to demonstrate that Mr Wilson neither: (a) intended the victim's death, and (b) did not inflict the wounds which caused the victim's death. Hence this evidence speaks directly to the foundational issue of the right to a fair trial and the arbitrary nature of Mr Wilson's deprivation of liberty and his right to life. This confession is especially important in Mr Wilson's death penalty case given that the prosecution's theory during

[70] Wilson v Hamm, in The United States District Court for the Middle District of Alabama, Southern District, Case 1:19-cv-00284-RAH-CSC, filed 02/23/2024, Petitioner's Fifth Motion for Brady Discovery, filed by Bernard E. Harcourt, The Initiative for a Just Society, Columbia Law School, 435 West 116th Street, New York, New York.

both the guilt and sentencing phases was that the victim was killed by repeated blows that were not only fatal but especially heinous, atrocious, and cruel.

34. In Mr Wilson's statement to the police he affirmed that he did not accompany Ms Corley into Mr Walker's home, and he therefore stated there was a period of time in the home that Mr Wilson cannot account for, but Ms Corley could have done so. Ms Corley did not provide her opinion of what happened in the house during the trial, but she did so through her letter. This evidence points to the fact that during this time, Ms Corley inflicted the fatal wounds which caused the death.

iv. Authorship and the Authenticity of the Letter

35. Between the 2004 investigation and until 28th July 2023, the State did not question the accuracy of the content of the letter or the identity of the author. The State of Alabama, through claims of the police, handwriting experts, and legal arguments by state prosecutors, had maintained that Ms Corley wrote the letter and that it was authenticated as to both authorship and the factual accuracy of its contents.

36. To affirm this Professor Harcourt cogently identified the factual predicates and legal propositions made by the State of Alabama in various court proceedings (replicated below)[71]:

a. To the United States Supreme Court, in its Brief in Opposition to Petition for Writ of Certiorari: "The prosecutor in this case maintained an open file policy and disclosed the existence of the Corley letter, its content, and its authenticity to Wilson's counsel. The police report attached to Wilson's petition disclosed that there was an authentic letter from Wilson's accomplice in which she stated that she had 'hit Mr. Walker with a baseball bat until he fell.'" (Doc. 76-35 at PDF 131, Bates 5990)

b. To the United States Supreme Court, again in its Brief in Opposition to Petition for Writ of Certiorari: "Wilson also argues that the State violated Brady by not producing documents authenticating the Corley letter, but that argument fails for at least three reasons. First, the authorship of the letter was not in dispute. As the exhibits to Wilson's petition show, the investigating officer believed "that the author of both documents are [sic] Catherine Nicole Corley." (R32 C. 616.) Second, the authenticating documents described in the petition have no independent materiality. [...] A document "authenticating" a letter's authorship when the authorship is not in dispute is not material because it neither adds to nor takes away from the quantum of evidence before the jury. Third, even if the letter's authenticity was at issue, the State produced the police report which disclosed the substance of the allegedly suppressed fact: that the document was authentic." (Doc. 76-35 at PDF 133, Bates 5992)

[71] Wilson v Hamm, in The United States District Court for the Middle District of Alabama, Southern District, Case 1:19-cv-00284-RAH-CSC, filed 02/23/2024, Petitioner's Fifth Motion for Brady Discovery, filed by Bernard E. Harcourt, The Initiative for a Just Society, Columbia Law School, 435 West 116th Street, New York, New York.

c. To this Court [District Court], in its Response to Notice of Appearance, Motion for a Status Conference, for Appointment of Counsel, and for an Order of Disclosure: "Thus, Wilson has, for over fifteen years, known both that a letter existed stating that Ms. Corley had also struck Mr. Walker and that the State believed that Ms. Corley was its author." (Doc. 33 at p. 6)

d. To this Court [District Court], in its Amended Response: "Thus, Wilson has, for over fifteen years, known both that a letter existed stating that Ms. Corley had also struck Mr. Walker and that the State believed that Ms. Corley was its author." (Doc. 37 at p. 6)

e. To this Court [District Court], in Respondent's Answer to David Wilson's Petition for Writ of Habeas Corpus: "In this case, Wilson does not contest the fact that, at minimum, he was made aware of the fact that Corley had written a letter in which she stated that she had 'hit Mr. Walker with a bat until he fell.'" (Doc. 56 at p. 9)

f. Again, in its Answer to David Wilson's Petition for Writ of Habeas Corpus: "Thus, Wilson knew before trial both that a letter existed stating that Ms. Corley had also struck Mr. Walker and that the State believed that Ms. Corley was its author." (Doc. 56 at p. 13) Having lost its battle to withhold Brady evidence, the Attorney General was forced to produce the full Corley letter under court order and did so on June 28, 2023.

37. So from the state's obtaining of the letter in 2004 to the moment the District Court ordered the disclosing of the letter to the defence, the state affirmed the content and authorship.

38. The Court ordered the Attorney General to produce the letter on 28th June 2023. However, following the eleven (11) petitions by the defence to disclose the letter and the court order, the very next day the Attorney General obtained an affidavit from Ms Corley stating that the letter is a fake. This was on 29th June 2023. This raises serious questions about the partiality of the prosecutor, because it appears that the state has knowingly tendered to the District Court an affidavit from Ms Corley it does not believe to be true. It is a reasonable proposition that had the jury been presented with the evidence of Ms Corley that at least one further juror would not have recommended the death sentence.[72]

v. The Appearance of Misconduct

39. The court order to hand over the letter on 28th June and the obtaining of an affidavit from Ms Corley on 29th June, raises questions regarding fair actions of the state, and conduct becoming of a state prosecutor.

[72] Favourable evidence is material there is a reasonable probability that disclosure would have led to a different legal result, see Banks v. Dretke, 540 U.S. 668, 696 (2004) and Kyles v. Whitley, 514 U.S. 419, 433 (1995).

40. Ms Corley's affidavit has an appearance of perjury and it is difficult to view this as a reasonable factual development after 20 years. The coincidental nature of the timing of this affidavit raises legitimate suspicions regarding its accuracy. Ms Corley has an upcoming hearing before the Alabama Board of Pardons and Paroles which is due to take place on a selected date from December 2024. Professor Harcourt argues:

> It is not surprising that Kittie Corley now denies authorship of the letter in which she confesses to having beaten Mr. Dewey Walker to death and to being deeply implicated in the drug-dealings and murder of C.J. Hatfield. (Doc. 86-1, Corley affidavit) Corley is about to appear before the Alabama Board of Pardons and Paroles. (See Appendix A) The last thing she wants is to be associated with her confessions to involvement in two murders. Corley has every motive in the world to lie and now contend that she was not involved in those murders—concerning the second of which there is no public knowledge of her involvement.
>
> But what is deeply alarming is that the Alabama Attorney General would file an affidavit with the Court that, by their own evidence, is likely perjurious. (Doc. 67 at p. 21, Opinion of this Court finding that "Prosecutors … concluded that Corley was its author") In fact, the Corley affidavit explicitly contradicts one of the core arguments that the Attorney General has relied on for years to shield the Corley letter: namely, that Petitioner is procedurally defaulted on his Brady claims because he knew that, in the Attorney General's words to the United States Supreme Court, "the authorship is not in dispute."
>
> It is also alarming that the Alabama Attorney General obtained Kittie Corley's sworn signature on June 29, 2023, the day after the Attorney General complied with this Court's production order of June 21, 2023, Doc. 79. Indeed, on June 28, 2023, at 11:54 PM, just a few hours before obtaining Corley's affidavit, the Attorney General turned over to undersigned counsel the back side of the Corley letter.[73]

41. The State's refusal to hand over Ms Corley's letter had been a violation of discovery requirements under *Brady v. Maryland*,[74] but the State now denying its authenticity raises significant further questions of fairness. The timing of this implicates access to justice, procedural impropriety, and prosecutorial misconduct. These factors speak to the heart of the claim that Mr Wilson was denied the right to a fair trial.

vi. Racial Discrimination in the Composition of the Jury

42. In 2004 the demography of Houston County in the United States revealed that there were 25% African Americans living within the jurisdiction. Therefore on a jury in this area it would be legitimately representative for 3 of the 12 jurors to be from this race.

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[73] Wilson v Hamm, in The United States District Court for the Middle District of Alabama, Southern District, Case 1:19-cv-00284-RAH-CSC, filed 02/23/2024, Petitioner's Fifth Motion for Brady Discovery, filed by Bernard E. Harcourt, The Initiative for a Just Society, Columbia Law School, 435 West 116th Street, New York, New York.

[74] Brady v. Maryland, 373 U.S. 83 (1963).

For Mr Wilson's trial there were 54 people in the venire pool for jury selection, and after initial strikes and hardship excuses there was a pool of 45 people and only 5 (12%) were African Americans. The state then used 5 peremptory challenges to strike all of the potential African American jurors thus creating a jury composition which *prima facie* demonstrated racial discrimination.

43. In *Batson v. Kentucky*,[75] the U.S. Supreme Court held that it was a violation of equal protection (under the Fourteenth Amendment) for a juror to be struck based solely on account of their race or on the assumption that an African American juror would be unable to impartially consider the prosecution's case. The reasonable interpretation of the State's actions is that the predominant factor for these strikes was the race of the person in the pool.[76] This was a *prima facie* unconstitutional jury selection. Such a formulation denied Mr Wilson the right to a fair trial.

vii. Incompetent Defence Representation

44. Following *Strickland v Washington*,[77] defence representation: (a) must not fall below an objective standard of reasonableness; and (b) this deficiency must not prejudice the defence. Under *Ford v. Wainwright*, capital proceedings must demonstrate a heightened standard of reliability.[78] It is clear that in this case there are numerous examples of ineffective assistance of counsel and viewing these both separately and cumulatively, demonstrates that Mr Wilson did not receive a fair trial.

45. Defence counsel did not adequately prepare for the capital case consistent with the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases.[79] The defence did not adequately reveal to the court the violations which occurred. The middle of the night arrest of a 20 year old young man suffering from Asperger's Syndrome and ADHD, forced to attend a police station, and unaware of his rights, was an act of discrimination against Mr Wilson due to his mental health. He should have been treated as a vulnerable adult by the arresting authorities and provided safeguarding processes for a person diagnosed with his mental and physical health conditions. This would have enabled Mr Wilson to have fairly and meaningfully comprehend what was occurring when he was confronted by the police. There are significant grounds for arguing this was an arbitrary arrest and thus an arbitrary deprivation of his liberty. He was therefore subjected to an unreasonable search and seizure in violation of the Fourth Amendment of the U.S. Constitution.

46. Mr Wilson was represented by two lawyers, and one of his counsel only visited him two times, and the other three times, and the meetings for the discussion of the whole capital case amounted to about 5 hours. This is a completely insufficient time to discuss the case with the defendant in this life-or-death circumstance. It did not enable counsel

[75] Batson v. Kentucky, 476 U.S. at 89.
[76] See, Wilson v. State, Court of Criminal Appeals of Alabama, 142 So.3d 732, November 5, 2010.
[77] Strickland v Washington, 466 U.S. 668 (1984), as affirmed in Wiggins v Smith, 539 U.S. 510 (2003).
[78] Ford v. Wainwright, 477 U.S. 399, 411 (1986)
[79] American Bar Association (2003) ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Hofstra Law Review, Vol. 31: 4, (2003) Available at: https://scholarlycommons.law.hofstra.edu/hlr/vol31/iss4/2

to prepare for the factual issues, the development of a 'theory of defence', prepare for cross examination of state witnesses, or understand the socio-medical and inter-generational background of the defendant, and then to prepare for the mitigation phase. This inadequate legal representation ensured that Mr Wilson was denied a right to a fair trial rendering his detention and sentence an arbitrary deprivation of his life.

47. Defence counsel provided no 'theory of defence' in that no clear reasons were provided for the jury to find that Mr Wilson was either not guilty or that it was appropriate for the jury to recommend a non-capital sentence.

48. It should be conceded that the state's suppression of evidence contributed to restricting the theory of defence, in that one of the co-defendant's (Ms Corley) had produced evidence she was the murderer. This should have been the primary focus of the theory of defence, and counsel could have also provided a thorough and clear assessment of Mr Wilson's mental health. This could then have been used to confront the arguments of his moral culpability for the crime, and as a mitigating factor for determining an appropriate sentence.

49. Counsel did not provide adequate objections to the involuntariness of Mr Wilson's statement to the police, due to the lack of consideration of his Asperger's Syndrome and ADHD.

50. Counsel did not adequately cross-examine the inconsistencies in Sergeant Luker's claims about: (a) whether Mr Wilson was arrested by the police at his home, or (b) he was arrested at the police station. What is clear is that the police did not have a warrant for a search and seizure and gave no meaningful choice of whether or not Mr Wilson should accompany them to the police station (CID room).

51. There was no challenge to the racial composition of the jury, inadequate cross-examination of state witnesses, no defence witnesses presented at the guilt/innocence phase of the trial, and at the sentencing phase, only two witnesses were called. No witnesses were able to provide an adequate mental health assessment for the diagnosis of Mr Wilson's Asperger's Syndrome and ADHD.

52. Mr Wilson was diagnosed at an early age with Asperger's Syndrome and ADHD. However, this was insufficiently investigated by the police, state prosecutors and the defence counsel.[80] The mental health diagnoses should have been adequately considered for assessing Mr Wilson's moral culpability in the trial and at sentencing. Consistent with *Ake v Oklahoma*[81] the jury was denied the opportunity to consider an adequate presentation of the mental health issues, the socio-physiological history, and the cogency of this for assessing Mr Wilson's moral culpability.

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[80] According to the Diagnostic and Statistical Manual of Mental Disorders, [t]he essential features of autism spectrum disorder are persistent impairment in reciprocal social communication and social interaction (Criterion A), and restricted, repetitive patterns of behavior, interest, or activities (Criterion B). These symptoms are present from early childhood and limit or impair everyday functioning (Criteria C and D). DSM-V § 299.00 (Autism Spectrum Disorder), p. 53 (5th ed. 2013). "In young children with autism spectrum disorder, lack of social and communication abilities may hamper learning, especially learning through social interaction or in settings with peers." Id. at 57. "Adolescents and adults with autism spectrum disorder are prone to anxiety and depression." Id. at 55.

[81] Ake v. Oklahoma, 470 U.S. 68 (1985).

53. There was a doctor (Dr. Robert D. Shaffer, PhD, a neuropsychologist), family members, and schoolteachers, who would have provided evidence concerning Mr Wilson's medical history and the observations on his difficulties with social adaptability. This would have spoken to: (a) the factual probability that Mr Wilson could have committed murder; (b) the extent of his moral culpability; and (c) the quality of the mitigating evidence.

54. Before wanting to kill any human being, and in this case, a person suffering from Asperger's Syndrome and ADHD, the state should provide adequate assessment of the facts and the mental health issues of the defendant. In Mr Wilson's case, neither has happened. The state of Alabama has therefore imposed an arbitrary death sentence upon Mr Wilson and this amounted to an arbitrary deprivation of his right to life.

55. At the end of the trial the defence counsel waived the opportunity to provide a closing argument to the jury. Therefore, defence counsel provided the jury with no reason why they should find him not guilty or guilty of a non-capital offence. It demonstrated to the jury that there was no clear 'theory of defence' and therefore no propositions for reasonable doubt against a capital offence.

viii Judicial Imposition of Death Despite a Non-Unanimous Jury Recommendation

56. Overall the trial lasted for only 3 days (from 3-5 December 2007, with the sentencing hearing on 8 January 2008). This is a completely insufficient amount of time for a capital trial. It thus *prima facie* reveals both the quality and substance of a violation of the right to a fair trial leading to an arbitrary sentence, an arbitrary imprisonment, and an impending arbitrary deprivation of Mr Wilson's life.

57. The jury verdict was 10 votes to 2 in favour of the death penalty. The jury's decision was therefore not unanimous. It was confined to a majority verdict. However, at the sentencing hearing the judge imposed the death sentence. Under the Alabama Code a sentence of death can only be imposed where a jury finds: (i) unanimously and beyond a reasonable doubt that a statutory aggravating circumstance exists, and (ii) that aggravating circumstances outweigh the mitigating circumstances.[82]

58. The non-unanimous jury verdict to impose the death sentence reveals there was uncertainty as to the level of the moral culpability for the crime. If the suppressed evidence had been presented to the jury it would have very likely increased that uncertainly, creating the very likely circumstance of a further increase in the jurors not favouring the death penalty. Therefore the right to a fair trial speaks to not only the finding of the facts of the case, but also to the determination of an appropriate sentence.

59. Under *Ring v Arizona*,[83] the U.S. Supreme Court held that a defendant has the right to have a jury, rather than a judge, decide on the existence of an aggravating factor for the determination of the appropriate sentence. The Court based its judgment on the

[82] Ala. Code 1975, s. 13A-5-46(e)(2).
[83] Ring v. Arizona, 536 U.S. 584 (2002).

constitutional principle that the Sixth Amendment right to trial by jury encompasses the right to a jury finding of all the facts that are necessary to put a defendant to death.

60. The 'jury' did not provide a unanimous verdict in favour of death, and so it may be interpreted that there was a *prima facie* form of judicial override. If this is correct, it is now a violation of the right to a fair trial following cases such as *Hurst v. Florida.*[84] Therefore, if the death sentence was improperly imposed by the court in violation of state and federal capital procedures, it is thus a denial of fair trial standards, and would constitute an arbitrary violation of Mr Wilson's right to life.

ix. Mr Wilson Was Shackled in the Courtroom in a Denial of the Right to a Fair Trial, Which Amounted to an Arbitrary Deprivation of Liberty and the Right to Life

61. Mr Wilson was shackled during the duration of the trial. The jury would have been able to see him presented in restraints and the appearance of the defendant in handcuffs would have *prima facie* tainted their ability to impartially consider the facts of the case and then to determine the extent of his moral culpability.

62. The court failed to consider the appropriateness of the shackling of Mr Wilson, and this resulted in a violation consistent with the legal findings in *Deck v. Missouri*.[85] It is unconstitutional to shackle a defendant during the trial unless such restraint is 'justified by an essential state interest.'[86] The court failed to establish this interest and the defence counsel did not challenge the use of the shackles. This prevented the court from ensuring that Mr Wilson had a presumption of innocence in violation of the fundamental tenets of fairness and equal treatment during criminal proceedings. This was a prejudicial act by the state and the court did not rectify the damaging, and damning, appearance of the defendant being in restraints during the trial.

63. The shackles also need to be placed in context with the stress and trauma that Mr Wilson would have felt as he suffers from Asperger's Syndrome and ADHD. This was cruel treatment of someone with such mental health difficulties, and further contributed to Mr Wilson's arbitrary deprivation of his right to life.

x. The Death Penalty Phenomenon

64. Mr Wilson has been subjected to the capital judicial process since his capital charge in 2004 and subsequent appellate proceedings following his conviction and then time on death row beginning in December 2008.[87] During this time, and exacerbated by

[84] Hurst v. Florida, 577 U.S. 92 (2016).
[85] Deck v. Missouri, 544 U.S. 622 (2005).
[86] Id. 626.
[87] Professor Harcourt provides the appellate record as: On direct appeal, the Alabama Court of Criminal Appeals (ACCA) remanded to the trial court to determine if the prosecution violated Batson v. Kentucky. Wilson I the circuit court denied the claim. On March 23, 2012, the ACCA affirmed Mr. Wilson's conviction and sentence. Wilson, 142 So. 3d at 748 and on June 22, 2012, denied rehearing. Id. The Alabama Supreme Court denied certiorari on September 20, 2013. The US Supreme Court denied Mr. Wilson's petition for writ of certiorari on 19th May 2014. Mr. Wilson filed a post-conviction petition on 19th September 2014. He filed an Amended

his Asperger's Syndrome and ADHD, his psychological and physiological condition has been adversely affected and the potential constitutional violations are assessed under the case of *Lackey v Texas*.[88] The international law standards for assessing the time and temporal features of the capital judicial process find their basis in the 1989 decision of the European Court of Human Rights in, *Soering v United Kingdom*.[89] It was held that a duration of 6 to 8 years on death row would contribute to the violation of the European Convention on Human Rights article 3 prohibition of inhuman and degrading punishment. Since this time, the Judicial Committee of the Privy Council has held in *Pratt and Morgan v. The Attorney General for Jamaica*, that 5 years under sentence of death would constitute cruel and inhuman punishment.[90] What constitutes cruel and inhuman punishment should be assessed considering all the factual and temporal predicates from arrest and capital charge, to the capital trial, appeals, duration on death row, and to the moment and method of execution. Each aspect should be used to assess the human rights violations and this includes the contributions from each party to the duration of time under the capital judicial process.[91]

66. Mr Wilson has been under the shadow of the capital judicial process for over 20 years and the Human Rights Committee *General Comment No. 36 - Article 6: the right to life*, states that 'extreme delays' can constitute a violation of ICCPR article 7,[92] and this was considered in the case of *Persaud and Rampersaud v. Guyana* for a fifteen (15) year period.[93]

xi. Potential Executions by Forced Nitrogen Gas Asphyxiation

67. Professor Harcourt filed a 42 U.S.C. §1983 civil rights action against the Commissioner of the Alabama Department of Corrections to enjoin the State from executing Mr Wilson by forced nitrogen gas asphyxiation. The lawsuit also requests a declarative judgment that the nitrogen gas asphyxiation method violates Mr Wilson's protected rights under the U.S. Constitution's Eighth Amendment clause prohibiting cruel and unusual punishment. There are legal arguments concerning both 'facial' and 'as-applied' method-of-execution challenges. Mr Wilson's case involves both the

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Petition on December 11, 2015, and a supplement on 7th September 2016. The State filed an Amended Answer and Motion to Dismiss on 24th February 2016, and a response to the supplement on 6th October 2016. The court held a hearing on the State's Motion on 8th November 2016, and dismissed the petition in its entirety without granting discovery or holding an evidentiary hearing on 24th February 2017. Mr. Wilson filed a Motion to Reconsider on 24th March 2017, which was denied by operation of law on March 26, 2017. The ACCA affirmed the dismissal of Mr. Wilson's Rule 32 petition on March 9, 2018. Mr. Wilson petitioned for certiorari from the Alabama Supreme Court. That court denied certiorari on August 24, 2018. Ex parte David Phillip Wilson, No. 1170747 (Ala. Aug. 24, 2018). Mr. Wilson filed a petition for writ of certiorari with the U.S. Supreme Court on January 18, 2019. The Supreme Court denied certiorari on 29th April 2019. Mr. Wilson then filed for a federal writ of habeas corpus on 22nd April 2019.

[88] Lackey v. Texas, 514 U.S. 1045 (1995).

[89] Soering v. United Kingdom, Application no. 14038/88, 7th July 1989

[90] Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica and The Superintendent of Prisons, Saint Catherine's, Jamaica, [1993] UKPC 1.

[91] See, Jon Yorke, Inhuman Punishment and Abolition of the Death Penalty in the Council of Europe. European Public Law, 16 (1). pp. 77-103.

[92] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, 3rd September 2019.

[93] Raymond Persaud and Rampersaud v. Guyana, Communication No. 812/1998, U.N. Doc. CCPR/C/86/D/812/1998 (2006).

domestic and international evaluation of the processes adopted to kill persons on death row. The various challenges to the execution methods will incorporate both the general torture through which death by nitrogen gas asphyxiation entails, and the specific cruelty imposed when considering Mr Wilson's Asperger's Syndrome, ADHD, his hypersensitivity to light, the problems associated with wearing glasses under the mask, and his pulmonary diseases which will render breathing in the nitrogen even more painful.

International Law Violations

E. The United States Reservations, Understandings, and Declarations, to the International Covenant on Civil and Political Rights

68. On the 8th June 1992 the United States ratified the International Covenant on Civil and Political Rights.[94] Included in the deposit of ratification to the Human Rights Committee were the government's reservations, declarations and understandings, that apply to the application of the ICCPR within its domestic jurisdiction.[95]

69. The Human Rights Committee considered the reservations to be 'incompatible with the object and purpose of the Covenant,' and therefore should be withdrawn.[96] It is the author's argument that the Special Procedure mandates should proceed in the review of Mr Wilson's case from the perspective of the incompatibility of the United States reservations to the general question of the death penalty. The Human Rights Committee's statement should be the guiding position on the applicability of the reservations. In 1992 the Human Rights Committee[97] and governments who commented on the US's RUDs had collectively stated the reservations were 'not valid'[98] as they are incompatible with the 'object and purpose'[99] of the ICCPR, and the Human Rights Committee has recently affirmed that the ICCPR has a 'pro-abolitionist spirit.'[100]

70. Since 1992 there has been a significant development in the evolution of international law to restrict the scope of the death penalty, and the provisions clarifying the safeguards for capital defendants. Multilateral and bilateral encouragement of moratoria is increasing around the world and governments are abolishing the death penalty and this is reflective of the pro-abolitionist perspective of the Covenant (see below on ICCPR article 6(6)). According to the latest figures from Amnesty International

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[94] See, Status of Ratifications, UN Treaty Body Database, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=USA&Lang=EN
[95] See, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53rd Sess., 1413th meeting, U.N. Doc. CCPR/C/79/add.50, 6 April 1995, and, US Senate Report on Ratification of The International Covenant on Civil and Political Rights, U.S. Senate Executive Report 102-23 (102d Cong., 2d Sess.) 24 March 1992.
[96] Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53rd Sess., 1413th meeting, U.N. Doc. CCPR/C/79/add.50, para. 14.
[97] Id.
[98] Id. For example, France, p. 21.
[99] Id. For example, Norway, p. 29.
[100] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, 3rd September 2019, p. 8.p. 11.

72% of the world's states are now abolitionist,[101] and in the most recent UN General Assembly's vote on the *Resolution on the moratorium on the use of the death penalty*, 77% of member states voted in favour.[102] This strengthens the legitimacy of the argument that the United States should withdraw its reservations as they are in violation of the aims and purposes of the ICCPR.

Reservations[103]:

> (2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.
>
> (3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

71. The last sentence of the government's Reservation 2 is now incompatible with the U.S. Supreme Court's judgment in *Roper v Simmons*,[104] in which it was held that to sentence a juvenile offender to death would be a violation of the Eighth Amendment's 'cruel and unusual punishments' clause.[105] However, the government has not yet amended this section of the reservation. This creates an inelegant and potentially confusing position concerning the international law position protecting juvenile offenders. The provision allowing for 'capital punishment on any person…duly convicted under existing or future laws' provides for a wider scope of the death penalty than is temporarily endorsed under ICCPR article 6(2) and fails to provide processes for abolition under article 6(6). The U.S.'s Reservation 2 is contrary to and incompatible with, the aims, objectives, and the spirit of the ICCPR.

72. Concerning methods of execution under Reservation 3, it is again incompatible with the object and purpose of the ICCPR. The search for a new execution method, most recently in the use of nitrogen gas is a further violation of article 6(6). The specific reasons for the case of Mr Wilson are set out below.

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[101] Amnesty International, Death Sentences and Executions 2022 (May 2023), Abolitionist for all crimes: 112 Abolitionist for ordinary crimes only: 9 Abolitionist in practice: 23 Total abolitionist in law or practice: 144 Retentionist: 55 (72% abolitionist).

[102] UNGA Resolution - Moratorium on the use of the death penalty, A/RES/77/222, 15 December 2022, adopted by 125 votes to 37, with 22 abstentions. [Subsequently, the delegations of Vanuatu and Zambia informed the Secretariat that they had intended to vote in favour; the delegations of Pakistan and Uganda informed the Secretariat that they had intended to abstain.] (77% in favour – without abstentions).

[103] See, https://treaties.un.org/pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&clang=_en

[104] Roper v Simmons, 543 U.S. 551 (2005)

[105] Id.

Understandings[106]*:*

> (1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.
>
> (5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

73. Contrary to Understanding 1, the trial and conviction of Mr Wilson demonstrates that many elements of the capital judicial process are discriminatory and arbitrarily applied, and constitutes violations of articles 6, 7, 10, and 14 of the ICCPR, and in the context of a person suffering from Asperger's Syndrome and ADHD are also a violation of the ICESCR and the CRPD.

74. The United States capital judicial process creates procedural hurdles and barriers which have the practical effect of violating international law. They have their foundation in Understanding 5. It sets out the relationship of the federal and state governments with regards to the legal architecture for comity review of cases and controversies.[107] However, this has the effect of nullifying international law and assessment by UN treaty bodies and human rights entities. This is because the federal government will deem its jurisdictional competence does not extend to providing a duty upon the U.S. states to fulfil the nation's international law commitments. However, this results in an impractical, unsatisfactory, and inelegant outcome, as Justice Breyer stated in *Medellin v. Texas*:

> The consequence of [future action by the political branches] is to place the fate of an international promise made by the United States in the hands of a single State [Texas]…And that is precisely the situation that the Framers sought to prevent by enacting the Supremacy Clause.[108]

[106] See, https://treaties.un.org/pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&clang=_en
[107] See, Jon Yorke, Comity, Finality, and Oklahoma's Lethal Injection Protocol, 69 Okla. L. Rev. 545 (2017)
[108] Medellin v. Texas, 552 U.S. 491, 560 (2008).

75. An example from the Framers demonstrates that the modern-day U.S. Supreme Court has gone against the founding principles and perspectives of the architects of U.S. constitutional law. Alexander Hamilton argued in The Federalist Papers, No. 22 (1787):

> The treaties of the United States, under the present [Articles of Confederation], are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government?[109]

76. There was a deep respect for international law and the comity relationship of nations and this is also expressed through the further warning by James Madison who stated in The Federalist Papers, No. 42 (1788) that under the Articles of Confederation, 'treaties might be substantially frustrated by regulations of the States.'[110] Justice Stevens reasoned that these warnings had not been heeded some 230 years later as he affirmed in *Medellin*:

> Under the express terms of the Supremacy Clause, the United States' obligations to "undertak[e] to comply" with the ICJs decision falls on each of the States as well as the Federal Government. One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas' duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another.'[111]

77. Justice Breyer affirmed that even if the federal government would want the states to comply with international law, they are not obliged to do so. States can therefore adhere to national constitutional provisions to legally act inconsistently with the Covenant, and they do so in the recognition that the States themselves did not sign the treaty. It was the federal government. This produces an unsatisfactory result in which many States of the Union can violate the ICCPR, which renders the federal government in violation of the treaty.

78. The key wording in Understanding 5 is 'the state or local government may take appropriate measures for the fulfilment of the Covenant,' and in the words of Justice Stevens, 'States must shoulder the primary responsibility for protecting the honour and integrity of the Nation.' However, as was seen in *Medellin*, the federal government cannot currently guarantee that States will uphold Covenant rights. It can only concede that they may do so. In this way, if they do not, the right to an effective remedy under ICCPR article 2 is violated nationally. Texas refused to and whilst the U.S. Supreme Court in

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[109] The Federalist Papers No. 22, From the New York Packet. Friday, December 14, 1787. HAMILTON, The Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/fed22.asp

[110] The Powers Conferred by the Constitution Further Considered, From the New York Packet. Tuesday, January 22, 1788. MADISON, The Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/fed42.asp

[111] Medellin v. Texas, 552 U.S. 491, 536 (2008).

Medellin considered the violations of the Charter of the United Nations and the Vienna Convention on the Law of Treaties, what had also occurred was a violation of the ICCPR.

79. It also provides for the opportunity for the federal government to receive treaty body reviews, and communications from UN Special Procedures mechanisms, but there is not a legal mandate requiring the States to: (a) reply to the UN communications, and (b) comply with the international law standards.

80. It should be recalled that the United States' RUDs to the ICCPR are also an explicit violation of the VCLT, article 27, which states:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.[112]

81. The United States government is using its 'internal law' to justifying its failure to adhere to many UN treaties, treaty body reviews, and the Universal Periodic Review. In *Medellin* the U.S. judicial system side-stepped the international law obligations, and the executive branch is seen to act likewise regarding U.N. treaty body reviews and U.N. Special Procedures' Communications and the UPR. A disturbing example was recently seen in the U.S. government's response to the U.N. Special Rapporteur's Communication following the receiving of the Complaint on behalf of Mr Kenneth Smith who was executed by Alabama on 25th January 2024.

82. In their Communication, the Special Rapporteurs stated:

> Considering the irreversibility of the death penalty, we respectfully call on your Excellency's Government to intervene and halt the execution of Mr. Kenneth Eugene Smith, pending a review of the execution protocol in the State of Alabama. We wish to request that your Excellency's Government brings our concerns to the relevant executive, legislative and judicial authorities of the State of Alabama.[113]

83. A Reply was submitted on 19th January 2024, six days before the execution, by Ms Kelly Billingsley, Deputy Permanent Representative, Human Rights Delegation of the Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva, that:

> <u>U.S. response re. Mr. Kenneth Eugene Smith</u>
>
> Thank you for your December 14 letter regarding the State of Alabama's scheduled execution of Mr. Kenneth Eugene Smith. The United States is governed by a complex federalist system, where the federal government and U.S. state governments share power and jurisdiction over criminal justice,

[112] Article 46, "Provisions of internal law regarding competence to conclude treaties"
(1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

[113] Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Ref.: UA USA 29/2023, 14 December 2023

including prosecutions and sentences. Accordingly, requests for information regarding cases under the jurisdiction of U.S. states or laws of U.S. states are referred to the state in question, in this case Alabama. We have passed your request for information to the relevant state authorities.[114]

84. This response is a practical example of how the U.S.'s RUDs to the ICCPR operate to maintain human rights violations. It reveals that the federal government shields itself behind the claim of a, 'complex federalist system, where the federal government and U.S. state governments share power and jurisdiction over criminal justice.' The U.S. has obligations and duties to uphold the ICCPR but it is failing to do so and responses such as this are indicative of a violation of the VCLT article 27. The responsibility to uphold the ICCPR is passed onto Alabama as requests are 'referred to the state in question.' However, this merely is a provision to allow states to violate international law, as was found by the U.S. Supreme Court in *Medellin*, and the violative procedure was affirmed and protected by the U.S. Permanent Mission in the case of Mr Kenneth Smith. The end result is that time runs out and an execution ensues causing violations of human rights. The Special Rapporteur's were only informed 6 days before the execution, and such response is unacceptable when considering the government was requested to 'halt the execution,' so that the human rights issues could have been adequately litigated. However, the U.S. government did not intervene, and the state law of Alabama prevailed to kill Mr Smith. This is a clear violation of the VCLT article 27, and the violation rendered a further procedural violation of ICCPR article 2, which resulted in Mr Smith's right to life being violated under article 6(1).

85. It is argued that this is a serious violation of human rights and demonstrates a significant 'bad faith' engagement with the United Nations Special Procedures. Therefore it would be appropriate to raise this in mandate reports to the Human Rights Council. The author of this Complaint will be raising this issue in the United States fourth cycle review of the UPR.

Declarations[115]

(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of

[114] See, US response re: Mr Kenneth Eugene Smith, 19 January 2024, https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=38093
[115] See, https://treaties.un.org/pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&clang=_en

> expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

86. Declaration 1 demonstrates that as a general principle international law is not automatically incorporated into U.S. domestic law. In *Foster v. Neilson*, Chief Justice Marshall recognised the jurisdictional responsibility and competence as the treaty is, 'carried into execution by the sovereign power.'[116] This established the U.S. constitutional law position that there is a distinction between treaties that are self-executing (under the monist approach) and non-self-executing (under the dualist approach). The U.S. has a dualist approach which is implemented through the Supremacy Clause of the U.S. Constitution and in the adoption of the review of treaties under the U.S. Constititon, Article II, for Congressional consideration and the required vote of two-thirds majority for a treaty to be incorporated into U.S. law. The significance of this for the question of the death penalty in the U.S. is considered below. In 1992 the Congressional debates on the ICCPR occurred in the fulfilment of the U.S. Constitution, Article II and the consideration of the global issues, and the relationship of sovereignty and the death penalty that was identified 32 years ago have now changed. Therefore, Congress' findings are now outdated and it would be pertinent for them to be revisited.

87. Under Declaration 2 the United States is acting inconsistent with the ICCPR. This questions the extent to which there is a good faith interpretation under article 2. States have a 'good faith' obligation, as guided by the VCLT article 31, to preserve ICCPR rights, and it is insufficient to propose that States will be encouraged to, 'wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights' within the ICCPR. The United States does not have discretion to provide protection under the ICCPR 'wherever possible,' it has a duty placed upon it through the act of ratification, and violations should be remedied under ICCPR article 2.

88. Declarations 1 and 2 significantly support the argument that the government is in persistent violation of the Covenant in all death penalty cases, not just in Mr Wilson's. The United States has created a legal framework to prevent meaningful review of its practices to kill its own prisoners on death row. This is a most repugnant circumstance and reflects a bad faith engagement with the United Nations and international law. Following the United State's RUDs the objections of the government of Finland are recalled:

> With regard to the reservations, understandings and declarations made by the United States of America:
>
> "... It is recalled that under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Understanding (1) pertaining to articles 2, 4 and 26 of the Covenant is therefore considered to constitute in substance a reservation to the Covenant, directed at some of its most essential provisions, namely those concerning the prohibition of discrimination. In the view of the Government of Finland, a reservation of

[116] Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

this kind is contrary to the object and purpose of the Covenant, as specified in article 19(c) of the Vienna Convention on the Law of Treaties.

As regards reservation (2) concerning article 6 of the Coven- ant, it is recalled that according to article 4(2), no restrictions of articles 6 and 7 of the Covenant are allowed for. In the view of the Government of Finland, the right to life is of fundamental importance in the Covenant and the said reservation therefore is incompatible with the object and purpose of the Covenant.

As regards reservation (3), it is in the view of the Government of Finland subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.

For the above reasons the Government of Finland objects to reservations made by the United States to articles 2, 4 and 26 [cf . Understanding (1)], to article 6 [cf . Reservation (2)] and to article 7 [cf. Reservation (3)]. However, the Government of Finland does not consider that this objection constitutes an obstacle to the entry into force of the Covenant between Finland and the United States of America.[117]

F. Due Process Violations Committed During the Investigation and at Trial

89. Mr. Wilson is arguing he was convicted of capital murder in violation of his rights to due process and a fair trial, that there was not a reliable determination of guilt, and then he received an unjust sentence. He maintains that the State of Alabama has violated the Sixth,[118] Eighth,[119] and Fourteenth[120] Amendments to the United States Constitution.

90. In *Khaleel v. Maldives*, the Human Rights Committee affirmed that all aspects of the capital judicial procedure must comply with the 'minimum guarantees' recognised within ICCPR article 14,[121] which states:

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[117] Finland, Declarations and Reservations, CHAPTER IV HUMAN RIGHTS 4. International Covenant on Civil and Political Rights, New York, 16 December 1966, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

[118] The Constitution of the United States, Amendment VI, 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.'

[119] The Constitution of the United States, Amendment VIII, 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'

[120] The Constitution of the United States, Amendment XIV, s. I, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

[121] ICCPR article 14 (3), In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality…(d). To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
    (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
    (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
    (c) To be tried without undue delay;
    (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
    (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
    (g) Not to be compelled to testify against himself or to confess guilt.

91. The Committee found a violation of both ICCPR articles 6 and 14 in that the procedural deficiencies rendered an unfair trial, and therefore when a death sentence was imposed following an unfair trial it results in a violation of the right to life.[122] Mr Smith has been subjected to comparable violations during his trial in Alabama and the subsequent federal appeals have not safeguarded his rights.

[122] Khaleel v Maldives, CCPR/C/123/D/2785/2016, 16th August 2019, para. 9.7, 'The author further claims a violation of Mr. Humaam's right to life under article 6(1) of the Covenant, since he was sentenced to death after an unfair trial in violation of article 14 of the Covenant. The Committee notes that the State party has argued, with reference to article 6(2) of the Covenant, that Mr Humaam was sentenced to death for having committed serious crimes following the judgement handed down by the courts, in accordance with the Constitution and laws of the Maldives and Shariah law, and that the imposition of the death penalty was not contrary to the Covenant. The Committee recalls its general comment No. 6 (1982) on the right to life, in which it noted that the article 6 provision that a sentence of death may be imposed only in accordance with law and not contrary to the provisions of the Covenant, implies that the procedural guarantees prescribed by the Covenant 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. It further reiterates its jurisprudence that the imposition of a sentence of death upon conclusion of a trial in which the provisions of article 14 of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.22 In light of its findings that the State party violated Mr Humaam's rights under article 14 as set out above it, the Committee considers that in sentencing Mr Humaam to death following a trial which suffered from such deficiencies, the State party has violated its obligations under article 6(1) of the Covenant.'

i. Exculpatory Evidence

92. For 20 years the State of Alabama has failed to provide exculpatory evidence to the defence rendering the conviction arbitrary in violation of the ICCPR articles 6(1) and 14. The state has a legal duty to disclose any evidence which can call into question the guilt of the suspect, and it denied the defence an opportunity to use Ms Corley's letter, in which she admits to inflicting the lethal blows on the victim, which are very likely to have caused his death.

93. Under *Brady v. Maryland*,[123] due process requirements oblige the prosecution to provide a criminal defendant with exculpatory evidence it possesses that would be material either to guilt or punishment. The state has therefore been deficient under *Brady*, and has therefore also violated the ICCPR articles 14 with 6(1). To deny Mr Wilson access to exculpatory evidence is to discriminate against him in violation of his right to a fair trial.

94. Concerning the meaning of 'adequate facilities,' in the ICCPR article 14 (3) (b), the Human Rights Committee's *General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*, explains:

> "Adequate facilities" must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary).[124]

95. Without sharing exculpatory evidence the minimum guarantees for the defence cannot be satisfied under article 14. Suppressing exculpatory evidence leads to a denial of equal access to courts, both *de jure* and *de facto*.[125] The Human Rights Committee has stated that article 14 guarantees, 'equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.'[126]

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[123] Brady v. Maryland, 373 U.S. 83, 87 (1963). Applied in Alabama under Ex parte Frazier, 562 So.2d 560 (Ala. 1990). The state's failure to disclose exculpatory information in this case essentially parallels the facts of Patton v. State, 530 So.2d 886, 890 (Ala.Cr.App. 1988) in which the defendant was granted a retrial because the government's withholding of an informant's identity prevented his calling the informant as a witness. The duty to disclose exculpatory material necessarily entails a corresponding obligation to discover, gather and preserve evidence that negates or mitigates liability, as held in California v. Trombetta, 467 U.S. 479 (1984).

[124] General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, p. 10. Citing, concluding observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13.

[125] The Human Rights Council affirms that, 'A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence,' General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, p. 2.

[126] General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23rd August 2007, p. 2.

96. The UN's *Guidelines on the Role of Prosecutors*[127] states:

> 12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
>
> 13. In the performance of their duties, prosecutors shall:
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> a. Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

97. For 20 years, the State of Alabama has both suppressed the evidence of Ms Corley's letter and at the same time, consistently affirmed its authenticity. The seeming presence of 'consistency' is a consistent violation of Mr Wilson's rights, and 20 years is not an 'expeditious' fulfilling of the prosecutor's duties. This is a violation of *Guidelines* 12 and 13. The reluctance to hand the letter over following the court order, then first providing only one page, and then the second, does not demonstrate a following of the *Guidelines*. Furthermore potential violations have arisen (are arising) through the fact that the day following turning over the letter to the defence an affidavit was obtained by the Attorney General in which Ms Corley states that the letter is a fake. She has written this only a few months before the possibility of a parole hearing (from December 2024), and this therefore clearly does not point to a fair process. It *prima facie* reveals that there is misconduct by the prosecutors and these recent developments provide further supportive evidence to affirm that Mr Wilson did not receive a fair trial. He is clearly not being treated fairly in the post-conviction period leading to his execution. There are significant grounds for arguing that Mr Wilson's detention, trial, post-conviction proceedings, and impending execution, are all arbitrary in violation of his human rights.

98. The UN's *Basic Principles on the Role of Lawyers*[128] states:

> 12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
>
> 21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.[129]

99. There are substantial reasons to argue that the Attorney General has failed to uphold the honour and dignity of his profession. In the act of suppressing potentially

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[127] Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 7th September 1990.

[128] Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana Cuba, 07 September 1990. The preambular text states, 'Whereas the Safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights.'

[129] Id. para. 21.

exculpatory evidence the State had denied Mr Wilson access to appropriate information, files and documents. In breach of *Basic Principle* 12, and Mr Wilson's right to a fair trial were violated. It is argued that the Attorney General had not been impartial and has discriminated against Mr Wilson. The suppressed letter speaks to the factual issues related to minimising or even refuting Mr Wilson's moral culpability for the crime.

100. Under *Basic Principle* 21 the 'earliest appropriate time' was in 2004 – 20 years ago. Ms Corley's letter as exculpatory evidence is 'appropriate information' for the trial to have been fair, and should have been shared with the defence at the time of the discovery of the letter in 2004. It is a damning fact that over a 20 year period, Mr Wilson's lawyers had to file 11 (eleven) requests before the District Court ruled in their favour. Under these circumstances, it can be argued that the State being ordered to disclose the potentially exculpatory evidence, demonstrates that the prosecutors had not acted with the 'honour and dignity of their profession as essential agents of the administration of justice.' Quite the contrary, the actions of the prosecutors have been to denigrate the administration of justice. These actions have been unjust and violate *Basic Principles* 12 and 21, and therefore the ICCPR article 14.

101. Instead of showing the 'dignity and honour' of the profession, the Attorney General appears to have brought his office into disrepute, and is likely committing misconduct. This is due to the fact that on the day following the court order to disclose the letter purporting to have been written by Ms Corley, he obtained an affidavit from her in which she states she was not the author. The District Court had already stated that the 'Respondent should not now be heard to conjure wholly new grounds to avoid disclosure of the letter,'[130] but it appears that a further attempt at a conjuring has occurred.

102. This produces an appearance of impropriety. The injustice of the suppression of evidence is a complete violation of duties recognised in *Basic Principle* 21. Instead of providing access to appropriate information, and thus allowing the defence adequate time to prepare and utilise the evidence, they have taken both time and facts away from the defence. The letter written by Ms Corley should have been provided 20 years ago, and at the trial this should have been presented as evidence to cast significant doubt on the State's case against Mr Wilson.

103. These principles should be applied consistent with the UN Economic and Social Council's *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*:

> Safeguard 4: Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.[131]

104. The suppression of exculpatory evidence demonstrates there was a 'clear and convincing' alternative explanation of the facts. In this case, the state has not fairly

[130] Cited in Brady Discovery, p. 21.

[131] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC 1984/50. The Human Rights Committee *in Price v Jamaica* stated:

> the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against sentence is possible, a violation of article 6 of the Covenant.

proven that Mr Wilson committed murder, as Ms Corley had written a letter in which she recounted committing the murder but the jury did not have the opportunity to consider this evidence. Therefore, the state had not demonstrated through 'clear and convincing' evidence that Mr Wilson committed the crime.

105. On the relationship of the ICCPR articles 14 with 6, the Human Rights Committee's *General Comment No. 32 – Article 14: Rights to equality before courts and tribunals and to a fair trial*, states:

> In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of a fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant).

106. Consequently, in preventing the defence from being able to consider this fundamentally important piece of evidence, the State of Alabama has acted in violation of the ICCPR articles 14 and 6, and has breached each of the UN's *Guidelines on the Role of Prosecutors*, the UN's *Basic Principles on the Role of Lawyers*, and the ECOSOC *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.*

107. Therefore, because of these violations the police's apprehension of Mr Wilson, the four-year pre-trial detention, the trial and conviction, and now subsequent stay on death row, have all been circumstances demonstrating an arbitrary deprivation of his liberty and his right to life.[132]

G. The Arbitrary Deprivation of the Right to Life

[132] In Burdyko v. Belaurus, Communication No. 2017/2010, 29 June-24 July 2015, the Human Rights Committee provided an affirmation on the jurisprudence on the symbiotic connection of the right to a fair trial with the imposition of a violation of the right to life through a death sentence:

> The author further claims a violation of his right to life under article 6 of the Covenant, since he was sentenced to death after an unfair trial. The Committee observes that these allegations have not been refuted by the State party. In that respect, the Committee recalls its general comment No. 6 (1982) on the right to life, in which it noted that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant, implies that "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." In the same context, the Committee reiterates its jurisprudence that the imposition of a sentence of death upon conclusion of a trial in which the provisions of article 14 of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.

The connection of the right to life under article 6 and the right to a fair trial under article 14 was affirmed in Yuzepchuk v Belarus, Communication No. 1906/2009, 24 October 2014, as the Committee stated:

> the Committee recalls its general comment No. 6 (1982) on the right to life, in which it noted that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant, implies that "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. In the same context, the Committee reiterates its jurisprudence that the imposition of a sentence of death upon conclusion of a trial in which the provisions of article 14 of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.

108. The Human Rights Committee has advised that, 'a death sentence issued following legal proceedings conducted in violation of domestic laws of criminal procedure or evidence will generally be both unlawful and arbitrary,'[133] and that:

> Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law. A deprivation of life may, nevertheless, be authorized by domestic law and still be arbitrary. The notion of "arbitrariness" is not to be fully equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. [134]

109. The standards on the right to a fair trial have also been affirmed by the General Assembly in the *Resolution on the moratorium on the use of the death penalty* (most recent biennial iteration is 15th December 2022), paragraph 7(d) which calls upon all states:

> To ensure that any trial leading to the imposition of the death penalty complies with internationally recognized fair trial guarantees, such as a fair and public trial and the right to legal assistance, including adequate access to legal counsel at every stage of the proceedings, without discrimination of any kind, including for persons belonging to minorities and foreign nationals, bearing in mind that namely failure to respect fair trial guarantees in proceedings resulting in the imposition of the death penalty could constitute a violation of the right to life.[135]

110. The arbitrary nature of Mr Wilson's arrest, trial, (post-conviction review pre-2019), death sentence, and incarceration on death row are human rights violations which it is argued falls within the mandate of the UN Working Group on Arbitrary Detention and specifically the 'Categories' for designating an arbitrary deprivation of liberty. The below observations are comparable with the findings of the Working Group in its decisions on cases involving the death penalty.[136] They are submitted consistent with the UN mandate under Resolution 51/8,[137] and the Fact Sheet No. 26 (Rev. 1): Working Group on Arbitrary Detention.[138] To facilitate the work of the WGAD it states that:

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[133] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, p. 3.

[134] Id. 3. Citing the African Commission on Human and People's Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) (2015), para 12; Gorji-Dinka v. Cameroon (CCPR/C/83/D/1134/2002), para. 5.1; Van Alphen v. Netherlands, communication No. 305/1988, para. 5.8. The Human Rights Committee state, 'The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception,' General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, p. 4. Citing, Communication No. 263/1987, Gonzalez del Rio v. Peru, para. 5.2.

[135] Resolution on the moratorium on the use of the death penalty, UNGA A/RES/77/222, 15th December 2022

[136] These include: Opinion No. 65/2019, 23 January 2020; Opinion No. 29, A/HRC/WGAD/2019/29; Opinion No. 32/2019, A/HRC/WGAD/2019/32, 9 September 2019; Opinion No. 32/2017, A/HRC/WGAD/2017/32, 6 July 2017; Opinion No. 56/2016, A/HRC/WGAD/2016/56, 23 January 2017.

[137] Resolution 51/8 Arbitrary detention, A/HRC/RES/51/8, 12th October 2022; see also, Resolution 42/22. Arbitrary detention, A/HRC/RES/42/22, 8 October 2019.

[138] Fact Sheet No. 26 (Rev. 1): Working Group on Arbitrary Detention, 14th February 2024, 'The Working Group is the only non-treaty-based mechanism whose mandate expressly provides for the consideration of individual complaints aimed at qualifying whether a detention is arbitrary. This means that its actions are based on the right of petition of individuals anywhere in the world. Because the Working Group is one of the Human Rights

To enable it to carry out its tasks using sufficiently precise criteria, the Working Group has adopted specific criteria applicable in the consideration of cases submitted to it, drawing on the relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. According to the Working Group, deprivation of liberty is arbitrary if a case falls into one of the five categories.[139]

111. Mr Wilson's human rights have been violated under Categories I, III, and V. Below is a synopsis of the claims and how they implicate violations of the WGAD's criteria for consideration of cases:

Category I

a) the unlawful arrest without an arrest warrant – in violation of the UDHR article 9, the ICCPR articles 9(2) and 14(3);

Category III

a) the undue delay between arrest and trial (4 years) between 2004 and 2008;

b) the insufficient time to determine a capital conviction (the trial lasted for 3 days) 5th-7th December 2007 and sentenced to death on 8th January 2008;

c) the lack of adequate consideration of the diagnoses of Asperger's Syndrome and ADHD for the past 20 years amounted to a denial of his right to healthcare and constituted inhumane treatment and subsequent punishment – under article 5 of the UDHR, article 7 and article 14 of the ICCPR;

Council's special procedures, it can engage with any State, irrespective of what treaties that State has or has not ratified,' pp. 8-9.

[139] The WGAD Categories include:

Category I applies when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty.

Category II When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed under articles 7, 13, 14, 18, 19, 20 or 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 or 27 of the International Covenant on Civil and Political Rights, it falls under category II.

Category III When the total or partial non-observance of the international norms relating to the right to a fair trial, as established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the State concerned, is of such gravity as to give the deprivation of liberty an arbitrary character, such cases fall within category III.

Category IV When asylum seekers, migrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy, such cases fall into category IV.

Category V When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation or disability or other status, and is aimed at or can result in ignoring the equality of human rights, it falls within category V.

Fact Sheet No. 26 (Rev. 1): Working Group on Arbitrary Detention, 14th February 2024, pp. 12-20.

d) the prosecutor's suppression of fundamentally important exculpatory evidence rendered an unfair and arbitrary trial. Suppression was for a 20 year period from the investigation of the crime in 2004, the trial in December 2007 and sentence in January 2008, and in 2023 the District Court ruled that the suppressed evidence should be handed over to the defence. The suppression of evidence is a violation of UDHR (right to a fair trial under articles 7, 8, 9, and 10), and ICCPR article 14 (3), and which resulted in an arbitrary violation of the right to life under ICCPR article 6(1).

e) the State of Alabama intends to impose an execution by forced nitrogen gas asphyxiation. Whilst other U.S. States have protocols for the use of nitrogen in executions,[140] Alabama was the first State in the United States to use this method on Mr Kenneth Smith on 25th January 2024. The eyewitness accounts observed that the execution began at 7:57-7:58pm and the Governor announced that time of death was between 8:15-8:25pm. The eyewitnesses observed significant trauma and struggle on the gurney, which reveals the pain and torture experienced by Mr Smith.[141] This period of around 30 minutes for Mr Smith to die is an exorbitant amount of time within which to experience cruelty and torture. If Mr Wilson is subjected to a similar procedure he will therefore experience an arbitrary and torturous deprivation of his right to life in violation of the UDHR article 3 and 5, and the ICCPR article 6, 7, and 10.

Category V

a) the pre-trial, trial, appeal, duration on death row and potential execution, have occurred during the above violations, and also have been imposed upon Mr Wilson in a discriminatory manner based upon his physical and mental disability. At no time during the past 20 years, have the courts adequately and meaningfully considered the impact upon the proceedings of Mr Wilson's diagnoses of Asperger's Syndrome and ADHD. This constitutes a violation of the UDHR article 2, 5, 7, 9, and 10 and articles 2(1), 16(1), 14, and 26 of the ICCPR, article 14 of the ICESCR, and violations of the CRPD, articles 5, 9, 12, 13, 14 and 15. The physical and mental health violations should be viewed as continuing through the whole treatment of Mr Wilson by the State of Alabama.

H. The Sentence of Death as a Violation of the Right to Life

[140] For example, along with Alabama the states which have nitrogen protocols are Oklahoma, Louisiana, and Mississippi, see Method of Execution, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/methods-of-execution.

[141] For example, see Kim Chandler, Alabama Executes a Man with Nitrogen Gas, the First Time the New Method Has Been Used, Associated Press, 26th January 2024, https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900

i. The 'worst of the worst' crimes

112. Due to the State of Alabama not fairly proving that Mr Wilson possessed the required intention to commit the murder of Mr Walker, and the fact that Ms Corley's letter significantly calls into question whether he initiated the act of homicide, he cannot be legitimately considered to have committed a capital offence. Therefore he does not fulfil the highest level of legal and moral culpability for the death penalty.

113. As it has not been fairly demonstrated that he either killed, attempted to kill, or intended to kill Mr Walker, the death penalty could not constitutionally be imposed as recognised in *Enmund v. Florida*.[142] Mr Wilson therefore did not possess the moral culpability for a capital offense. In *Kansas v. Marsh,*[143] Justice Souter stated that the death penalty must be reserved for evidence which is used to, 'identify the worst of the worst.'[144] In this case the evidence does not clearly reveal Mr Wilson to be the 'worst of the worst,' but it does provide substantial questions to demonstrate that he has been unfairly treated when considering the suppression of Ms Corley's letter of confession.

ii. The 'most serious crimes'

114. In international law the 'worst of the worst' criminal in the capital judicial process is categorised as those who commit the 'most serious crimes.' The ICCPR article 6(2) states:

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant…

115. The ICCPR article 6(6) mandates that all state parties to the ICCPR must be on a path towards abolition. During their journey towards abolition a temporary concession is provided under article 6(2) as capital punishment 'may be' applied, but it is temporally confined under the fulfilling of article 6(6). There is a duty upon all retentionist states, after ratifying the ICCPR, to abolish the death penalty, and leading up to this it should indicate reasonably foreseeable processes for this legal change. Due to the temporal enumeration within article 6(6), article 6(2) is interpreted as only temporarily allowing retentionist states (in their process towards foreseeable abolition) to reserve the death penalty for the 'most serious crimes.' There is a clear consistency in the UN's interpretation of what constitutes a 'most serious crime,' in that it has two definable elements:

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[142] Enmund v. Florida, 458 U.S. 782 (1982), as imposing a death sentence based on the felony murder rule violates the Eighth Amendment because the defendant did not kill, attempt to kill, or intend to kill the victim.
[143] Kansas v. Marsh, 548 U.S. at 211 (Souter, J., dissenting) arguing that 'unless application of the Eighth Amendment no longer calls for reasoned moral judgment in substance as well as form, the Kansas law is unconstitutional.'
[144] Id. at 206-07. 'The statute produces a death sentence exactly when a sentencing impasse demonstrates as a matter of law that the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal, in a combination heinous enough to demand death.'

(a) intention, and;

(b) the act of killing.

116. In interpreting article 6(2) the Human Rights Committee's *General Comment No. 36 – Article 6: right to life*, states:

> The term "the most serious crimes" must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. Crimes not resulting directly and intentionally in death…can never serve as the basis, within the framework of article 6, for the imposition of the death penalty.[145]

117. The *General Comment No. 36* continues:

> In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty. States parties are under an obligation to review their criminal laws so as to ensure that the death penalty is not imposed for crimes that do not qualify as the most serious crimes. They should also revoke death sentences issued for crimes not qualifying as the most serious crimes and pursue the necessary legal procedures to resentence those convicted for such crimes.[146]

118. Article 6(2) must be reserved for those who commit 'intentional killing' and therefore '[c]rimes not resulting directly or indirectly in death,' cannot attract the death penalty. Ms Corley's letter demonstrates that there is significant doubt that Mr Wilson satisfies either of the criteria of article 6(2). What is clear is that the trial court in Mr Wilson's case did not sentence him consistent with these standards. Mr Wilson's death sentence should be commuted following the recommendations of the Human Rights Committee.

119. This process of limitation is also recognised by the General Assembly in the *Resolution on the moratorium on the use of the death penalty* (2022), as paragraph 4 states:

> Also welcomes the steps taken by some States to reduce the number of offences for which the death penalty may be imposed, as well as steps taken to limit its application, including by commuting death sentences, [and paragraph 7(f) calls upon all states], To reduce the number of offences for which the death penalty may be imposed.[147]

120. The Human Rights Council affirms that retentionist states have to be seen to be active in the limiting process as in paragraph 3 of the *Resolution on the question of the death penalty* (2023):

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[145] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, 3rd September 2019, p. 8.
[146] Id.
[147] Resolution on the moratorium on the use of the death penalty, A/RES/77/222, 15th December 2022.

> *Calls upon* States that have not yet abolished the death penalty to take active steps to reduce the number of offences for which the death penalty may be imposed and to limit them strictly to "the most serious crimes."[148]

121. The *Report of the Secretary General on the Question of the death penalty*, adopted the *General Comment No. 36* interpretation on what constitutes the most serious crimes.[149] On 25th July 2023 the Human Rights Council held a *High-level panel discussion on the question of the death penalty*, with a focus on the limiting of the death penalty to the most serious crimes.[150] Mr Václav Báleck, the President of the Human Rights Council, echoed the guiding interpretation as, 'the Human Rights Committee had clearly stated that retentionist States could only apply the death penalty for crimes of extreme gravity that involved intentional killing.'[151] This was affirmed by Mr José Manuel Santos Pais, a current member of the Human Rights Committee who stated, 'the expression "most serious crimes" must be read restrictively and only concerned crimes of extreme gravity involving intentional killing.'[152]

122. The State of Alabama is acting in violation of this standard in sentencing Mr Wilson to death as he did not possess the requisite *actus reus* (act of killing) or *mens rea* (intention to kill). So Mr Wilson could not legitimately be sentenced in compliance with ICCPR article 6(2). He committed, and intended to commit, a burglary, but had no knowledge that Ms Corley would visit the house to kill Mr Walker (as she confessed she did in her letter). Therefore he had committed a crime 'not resulting directly and intentionally in death.' His element of complicity in the crime does not satisfy article 6(2) and thus his death sentence is a violation of the right to a fair trial under article 14 and is concomitantly an arbitrary deprivation of his right to life under article 6(1).

I. Forced Nitrogen Gas Asphyxiation as a New Method of Execution

123. Alabama intends to execute Mr Wilson with forced nitrogen gas asphyxiation. This follows the execution of Mr Kenneth Smith through this method on 25th January 2024. The eyewitness accounts referred to above reveal that this is a torturous method which imposed significant bodily trauma of between 17 and 27 minutes. In the Complaint on behalf of Mr Kenneth Smith, Dr Zivot provided his expert opinion on the dangers of execution by nitrogen, and some of the significant issues were experienced by Mr Kenneth Smith. He stated:

> It is not in dispute that if a person breaths pure nitrogen gas for a period of time, death will be the result. This has been evidenced by industrial accidents and

[148] Question of the death penalty, A/HRC/RES/54/35, 17th October 2023, para. 3.
[149] Report of the Secretary-General, Question of the death penalty, A/HRC/51/7, 25 July 2022:
> In accordance with article 6 (2) of the Covenant, States should only impose the death penalty for the "most serious crimes". In its general comment No. 36, the Human Rights Committee indicated that the term "most serious crimes" must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. The Committee stated that crimes not resulting directly and intentionally in death can never serve as the basis, within the framework of article 6, for the imposition of the death penalty, p. 8

[150] High-level panel discussion on the question of the death penalty, A/HRC/54/46, 25 July 2023.
[151] Id. p. 2.
[152] Id. p. 4.

suicide. The human body requires a certain minimum concentration of oxygen within inhaled gases and within the blood stream. To do so, the body has developed so called "chemoreceptors" that are designed to measure blood oxygen concentration on an ongoing basis. If oxygen levels drop, the body will make physiologic adaptations to maintain normal cellular function. In low oxygen environments, the body has a striking capacity to accommodate, but only when the lowering of ambient oxygen occurs slowly. Mountain climbers can ascend without extra oxygen by greatly increasing respiratory minute volume defined as the total volume of gas utilized in respiration over a period of 1 minute. This adaptation may naturally occur over several days but if ascent is too rapid, altitude sickness may be the result.

[…]

Though nitrogen has no therapeutic nor anesthetic uses, it is possible to speculate how dying by the asphyxiation of nitrogen gas might be experienced and what those watching would observe. Unlike lethal injection, nitrogen gas execution will require a prisoner to cooperate by continuing with natural breathing. In lethal injection, once an intravenous is started, all that is needed is a functioning heart to distribute the injected chemicals. People have no practical capacity to stop their heart and delay lethal injection execution. Nitrogen gas will have to be breathed in. A prisoner may try to hold their breath at the beginning to delay the exposure to nitrogen gas. Such breath holding at the beginning of an execution will ultimately end by great discomfort and an unwilling breath. This might be the way every nitrogen gas execution begins. Nitrogen must also be delivered by a tightly fitted mask. The ADOC protocol refers to a mask but does not specify how that mask will be held on the prisoner's face and how ADOC will deal with a poor mask fit. Any break in the mask seal will allow the ingress of air and the interruption and prolongation of an attempted execution. As an anesthesiologist and intensive care specialist, I am fully aware of the challenges of such masks, particularly when an individual is not cooperative. Some people are profoundly claustrophobic. Even a moment of a mask application is terrifying. The sensation is suffocation which is universally experienced as terrifying.

Assuming the very unlikely scenario where a mask is properly fit and the prisoner cooperates with breathing, what will be the expected result? In a veterinary euthanasia study designed to compare death from pentobarbital injection vs nitrogen gas inhalation, most animals developed early convulsions when exposed to nitrogen gas.[i153] In an earlier physiology experiment set to understand the physiological adaptations by humans to hypoxia, a series of healthy volunteers were given pure nitrogen to breath. Volunteers were very often observed to have seizures by 17-20 seconds after breathing nitrogen. A

[153] J.P. Quine, W. Buckingham, L. Strunin, Euthanasia of small animals with nitrogen; comparison with intravenous pentobarbital, Can Vet J. 1988 Sep;29(9):724-6.

seizure is a chaotic firing of brain electrical activity. A person will shake violently, may urinate, and aspirate gastric contents into the lungs leading to a chemical lung burn. While this may not occur in every case in the most extreme fashion, seizures occurred in almost every case.[154] When a person has a seizure, they may stop breathing. Apnea during a seizure will mean no further nitrogen gas will be taken up, and the onset of death will be delayed, or else occur by a more painful and terrifying mechanism like choking. The main argument in favor of nitrogen gas execution focuses on the non-noxious effect of a few breaths of nitrogen gas and the lack of a rise of carbon dioxide. While both claims are likely true, the sort of death most likely from this method will be terrifying to experience and horrifying to watch.

The use of nitrogen gas for execution has been described by some as an experiment. In this setting "experiment" is a term of art with a specific and relevant meaning. Prisoners can be subjects in experiments but according to the Common Rule 45 CFR 46.306(iv) any study must have *"the intent and reasonable probability of improving the health or well-being of the subject."* Execution, in any form cannot be claimed to improve the health of a prisoner. If one considers nitrogen to be a drug, it has no FDA approval for any therapeutic use and cannot be prescribed. FDA approval requires a series of clinical trials that ultimately lead to human use in a specific therapeutic indication. ADOC makes no specific claim that using nitrogen for execution is a form of treatment. It is most accurate to consider the use of nitrogen as exposing a person to a poison gas for the purposes of killing them.

Whether or not nitrogen gas execution will be considered cruel, it will certainly not be neutral. Our capacity to tolerate the pain and suffering of others is arguably a demonstration of our cruelty. It would certainly be false to claim death with nitrogen gas would be even outwardly peaceful. Inwardly, it will clearly be torturous and uncertain.[155]

124. It is clear from the eyewitness testimonies that Mr Kenneth Smith experienced the phenomena of torture predicted by Dr Zivot. The levels of pain which Mr Smith endured, and the timeframe in which he suffered, violated the standards of international law. It is therefore argued there are substantial grounds for believing that Mr Wilson will be subjected to comparable torture and inhuman punishment.

[154] J. Ernsting, "The effect of brief profound hypoxia upon the arterial and venous oxygen tensions in man." J Physiol 1963; 169:292.
[155] Complaint on behalf of Mr Kenneth Eugene Smith, in custody under sentence of death in the Alabama Department of Corrections. Submission to Mr Morris Tidball-Binz, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, OHCHR-UNOG, 8-14 Avenue de la Paix, 1211 Geneve 10, Switzerland, 23rd November 2023, paras. 104, 109-112.

i. Inaccurate State Legal Arguments and Maladministration by the Department of Corrections

125. Within the pleadings filed by the Attorney General the timeframe to produce the death of Mr Kenneth Smith was claimed to be within seconds to a few minutes. The submissions do not entertain the possibility of the length of time (from the beginning of the process to the time of death) to be approaching half-an-hour (30 minutes).

126. The predictions by the Attorney General about the speed of death were proven false as in the U.S. Supreme Court the Attorney General predicted, '[t]he State's method will rapidly lower the oxygen level in the mask, ensuring unconsciousness in seconds.'[156] The Attorney General also assured that the 'ADOC's nitrogen hypoxia protocol will rapidly reduce oxygen levels in the mask, cause unconsciousness within seconds, and cause death within minutes.'[157] Further that, '[i]n all likelihood, hypoxia will cause unconsciousness in a matter of seconds, rendering Smith unable to feel pain.'[158]

127. Mr Wilson's attorney, Professor Harcourt, submitted in his Complaint to the United States District Court for the Middle District of Alabama Southern Division, that:

> In stark contrast to the Attorney General's representations, the five media witness chosen by the Alabama Department of Corrections and present at Mr. Smith's execution recounted a prolonged period of consciousness marked by shaking, struggling, and writhing by Mr Smith for several minutes after the nitrogen gas started flowing.[159]

128. Concerning the eyewitness accounts, Professor Harcourt's submission is replicated below, as it concisely provides the cogent details of the eyewitness record:

> Marty Roney of the Montgomery Advertiser reported that "Kenneth Eugene Smith appeared to convulse and shake vigorously for about four minutes after the nitrogen gas apparently began flowing through his full-face mask in Alabama's death chamber. It was another two to three minutes before he appeared to lose consciousness, all while gasping for air to the extent that the gurney shook several times." Marty Roney, "Nitrogen gas execution: Kenneth Smith convulses for four minutes in Alabama death chamber," Montgomery Advertiser (Jan. 25, 2024), https://www.montgomeryadvertiser.com/story/news/local/alabama/2024/01/25/four-minutes-ofconvulsions-kenneth-smith-executed-with-nitrogen-gas/72358038007/.
>
> From 7:57 to 8:01pm, "Smith writhed and convulsed on the gurney. He appeared to be fully conscious when the gas began to flow. He took deep breaths, his body shaking violently with his eyes rolling in the back of his head. […] Smith clenched his fists, his legs shook under the tightly tucked-in white sheet that covered him

[156] Opposition to Application for Stay of Execution Pending Petition for Writ of Certiorari and Brief in Opposition, Smith v. Hamm, No. 23A688 (U.S. 2024), p. 22.
[157] Defendant's Post Conviction Brief in Opposition to Plaintiff Smith's Motion for a Preliminary Injunction, Smith v. Hamm, No. 2:23-cv-00656 (M.D. Al a., Dec 29 2023), ECF No. 66, p. 12.
[158] Id. p. 15
[159] Complaint, David P. Wilson v. John Q Hamm, in the United Sattes District Court for the Middle District of Alabama Southern Division, Case 2:24-cv-00111, Filed 02/15/24, submitted by Bernard E. Harcourt, on February 14, 2024.

from his neck down. He seemed to be gasping for air. The gurney shook several times during this time." Id. At 8:02 p.m., "Smith appeared to lose consciousness. His chest remained still for about 20 seconds then he took several large gasps for air. There appeared to be saliva or tears on the inside of the facemask." Id. It was not until 8:06 that "Smith's gasping appeared to slow down." Id. And at 8:07 p.m. "Smith appeared to take his last breath." Id. The curtains closed at 8:15 p.m. Id.

Kim Chandler of the Associated Press reported that "The execution took about 22 minutes from the time between the opening and closing of the curtains to the viewing room. Smith appeared to remain conscious for several minutes. For at least two minutes, he appeared to shake and writhe on the gurney, sometimes pulling against the restraints. That was followed by several minutes of heavy breathing, until breathing was no longer perceptible." Kim Chandler, "Alabama Executes a Man with Nitrogen Gas, the First Time the New Method Has Been Used," Associated Press (Jan. 26, 2024), https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900.

129. Alabama officials announced that death was confirmed by 8:25pm.[160] Taking these facts into account, the State is wrong about the assessment of this method of execution on: a) the time taken, and b) the level of pain and trauma felt by Mr Smith. The Attorney General predicted that he would lose consciousness quickly and then death would be experienced. What happened was a traumatic struggle to be kept alive, significant straining on the gurney, and clear expressions of the feeling of torture. This was an inhumane death.

130. If the execution began at 7:57-7:58pm the trauma experienced was at least until 8:15pm and probably later, and then death pronounced at 8:25pm but may have occurred between 8:15-8:25pm, then this still exceeds the timeframe for a humane execution. This means that from the beginning of the execution to the end it took minimally between 7:58pm-8:15pm which is 17 minutes for the completion of the execution process, and at a maximum length of time between 7:57-8:25pm being 28 minutes.

131. Both the minimum and the maximum timeframes exceed that found in *Ng v. Canada*, which held that subjecting Mr Ng to 12 minutes to die by cyanide gas would contribute to the infliction of torture, cruel and inhuman punishment.[161] The legal assessment of pain in punishment involves a temporal evaluation of the duration of the pain under the execution process, and a physiological and psychological evaluation of the level of pain experienced. It is argued that the length of time for Mr Smith to die, following *Ng v. Canada*, was a violation of ICCPR article 7. Therefore Mr Wilson will be exposed to an executions by nitrogen gas asphyxiation which will not comply with international human rights standards. He will be subjected to torture and it will take an excessive amount of time for him to experience death.

[160] Kim Chandler, Alabama executes a man with nitrogen gas, the first time the new method has been used, AP News, 26th January 2024
https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900
[161] Chitat Ng v. Canada, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994).

ii. The redacted Protocol is a Violation of the Duty of the State to be Transparent About Execution Methods.

132. The General Assembly *Resolution on the moratorium on the use of the death penalty*, paragraph 7(i) calls upon all states, 'To provide access for persons sentenced to death to information relating to the method of execution, in particular the precise procedures to be followed.'[162] The Human Rights Council's *Resolution on the question of the death penalty* states:

> *Stressing* the need to examine further in which circumstances the imposition or application of the death penalty violates the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, including because of the death row phenomenon, the methods of execution or the lack of transparency around executions.'[163]

133. Concerning the need for transparency, the *Resolution* states in paragraph 9:

> *Calls upon* States that have not yet abolished the death penalty to make available systematically and publicly full, accurate and relevant information…as well as information on any scheduled execution, which can contribute to possible informed and transparent national and international debates, bearing in mind that access to reliable information on the imposition and application of the death penalty enables national and international stakeholders to understand and assess the scope of these practices, including about compliance with the obligations of States with regard to the use of the death penalty.[164]

134. Both the General Assembly and the Human Rights Council resolutions place the onus upon the state governments to ensure humane methods of execution. It is the 'obligations of States with regards to the use of the death penalty,' and not the 'obligations of persons condemned to death.' There is no requirement for the inmate to be forced to select their own execution method (and the U.S. Supreme Court's jurisprudence in *Baze-Glossip-Bucklew* is explicitly in conflict with this UN position). Alabama, however, has not been transparent on: (a) the process, and (b) their understanding of the likely outcome. Their current procedure and their failure to take responsibility for ensuring humane executions are in violation of the UN's resolutions on the death penalty. The General Assembly and the Human Rights Council are intergovernmental bodies and the U.S. is an active member of both. The government, therefore, should ensure that it acts consistent with the aims, objectives, and the ordinary meaning of the text of the resolutions.

135. The use of nitrogen by Alabama also has an intolerable risk of violating the Economic and Social Council's *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.* Safeguard 9 states, 'where capital punishment occurs it

[162] Moratorium on the use of the death penalty, A/RES/77/222, 15 December 2022, para. 7(i).
[163] Question on the use of the death penalty, A/HRC/RES/54/35, 17 October 2023, preambular text.
[164] Id. para. 9.

shall be carried out so as to inflict the minimum possible suffering.'[165] Therefore Alabama is also violating the ICCPR articles 6, 7, and 10, and the CAT articles 1 and 2.

iii. The Method of Execution and Physical and Mental Health Considerations

136. In the Complaint on behalf of Mr Kenneth Smith, Dr Zivot observes that there can be difficulties in applying the mask when people suffer from claustrophobia. The terrifying nature of having it applied to a person suffering from Asperger's Syndrome and ADHD would be significantly heightened. Professor Harcourt has stated in his submission to the District Court, that the fitting of the mask over Mr Wilson's face will cause significant personal distress as he suffers from sensitivity to bright light and requires prescription glasses. The gasmask will not prevent the exposure to the bright lights, and it is very likely that any prescription glasses that he wears under the mask may cause gaps in the seal of the mask over his facial skin. This may cause gas seepage and ensure a more torturous execution of Mr Wilson due to the mixing of oxygen and nitrogen. Furthermore, the leaking nitrogen may expose those in the execution chamber by the gas which escapes from the mask. In addition to the violations of the ICCPR and CAT in (ii) above, Alabama is also violating Mr Wilson's healthcare rights under the ICESCR article 14, and the CRPD articles 4, 5, 10, and 15.

J. 'Method-of-Execution' Challenges and the Perverse Evidentiary Standards

a. The Baze-Glossip-Bucklew Trilogy

137. Through *Baze v. Rees*,[166] *Glossip v Gross*,[167] and *Bucklew v. Precythe*,[168] the Supreme Court considered 'method-of-execution' challenges and created a corpus of decisions which defy reasonable expressions of fairness and humanity. The U.S. Constitution's, Eighth Amendment, 'cruel and unusual punishments' clause,[169] has received a strange and unreasonable interpretation which has the practical effect of denying victims their process rights under the ICCPR article 2. Chief Justice Roberts reveals the inherent inhumanity of the current U.S. Supreme Court jurisprudence which has hitherto not fully considered the international human rights standards. The Chief Justice reveals the unnerving and repugnant truth that the highest court in the U.S.:

> has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishments.[170]

i. Mr Ralph Baze

[165] See also, ECOSOC Strengthening of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, para 5.
[166] Id.
[167] Glossip v Gross, 135 S.Ct. 2726 (2015).
[168] Bucklew v. Precythe, 139 S.Ct. 112 (2019).
[169] US Constitution, Eighth Amendment, 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and usual punishments inflicted.'
[170] Baze v. Rees, 553 U.S. 35, 48 (2008).

138. In *Baze* the Supreme Court held that the risk of Kentucky imposing an improper administration of the first drug in the lethal injection protocol did not render cruel and unusual punishment.[171] Chief Justice Roberts provided a plurality opinion that there is a burden of proof to be carried by the inmate in assessing the future risk of pain to be, 'sure or very likely to cause serious illness and needless suffering,' and constitute an, 'objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.'[172] A state's refusal to alter its lethal injection protocol could violate the Eighth Amendment only if an inmate first identified a 'feasible, readily implemented' alternative procedure that would 'significantly reduce a substantial risk of severe pain.'[173]

139. The Chief Justice affirmed the court has not asked the States to define, 'with exactness the extent of the constitutional provision,' that is violated, and that States have the benefit of the doubt when it makes mistakes as, 'accidents happen for which no man is to blame.'[174] This is a lower burden of proof than is required by the General Assembly and the Human Rights Council's resolutions on the death penalty cited above. It is a reduced evidentiary threshold for the States to exceed so they can kill people.

140. The unfairness is extraordinary. The scales for the burden of proof are glaringly tipped in favour of the State and is further locked-in through the court's linguistic techniques for changing the meaning of words. The Chief Justice displayed a wordsmith's etymological power as, 'the punishment of death is not cruel, within the meaning of that word as used in the Constitution.'[175]

141. Under the execution protocol the U.S. Supreme Court has taken away from inmates the ability to express their pain through the normal and good faith use of language. So 'cruelty' and 'torture' is now not what inmates subjectively feel, because under the Constitution it is a phenomenon that only exists if the U.S. Supreme Court says it exists. This is a horrifying return to pre-modern sentiments over the control of language describing pain in punishment. In contrast, international human rights are designed to bring transparency and fair assessment over what occurs. This fairness involves the normal recourse to the use of language and what words are normally used to describe circumstances. Without etymological or word-use fairness, the principle of good faith is violated. The aims and objectives, and the living spirit of the law becomes thwarted. The end result is a capricious and brutal bare exercise of power which renders death. In other words, it could be described as an act of evil.

ii. Mr Richard Glossip

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[171] The three drugs used in Kentucky's execution protocol were: sodium thiopental, pancuronium bromide, and potassium chloride, Baze 35.
[172] Baze, 50. Internal quotation marks omitted, citing Helling v. McKinney, 509 U.S. 25, 33, 34-35 (1993) and Farmer v. Brennan, 511 U.S. 825, 842, 846 (1994).
[173] Id. at 52.
[174] Baze 48, 51, the Chief Justice stated, '[r]ather than undertake such an effort, the [Supreme Court's decisions] simply noted that torture…and unnecessary cruelty are forbidden,' internal quotation marks omitted, citing, Wilkerson v. Utah, 99 U.S. 130, 134-135 (1879) and Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 462 (1947).
[175] Baze, 48.

142. Subsequently, in *Glossip v. Gross*,[176] a majority of the U.S. Supreme Court clarified the plurality opinion in *Baze* and held that it was controlling. The court stated that the Eighth Amendment does not guarantee a painless death, it only prohibits punishments that, 'intensif[y] the sentence of death' with a 'superaddition of terror, pain, or disgrace.' The plaintiff must establish that the challenged method poses a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'[177]

143. Justice Alito provided the judgment in *Glossip.* Through the *Baze* test for assessing the risk of pain he was empowered to apply a *reductio ad absurdum* for disregarding sound scientific assessment of the inappropriateness of midazolam to perform as anaesthesia in the execution protocol.[178]

144. The State only provided one medical expert to establish the efficacy of the drug but his testimony was implausible and scientifically unsupported.[179] Glossip's two medical experts provided ample evidence for clearly refuting the State's witness, and demonstrated that midazolam has a 'ceiling effect' that will not keep an inmate unconscious as the lethal substances render death.[180]

145. Justice Alito provided the judicial seal for the unreasonable evidentiary standard so that an inmate cannot challenge a method of execution unless an alternative is available that is 'feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain.'[181]

146. In her dissent in *Glossip*, Justice Sotomayor identified the glaring deficiency as, '[i]rrespective of the existence of alternatives, there are some risks so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to them.'[182] This means that if all available options of execution methods will cause torture and cruelty, there is currently no practical constitutional protection for the inmate.[183] He or she is going to be subjected to at least one of them (Mr Kenneth Smith, and potentially, Mr Alan Miller, will be subjected to two – torture through a botched and failed lethal injection execution, and then torture in the next attempt at an execution through nitrogen gas asphyxiation).

iii. Mr Russell Bucklew

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[176] Glossip v. Gross, 576 U.S. 863 (2015).
[177] Id. 877
[178] For a discussion of the judicial assessment of the scientific assessment of Oklahoma's execution protocol see, Jon Yorke, Comity, Finality, and Oklahoma's Lethal Injection Protocol, 69 Oklahoma Law Review 545-621 (2017).
[179] Justice Sotomayor dissenting opinion, in Glossip, 2781-2786.
[180] Id. 2785-86.
[181] Id. 2737. Justice Thomas provided an additional substantive requirement in that in his view the Eighth Amendment, 'prohibits only those methods of execution tat are deliberately designed to inflict pain,' Id. 2750.
[182] Id. 2794. Quotation marks omitted, citing Helling v McKinney, 509 U.S. 25, 36 (1993) (emphasis in original).
[183] See Id. 2795-2796. Reminiscent of a horror story, Justice Sotomayor explains:

> Certainly the condemned has no duty to devise or pick a constitutional instrument of his or her own death…In concocting this additional requirement, the Court is motivated by a desire to preserve State's ability to conduct executions in the face of changing circumstances, Id.

147. Russell Bucklew suffered from a congenital condition known as cavernous hemangioma. It is a very rare condition which causes tumours filled with blood vessels to grow over his body, and which would very likely burst during lethal injection. Dr Joel Zivot testified as an expert witness in the District Court and he explained that during the execution Mr Bucklew would very likely be unable to maintain his airways, he would haemorrhage blood then would exhibit convulsions and subsequently choke to death.[184]

148. Bucklew's rare medical condition provided an ideal opportunity for the U.S. Supreme Court to consider specific questions arising from 'facial'[185] and 'as applied'[186] method-of-execution challenges. This would distinguish between how execution protocols and methods function generally (facially), as opposed to what will likely happen in a specific case (as-applied).

149. Due to Mr Bucklew's medical condition he argued that the *Baze-Glossip* test should govern only facial challenges. This would allow an expression of human dignity to inform the constitutional assessment of his particular medical condition.[187] The majority, however, denied this distinguishing feature and allowed the opportunity for impermissible suffering.[188]

150. In *Bucklew v. Precythe,* it was affirmed that the Eighth Amendment does not guarantee a painless death. It merely prohibits an execution that would intensify the physical and mental trauma through a 'superaddition of terror, pain, or disgrace'.[189] The key issue the majority of the U.S. Supreme Court affirmed was that even though Bucklew presented significant medical evidence describing how lethal injection would cause him to experience excessive pain, his 'as-applied' challenge must meet the same standard that would apply to a 'facial' challenge under *Baze* and *Glossip*. Even though he demonstrated particular medical issues in his case, he still needed to point to an alternative method of execution which was feasible and readily implementable.

151. In his brief filed in the District Court, Professor Harcourt argued that there are both facial and as-applied challenges to Mr Wilson's execution, and that Alabama should, 'abstain from carrying out his execution using the state's new gas-mask nitrogen

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[184] Dr Zivot's testimony in the District Court is summarised by Justice Breyer in Bucklew, 1138. Dr Zivot testified that in light of 'the degree to which Mr. Bucklew's airway is compromised by the hemangiomas' and 'the particular psychological and physical effects of lethal injection, it is highly likely that Mr Bucklew would be unable to maintain the integrity of his airway during the time after receiving the ;lethal injection and before death,' … 'hemorrhaging will further impede Mr Bucklew's airway by filling his mouth and airway with blood, causing him to choke and cough on his own blood' … 'it is highly likely that Mr Bucklew, given his specific congenital medical condition, cannot undergo lethal injection without experiencing the excruciating pain and suffering…suffocation, convulsions, and visible hemorrhaging.

[185]Justice Gorsuch explained that a 'facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications,' Id. 1127.

[186]Justice Kavanaugh explained that 'as-applied' challenges are, 'a challenge to a method of execution that is constitutional in general but that the inmate says is very likely to cause him severe pain,' Id. 1135.

[187] Justice Brennan developed a judicial line of thought that the death penalty violates human dignity in Furman v Georgia, 408 U.S. 238, 270-73 (1972), Gregg v Georgia, 428 U.S. 153, 229 (1976), and McCleskey v. Kemp, 481 U.S. 279, 336 (1987).

[188]Justice Breyer lamented in dissent that the, 'evidence establishes at this stage of the proceedings that executing Bucklew by lethal injection risks subjecting him to constitutionally impermissible suffering. The majority holds that the State may execute him anyway,' Bucklew, 1136.

[189] Bucklew v. Precythe, per Justice Gorsuch.

asphyxiation protocol, and to declare that protocol facially unconstitutional or, alternatively, unconstitutional as applied to Mr. Wilson in light of his unique medical conditions.'[190] He argued:

> Mr. Wilson brings two causes of action pursuant to 42 U.S.C. § 1983. First, Alabama's new nitrogen asphyxiation protocol violates the Eighth Amendment in all of its applications by exposing persons to an unconstitutional risk of gratuitous pain. Second, Mr. Wilson's unique medical conditions will almost certainly cause him to suffer a painful and prolonged death in violation of the Eighth Amendment if the state is allowed to execute him using its current nitrogen asphyxiation protocol.[191]

iv. The 'procedural impropriety,' 'facial,' and 'as-applied' challenges under international law

a. The procedural impropriety

152. International law places the burden upon the State to provide a fair and just capital judicial process, to design and use execution technologies without violating business and corporate obligations for the observance of human rights, and to ensure that the resultant death does not violate the thresholds recognised for committing torture, cruel, and inhuman punishment (see Section N below, and the UN *Guiding Principles on Business and Human Rights*). Due to the severity of the punishment and the irreversibility once imposed, the United Nations and other intergovernmental organisations have created treaties establishing a high threshold for the states to meet. There is not any obligation on the person about to be killed to help the state accomplish its penological task.

153. In the United States, the burden is on the defendant to prove the execution method, 'superadds pain well beyond what's needed to effectuate a death sentence.'[192] 'To determine whether the State is cruelly superadding pain,' the Court must ask 'whether the State had some other feasible and readily available method to carry out its lawful sentence that would have significantly reduced a substantial risk of pain.'[193] The burden of proof has been placed upon the defendant to demonstrate this to an unreasonably elevated standard. Hence, this will make it practically beyond defendants to have an meaningful and effective access to a remedy under both the U.S. Constitution and the ICCPR article 2.

154. State parties to the ICCPR are under an obligation to give effect to the rights recognized under the Covenant, to provide an effective remedy in domestic law, and to ensure that competent authorities enforce Covenant remedies. The ICCPR Article 2

[190] Wilson v Hamm, in The United States District Court for the Middle District of Alabama, Southern District, Case 1:19-cv-00284-RAH-CSC, filed 02/23/2024, Petitioner's Fifth Motion for Brady Discovery, filed by Bernard E. Harcourt, The Initiative for a Just Society, Columbia Law School, 435 West 116th Street, New York, New York.
[191] Id.
[192] Bucklew, 1127.
[193] Id.

creates an obligation for State Parties to provide an 'effective remedy' for violations of the Covenant.

> Article 2
>
> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[194]

155. The State must ensure that the capital judicial process and execution methods are meaningfully reviewable under the procedural requirement of ICCPR article 2. The content of the review needs to consider all the substantive issues, in this case the U.S law requirement of facial and as applied challenges under, *inter alia*, the ICCPR articles 6, 7 and 10.

156. It is for the State to ensure that all methods of execution comply with the ICCPR. It is the state that is assigned 'territory' and 'jurisdiction' under the Covenant, not the individual about to be killed. The legal competence to perform the ICCPR resides with the state, not the inmate. To attempt to create such a circumstance reflects some of the clearest examples of arbitrary and capricious power and unfair control over a human being with the ultimate design to kill. This is why the U.S. Supreme Court jurisprudence in *Baze-Glossip-Bucklew* is perverse and is a complete rejection of international human rights.

157. The inmate has no control over the feasibility and implementation of execution technologies, and the burden to prove the risks of pain under the technologies is a perverse requirement which violates process safeguards under international law. What if an execution method that is humane does not exist in the state? The inmate cannot create one. That is for the state authorities to do. As such by shifting the burden to discover a humane method of execution, which is not practically possible for the condemned person to do, the State is violating international human rights.

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[194] ICCPR Article 2 (2)

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

158. International law does not require the inmate to differentiate between 'facial' and 'as-applied' challenges for determining the legitimacy of ICCPR articles 6 and 7 claims. This is because the burden is not on the individual to prove that one execution method over another substantially reduces the levels of pain. This is for the State to demonstrate. International law focuses upon the role of the State in adopting execution technologies and the assessment of their use of such technologies. Human rights are assessed on that basis. They do not involve an assessment of the role of the inmate for selecting execution technologies. However, in assessing the State's duties and responsibilities regarding executions, the general and specific issues are considered.

b. Facial and as-applied challenges and international law

159. In Mr Wilson's domestic challenge to execution by nitrogen gas asphyxiation there are 'facial' aspects as every person execution by this gas will experience the torture and inhuman death as described above, and there are 'as-applied' features in that his mental health diagnoses of Asperger's Syndrome and ADHD will result in specific torture, cruel, and inhuman treatment during the execution.

160. The *Baze-Glossip-Bucklew* trilogy creates a damning precedent and the end result is that the United States is now forcing a person facing execution to, in the words of Professor Harcourt, 'dig his own grave.' It is a vile and gratuitous legal rule which violates the ICCPR articles 6, 7, 10, and 14, and the procedural barriers it has created is in violation of article 2.

161. The U.S. Supreme Court has failed in its obligations to uphold the Constitution and instead victims must go to the UN to seek to safeguard human rights, as in *Ng v. Canada.*[195] Hence, the United States has created a quixotic legal circumstance. This is a clear perversion of the rule of law and the burden of proof as articulated in the rules of evidence.

162. In the 54th session of the Human Rights Council's *High-level panel on the question of the death penalty*, Mr. José Manuel Santos Pais, a member of the Human Rights Committee stated, 'An execution that lacked a legal basis or was otherwise inconsistent with life-protecting laws and procedures was arbitrary.'[196] The concept of 'arbitrariness' is to be interpreted under article 6(1). It is used to assess the actions of the state. There is no provision in the language of article 6 for the condemned individual to help the state to kill him or her.

163. During the Fourth review of the United States by the Human Rights Committee in 2014 the lack of transparency of the execution protocols and their ineffectiveness were

[195] Ng v. Canada, CCPR/C/49/D/469/1991, 7 January 1994.
[196] Human Rights Council, High-level panel discussion on the question of the death penalty, A/HRC/54/46, 25th July 2023, p. 4.

highlighted.[197] The same concerns have remained in the Fifth review which occurred on 17th-18th October 2023.[198] Concerning the management of pain in the initiation of an execution, the Human Rights Committee stated:

> when the death penalty is applied by a State party for the most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.[199]

163. With someone suffering from Asperger's Syndrome and ADHD the pain during the execution will very likely be increased. Therefore, the execution by nitrogen will likely constitute a violation of the ICCPR articles 6, 7, 10, and 14, the UNGA and HRC resolutions on the death penalty, and be a further example of the failure of the United States to adhere to the recommendations during its treaty body reviews, and the recommending governments in the Universal Periodic Review. The state is completely responsible for the legality of the methods of execution. Not the condemned person. To place the burden on the inmate is to create a perverse process, which is arbitrary, unequal, inhumane, and denies human dignity.

164. It is the State that 'must respect article 7,' not the inmate, as the Human Rights Committee has stated:

> States parties that have not abolished the death penalty must respect article 7 of the Covenant, which prohibits certain methods of execution. Failure to respect article 7 would inevitably render the execution arbitrary in nature and thus also in violation of article 6…painful and humiliating methods of execution are also unlawful under the Covenant.[200]

165. Indeed forced nitrogen gas asphyxiation constitutes an example of the, 'other painful and humiliating methods of execution' which is 'unlawful under the Covenant.'[201] Mr Wilson will very likely be subjected to excruciating pain, but unlike the motivation for lethal injection to mask the trauma internally, the external expression of the internal trauma that Mr Wilson will experience will increase the humiliating aspect of execution by nitrogen gas. His Asperger's Syndrome, ADHD, and sensitivity to light, will compound these factors.

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[197] See, Concluding observations on the fourth periodic report of the United States of America, 'the Committee notes with concern reports about the administration, by some states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs,' CCPR/C/USA/CO/4, 23 April 2014, p. 4.
[198] United States of America, 17th-18th October, 139 Session, 9th October 2023 – 3rd November 2023, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2637&Lang=en
[199] General comment No. 20: Article 7: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), CCPR/C/21/Add.3, para. 6.
[200] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, p. 9, citing, CCPR/C/IRN/CO/3, para. 12. CCPR/C/USA/CO/4, para. 8. Ng v. Canada (CCPR/C/49/D/469/1991), para. 16.4. African Commission on Human and Peoples' Rights, Malawi African Association and others v. Mauritania, 11 May 2000, para. 120. CCPR/CO/72/PRK, para. 13. 170 CCPR/C/JPN/CO/6, para. 13.
[201] Id. General Comment No. 36.

166. If nitrogen gas is used to kill Mr Wilson, there needs to be transparency concerning the use of the composition (medical and/or industrial grade) nitrogen, the gasmask design, and restraints, will be applied as in the execution of Mr Smith. Hence, the execution will likely be both a prolonged and torturous ending of his life. It will be an unsafe process that will not protect Mr Wilson from torture and inhumane punishment. This concerns both the amount of pain and the duration of that pain he will likely experience.

167. Following the Human Rights Committee's observations in *Ng v. Canada*, it is likely that Mr Wilson will be subjected to a similar violation as:

> asphyxiation may take up to twelve minutes, during which condemned persons remain conscious, experience obvious pain and agony, drool and convulse and often soil themselves.[202]

168. In *Ng* a material issue was the fact that cyanide was not approved in other foreign state's capital judicial systems, indeed, 'elsewhere in the international community.'[203] The Human Rights Committee designated three fundamentally important issues: (a) a time assessment of duration; (b) an assessment of the level of pain during this time, and (c) the use of the method of execution in other retentionist states. This assessment criteria should also be applied to Alabama's use of nitrogen, to consider whether: (i) the time to die will exceed a duration considered to be humane, (ii) the level of pain will amount to torture or other cruel and inhuman punishment, and (iii) the U.S. is currently the only county in the world who officially uses forced nitrogen gas asphyxiation as an execution method. It is therefore an outlier State violating the Human Rights Council's standards.

169. In *Ng*, the time lapse of 12 minutes for the inmate to die was considered a violation of article 7. The legal consideration of the temporal issues which contributed to the assessment of article 7, demonstrate that Mr Wilson's execution using nitrogen gas will only serve to compound this violation and will therefore constitute a further example of the United States' failure to observe the ICCPR, articles 6, 7, and 10.

170. Ultimately in *Ng*:

> In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of 'least possible physical and mental suffering', and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant.[204]

171. The Human Rights Committee affirmed it considers: (a) a time assessment; (b) the phenomenon of pain; and (c) the use of the method in other retentionist states. The eyewitness accounts of the execution of Mr Smith and the review of these by healthcare

[202] Id.
[203] Id.
[204] Id. para. 16.4. Citing the General Comment No. 20: Article 7: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), CCPR/C/21/Add.3, para. 6.

professionals, demonstrates that this method poses an intolerable risk that Mr Wilson will be subjected to the above factual predicates, and experience torture, cruel, and inhuman punishment. It is likely that if Mr Wilson is forced to breath nitrogen gas into his body, that he will die whilst experiencing seizures, the sensation of choking, he may vomit, and feel great pressure within his internal organs. It took Mr Smith nearly half-an-hour to die. The precise time is incalculable, but through the eyewitness accounts the execution began at either 7:57 or 7:58pm and death occurred somewhere between 8:15 and 8:25pm. So death occurred at a minimum time of 17 minutes (between 7:58pm and 8:15pm), or somewhere within this minimum and the maximum time of 28 minutes (between 7:57 and 8:25pm). Both of these lengths of time are in violation of the time it would take to die in *Ng* (12 minutes), the international standards determining that executions must be confined to the 'minimum possible suffering',[205] and the U.S. is an outlier state using this horrific method, and therefore it constitutes a violation of ICCPR articles 6, 7, and 10, the CAT articles 1 and 2, and the CRPD articles 10, 12, 13, 14 and 15.

172. The Committee also cited the *General Comment No. 20 - Article 7: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment* to provide a reasoning on the standard of 'least possible physical and mental suffering.'[206] It is argued that the same conclusion should be applied to Alabama's use of nitrogen gas to kill Mr Wilson. To execute Mr Wilson through the use of forced nitrogen gas asphyxiation will create the unreasonable risk that he will be subjected to intolerable levels of pain and torture. He will not receive an execution which imposes the 'least possible physical and mental suffering.' He will most likely receive torture, cruel, and inhumane punishment, in violation of ICCPR articles 7 and 10 and the CAT articles 1 and 2, and the CRPD articles 10, 12, 13, 14 and 15.

K. Temporal Considerations and the Capital Judicial Process

173. Mr Wilson was arrested in 2004, sentenced to death in 2008, and therefore has spent 20 years under the capital judicial process and 16 years under the sentence of death. The U.S. Supreme Court jurisprudence on the assessment on time, provides a *de jure* thwarting of the UN's ability to consider the arbitrary nature of his deprivation of liberty and life. From what is considered below, it is argued that the court's interpretation of the constitutionality of the duration of time spent under the capital judicial process is contrary to international law under both procedural and substantive assessments.[207]

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[205] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC 1984/50, Safeguard 9.

[206] General Comment No. 20: Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (article 7) (1992), adopted by the Human Rights Committee at the Forty-fourth Session, A/44/40, 10 March 1992.

[207] See, Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989). For the full assessment of the death row phenomenon, the impact of the capital judicial process should be initiated from the moment the defendant understands he or she is under a capital charge, see Jon Yorke, Inhuman Punishment and Abolition of the Death Penalty in the Council of Europe, European Public Law, Vol. 16, (2010), pp. 77-105.

174. It should be clarified that whilst under state and federal review of a capital process, the inmate may be able to receive a *de facto* access to the courts to raise issues concerning the impact of time spent under the death penalty. However, such assessment is thwarted by a *de jure* bar to access to justice through an adjudicative, linguistic, and temporal, trick on the defendant. Impossible hurdles are created through the burden of proof, and only those with a time machine can meet the factual (timely) submission points for the courts to justify allowing the claim. Consequently, submissions to assess the temporal aspects of the capital judicial process have created unfair, unjust, and arbitrary criteria which is hitherto practically impossible to meet. It is stated 'impossible' here, because no death row inmate has ever satisfied a *Lackey* claim to demonstrate their duration under the capital judicial process is cruel and unusual. Thus excessive duration on death row should *ipso facto* be considered to amount to an arbitrary detention under international law.

i. The Legal Creation of a Time Paradox to Prevent Effective Remedies of Violations

175. In *Lackey v. Texas*,[208] the question for *certiorari* concerned whether executing an individual spending 17 years on death row violated the Eighth Amendment's prohibition against cruel and unusual punishment. In assessing this duration, Justice Stevens in his Memorandum respecting the denial for *certiorari* argued for an alternative adjudicative methodology that would dissect the individual's, and the state's, use of time. Justice Stevens would provide for the identification of specific responsibility for causing, or contributing to, the portions of time which cumulatively create the duration of incarceration. Such identification would significantly contribute to making transparent both the individual's and the State's use of time.

176. There are various reasons for the exorbitant length of time many individuals spend on death row, so a fair perceptual system of retrospective assessment is necessary, as Justice Stevens held:

> [i]t may be appropriate to distinguish, for example, among delays resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the state.[209]

177. Justice Stevens did not take into account the assessment from the moment a person is subjected to a capital charge. However, his dissection assessment for the portioning of responsibility would fundamentally challenge the State's ability to privilege linear time in its favour and create opportunities for the defence to ensure a fairer duration assessment. The majority of the U.S. Supreme Court, however, have not been able to endorse this fairer time-use assessment.

[208] Lackey v Texas, 514 U.S. 1045 (1995).
[209] Id. 1046-47.

178. Indeed, the Court has dug in its heels as exemplified by Justice Thomas in his concurring judgments, in which he refused to allow the appropriate designation of equal time use for the clear identification of each party's time portion. He unreasonably rejected this adjudicative methodology, in *Knight v. Florida* and *Moore v. Nebraska*,[210] through focusing on the role of the inmate, in stating that:

> I am unaware of any support in the American constitutional tradition or in the Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.[211]

179. Similarly, in *Thompson v. McNeil*, the issue was 'whether the death-row inmate's litigation strategy, which delays his execution, provides a justification for the Court to invent a new Eighth Amendment right,' and he concluded '[i]t does not.'[212] Justice Thomas has provided a quixotic reasoning that the individual's litigation strategies are the determinative basis for the refusal to grant *certiorari*. By any reasonable evaluation this is an unfairly selective reading of the factual record and does not reveal an accurate account of time-use by the various parties, which should include a meaningful assessment of time-use by the State.

180. In *Knight*, Justice Breyer dissented and provided a fairer time-use assessment through utilizing Justice Stevens' portioning of time in *Lackey*. He argued that Thomas Knight's twenty-four (24) years on death row was caused in significant part by 'constitutionally defective death penalty procedures' of the 'State's own failure to comply with the Constitution's demands,' and noted that 'the claim that time has rendered the execution inhuman is a particularly strong one.'[213]

181. For Justice Breyer, 'it is fair, not unfair, to take account of the delay the State caused.'[214] In *Boyer v. Davis*, Justice Breyer in making a similar point referenced a report finding that the State of California significantly contributed to Richard Boyer's stay on death row.[215]

182. This is material for Mr Wilson's case as his death sentence is in significant part due to the failure of both the prosecutor and the judge to reasonably perform their roles to further due process and a fair trial. The delay in time on death row was caused by the prosecutor suppressing exculpatory evidence and the judge's delivering of a death sentence following a non-unanimous jury verdict of 10-2 (the Alabama Code requires unanimity for a death sentence). These are the primary reason for Mr Wilson's 'time on death row.' Mr Wilson did not release the arrow of time. The state did.

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[210] Knight v Florida and Moore v Nebraska, 528 U.S. 990 (1999).
[211] Id.
[212] Thompson v McNeil, 556 U.S. 1114, 1117 (2009).
[213] Knight, at 991.
[214] Thompson, at 1120-21
[215] Boyer v Davis, 2016 LEXIS 2928.

183. Time study renders reasonable a claim that Justice Thomas promoted a false contributor assessment to the duration with the consequence of the decision being that the only factor which is determinative is the role of the inmate. Justice Thomas did not evenly present the degrees of blame of all state and defence stakeholders in the process, and this creates an error in measurement which sustains an illegitimate legal outcome.

184. More reasonably, as recognized by Justices Stevens and Breyer, this temporal measurement necessitates consideration of multiple factual causes for assigning responsibility and blame for the extending of the different portions of time of the duration under the capital judicial process and sentence of death (it is argued it should extend back to the capital charge), and this includes the determinations of the state and federal judges, the performance of the prosecution, and the defence team. Each party contributes to duration, and so each party accrues time-use, and therefore each party must be assessed for contributing to the temporality of the case and situations.

185. In *Johnson v. Bredesen*,[216] Justice Stevens, joined by Justice Breyer, issued a statement of disagreement with the Court's denial of *certiorari*. Johnson was found guilty of three murders in 1981. He continued to assert he was innocent after the jury convicted him, and in 1992 a new law provided Johnson with access to evidence calling into question the reliability of the testimony provided by some of the State's central eyewitnesses. The potential merits of Johnson's *Brady* claim based on newly available evidence not originally turned over to the defendant were never decided by the Court, which had denied *certiorari* on that issue a few months prior.

186. Justice Stevens stated that this second claim was as compelling as any he had encountered for addressing the *Lackey* issues. He revealed his difficulty with concluding that Johnson's second action was, 'the functional equivalent of a habeas petition' as to apply the bar on successive habeas corpus appeals, had 'the curious effect of forcing Johnson to bring a *Lackey* claim prematurely, possibly at a time before it is ripe.'[217] Johnson may not have been able to bring a *Lackey* claim for the initial post-conviction writ because eighteen (18) years of incarceration may not have been long enough to qualify for release under *Knight*, but even when *enough time might have passed* the majority held any claim *time barred* under the AEDPA deference to the states.

187. So to keep people on death row in the United States, the state can unfairly control the assessment of time. This has also occurred in Mr Wilson's case. From all reasonable readings, it is currently procedurally impossible for a death row inmate to identify the appropriate time to appeal, because the State can control whether he or she will be within constitutionally accepted reaction times.

188. In *Johnson*, the majority had endorsed a temporal double-bind over the individual in that the State can determine that the inmate's petition will always be either *too late* or *too early*, and so the petitioner is placed in limbo through this temporal control.

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[216] Johnson v. Bredensen, 558 U.S. 1067 (2009)
[217] Id. 1068-69.

189. This is the malleability of time through a procedural mechanism which has the practical effect of legitimizing a time incoherence that is then taken by the State prosecutors and the majority of judges to constitute a legal bar. This is how control over time leads to control over legal outcomes. Therefore, the only possible way for the individual to satisfy the majority's reasoning in *Johnson* is to somehow plan to travel back in time with the evidence of the moment of the prosecutorial misconduct—because it is only discoverable in the future—and introduce it into the earlier judicial proceedings.

190. However, the practical impossibility of doing this is realised because here we enter the world of H.G. Wells' *Time Machine*.[218]

191. Marc Wittmann's observation that 'judgments about time often serve as error signals indicating that something is taking too long or was much too short'[219] provides the key paradox inherent within *Lackey* claims.

192. In *Knight*, Justice Thomas focused on the problem of too short when he cited the petitioner's reference to eighteenth century English jurist William Blackstone and stated, 'punishment should follow crime as early as possible.'[220] He noted that in eighteenth century England executions were commonly performed two days after the death sentence, and then stated intuitively that, 'such a procedure would find little support from this Court.'[221]

193. A hastened process would satisfy finality in the death penalty.[222] However, the sanguinary history of the punishment has clearly demonstrated that expedited processes increase the danger of manifest injustice, and if executions occur before adequate review, there is a significant likelihood that innocent people will be killed. But determining the question of 'too long' necessitates the use of cycles, reversibility, and alternative branching of time. So a conflict occurs between durations that are either too long or too short. In *Johnson*, Justice Stevens reasoned that as the capital judicial system has not been able to adequately resolve this friction it reveals the ever-presence of at least, 'two underlying evils of intolerable delay.'[223]

194. The two evils are first, 'the delay itself [that] subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement,' and the second is the fact that, 'delaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death....In other words, the penological justification for the death penalty diminishes as the delay lengthens.'[224]

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[218] H.G. Wells, *The Time Machine*, (Penguin, 2005).
[219] Marc Wittman, *Felt Time: The Science of How We Experience Time*, (MIT Press, 2017), p. xii
[220] Knight, 990 n. 1.
[221] Id.
[222] As referred to by Justice Sotomayor in her dissent in Bucklew, 1147-48.
[223] Johnson, 1071
[224] Id.

195. Justice Breyer affirmed, 'the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes.'[225] Based on these judicial observations, execution dates that result in durations that for appeal are either too short or too long are temporal errors that demonstrate something is going wrong with the death penalty. There is a problem, and time and temporal study reveals that in applying the current U.S. evidentiary standards in the capital judicial process, it is improbable (impossible) to resolve.

196. It may therefore prove constitutionally difficult to identify a legitimate *present moment* for the reading of the death warrant. Adolph Carnap revealed from his dialogues with Albert Einstein that Einstein struggled with the concept of the *presence of the present* because, 'there is something essential about the Now which is just outside the realm of science.'[226] The problem of presentism is persistent within the capital judicial system and it appears that the process for producing a capital judicial 'now' for a legitimate execution may be practically improbable (impossible), and in any case may be currently outside the realm of the science-litigation interface. What this means is that the capital judicial process cannot be trusted to legitimately identify a 'fair' moment in time to execute a human being. Executions will therefore always be in *temporal error* and will always be cruel and unusual in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution, and of international human rights law.

197. It is therefore very likely that if Mr Wilson submits a *Lackey* claim to assess his time under the capital judicial process (20 years under the criminal judicial process and 16 years on death row), that he will be subjected to the judicially imposed legal paradox on the temporal assessment. Whenever he seeks to raise the issue, it will always be the *wrong time*. In *Lackey* claims, time is moulded by the State and the U.S. Supreme Court to allow executions. Time is utilised to continue the death penalty, rather than viewing it as a lens to bring into clearer focus the violations of human rights.

i. The Assessment of Duration under the Death Penalty in International Law

198. Consequently, the U.S. Supreme Court's *Lackey* jurisprudence would violate Mr Wilson's right to an effective remedy under ICCPR article 2, imposed an arbitrary deprivation of his right to life under article 6(1), inflict torture, cruel, and inhumane punishment under article 7, and denigrate human dignity under article 10.

199. Due to his diagnosis of Asperger's Syndrome and ADHD, the experience of the 'long time on death row' is compounded. The Human Rights Committee has stated:

> Extreme delays in the implementation of a death penalty sentence that exceed any reasonable period of time necessary to exhaust all legal remedies may also entail the violation of article 7 of the Covenant, especially when the long time on death row exposes sentenced persons to harsh or stressful conditions,

[225] Knight, 995.
[226] Paul Arthur Schillp, *The Philosophy of Rudolf Carnap: Intellectual Autobiography*, (1963), p. 37.

including solitary confinement, and when sentenced persons are particularly vulnerable due to factors such as age, health or mental state.[227]

200. Unlike some regional courts[228] and national courts,[229] in previous jurisprudence, the Human Rights Committee refused to apply an adequate assessment of the time duration on death row under the Covenant.[230] This was a previous approach similar to that of the U.S. Supreme Court's *Lackey* jurisprudence.

201. However, the Human Rights Committee is now prepared to appropriately assess duration on death row. In *Persaud and Rampersaud v. Guyana,*[231] it considered a case in which the petitioners were arrested for murder in 1986, sentenced to death in 1990, and after exhausting domestic remedies filed a Communication in 1998. Following this 12 year period, and a further 3 years for the Committee to consider the case:

> As regards the issues raised under article 7 of the Covenant, the Committee would be prepared to consider that the prolonged detention of the author on death row constitutes a violation of article 7. However, having also found a violation of article 6, paragraph 1, it does not consider it necessary in the present case to review and reconsider its jurisprudence that prolonged detention on death row, in itself and in the absence of other compelling circumstances, does not constitute a violation of article 7.[232]

202. We can draw from the Committee's interpretive methodology for assessing history and contemporary state practice in the evolution of international law, as established in *Judge v Canada.*[233] It is argued that in the future the Committee will progress from being prepared to consider prolonged detention to hearing a claim based upon/including the temporal assessment and ruling on it. In *Judge* it was held:

> While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights – the right to life - and in particular if there have

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[227] General Comment No. 36 – Article 6: the Rights to life, CCPR/C/GC/36, 3 September 2019, paragraph 40. Citing, Johnson v. Jamaica (CCPR/C/56/D/588/1994), para. 8.5; Kindler v. Canada, para. 15.2; Martin v. Jamaica (CCPR/C/47/D/317/1988), para. 12.2. 172 Brown v. Jamaica (CCPR/C/65/D/775/1997), para. 6.13. 173 CCPR/C/JPN/CO/6, para. 13. 174 Kindler v. Canada, para. 15.3.

[228] Soering v United Kingdom, and Pratt and Morgan v. Attorney General of Jamaica, [1993] 4 All ER 769

[229] United States v. Burns, [2001] 1 SCR 283, Catholic Commission for Justice and Peace in Zambwawe v Attorney general (1993) 14 Human Rights Law Journal 323.

[230] For example, see Robinson v Jamaica, CCPR/C/68/D/731/1996, when it stated, 'As to the claim that the author's detention on death row from 1992 to 1997 constitutes cruel, inhuman or degrading treatment, the Committee reiterates its constant jurisprudence that detention on death row for any specific period of time does not per se constitute a violation of articles 7 and 10, paragraph 1, of the Covenant, in absence of further compelling circumstances. As neither the author nor his counsel have adduced any such circumstances, the Committee finds this part of the communication inadmissible under article 2 of the Optional Protocol,' para 9.3.

[231] Raymond Persaud and Rampersaud v. Guyana, Communication No. 812/1998, U.N. Doc. CCPR/C/86/D/812/1998 (2006).

[232] Id. para. 7.3.

[233] Judge v. Canada, CCPR/C/78/D/829/1998, 13 August 20023, paras. 6.11-6.12

> been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the abovementioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out.[234]

203. It is very likely that a future Committee decision will provide a full factual assessment of duration within the capital judicial process and then duration on death row. This would be consistent with the wider jurisprudence on the issue of the death row phenomenon. In support if this reasoning is the *Persaud and Rampersaud* dissenting opinion of Mr Hipólito Solari-Yrigoyen and joined by Mr Edwin Johnson, who stated:

> I disagree with the majority view that it is unnecessary in the present case for the Committee to reconsider its jurisprudence, which has, to date, held - wrongly, in my view - that prolonged detention on death row does not, in itself, constitute a violation of article 7 of the Covenant.
>
> Although the Committee has rightly concluded that there has been a violation of article 6, it is my view that, in a case in which the death sentence was imposed, we have an obligation not to disregard the specific claim by the author that his prolonged stay on death row amounts to a violation of his fundamental rights; and that we are thus bound to rule on the claim.
>
> Consequently, taking into account the circumstances of this case, in which the author of the communication has spent 15 years on death row, I am of the view that this fact alone constitutes cruel, inhuman and degrading treatment and that article 7 of the Covenant has been violated.
>
> Accordingly, the facts before the Committee reveal violations by the State party both of article 6 and of article 7 of the Covenant.[235]

204. The opinion of the Committee members Mr Hipólito Solari-Yrigoyen and joined by Mr Edwin Johnson, is that the duration of 15 years on death row is a violation of ICCPR article 7.

205. Mr Wilson has been under Alabama's criminal jurisdiction for 20 years and under sentence of death for 16 years. It is clear this length of time is a duration which contributes to the violation of ICCPR articles 7 and 10.

206. The increased State abolition of the death penalty globally, and the solidification of the UNGA and HRC votes in their resolutions on the death penalty, the discussions in the Human Rights Council's high-level panels, and the reports of the Secretary-General, demonstrate that due to the decline of the death penalty it is a reasonable proposition that

[234] Id. para. 10.3.
[235] An individual opinion co-signed by Committee members Mr. Hipólito Solari Yrigoyen and Mr. Edwin Johnson, Raymond Persaud and Rampersaud v. Guyana, Communication No. 812/1998, U.N. Doc. CCPR/C/86/D/812/1998 (2006).

the opinions of Mr Solari-Yrigoyen and Mr Johnson will be ultimately determinative. The interpretive evolution which occurred from *Kindler* to *Judge* (on the question of transfer of the author from one jurisdiction to another) will very likely occur from *Robertson* to *Persaud and Rampersaud* to a further case (on the question of the assessment of duration on death row). A future interpretive decision will likely identify that duration on death row implicates a full and specific review under an article 6, 7, and 10 assessment.

207. For the assessment of the various contributory factors extending duration under the capital judicial process and in death row incarceration, all aspects which contribute to the extension of time should be considered consistent with the Human Rights Committee's decision in *Lumanog and Santos v. The Philippines*:

> In relation to the authors' claim under article 14, paragraph 3 (c), it may be noted that the right of the accused to be tried without undue delay relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment []. All stages whether at first instance or on appeal, must be completed "without undue delay". Therefore, the Committee must not limit its consideration exclusively to the part of the judicial proceedings subsequent to the transfer of the case from the Supreme Court to the Court of Appeals, but rather take into account the totality of time, i.e. from the moment the authors were charged until the final disposition by the Court of Appeals.[236]

208. Therefore, it is reasonable for the Special Procedures to reflect upon how this 'totality of time' could be articulated within relevant mandates and in application to the totality of the facts in Mr Wilson's case. There is an interpretive affirmation that prolonged detention on death row can be a violation of ICCPR articles 6, 7, 10, and 14, and in the case of *Lumanog and Santos* the U.S. capital judicial system and specifically in Mr Wilson's duration on death row, can be compared to this standard due to the various levels of review as the Committee observed:

> the establishment of an additional layer of jurisdiction to review death penalty cases is a positive step in the interest of the accused person. However, State parties have an obligation to organize their system of administration of justice in such a manner as to ensure an effective and expeditious disposal of the cases. In the Committee's view, the State party has failed to take into consideration the consequences, in terms of undue delay of the proceedings, that the change in its criminal procedure caused in this case, where the review of a criminal conviction was pending for many years before the Supreme Court and was likely to be heard soon after the change in the procedural rules.[237]

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[236] Lumanog and Santos v. The Philippines, CCPR/C/92/D/1466/2006, 21 April 2008, para 8.3. Citing, General Comment No. 32 on article 14 "Right to equality before courts and tribunals and to a fair trial", para. 35. See also, for instance, Communications No. 526/1993, Hill v. Spain, para. 12.3; No. 1089/2002, Rouse v. Philippines, para.7.4; and No. 1085/2002, Taright, Touadi, Remli and Yousfi v. Algeria, para. 8.5

[237] Id. para. 8.5.

209. The above two sections of the Committee decisions echo the judicial reasoning of Justices Stevens and Breyer in their criticism of the majority decisions on the assessment of time-usage in the capital judicial process cited above. It affirms the injustice inflicted by the majority of the U.S. Supreme Court in the denial of *Lackey* claims.

210. The Committee was of the view that there is no justification for the delay in the disposal of the appeal. More than eight years had passed without the authors' conviction and sentence receiving a reviewed by a higher tribunal. The Committee found that the authors' rights under ICCPR article 14(3)(c) had been violated.[238] The Committee therefore identified the excessive length of time was contributed to by the government, and it was this portion of time that also rendered a violation of the Covenant.

211. Likewise in Mr Wilson's case his violation of the right to a fair trial by the State of Alabama is the major cause for his time on death row. The State's contribution to Mr Wilson being exposed to an excessive duration of capital judicial time is a violation of his human rights. Mr Wilson has been under Alabama's capital jurisdiction for 20 years and under sentence of death for 16 years. It is clear this length of time is a violation of ICCPR articles 7 and 10.

L. Practically Impossible Legal Standards as Inherent Injustice

212. The *Baze-Glossip-Bucklew* trilogy and the *Lackey* jurisprudence demonstrates that the majority reasoning of the U.S. Supreme Court which has formed the legal opinions and the denials of *certiorari*, are failing to uphold the international legal standards on the role of the judiciary and are therefore dishonouring the dignity of their profession. What these cases have demonstrated is a judicial creation of practically impossible evidentiary standards to be met by death row inmates. There are no U.S. Supreme Court cases in which a death row inmate has been able to provide a successful 'method-of-execution' challenge for the demonstration that an execution method is torture, cruel and unusual punishment, and the U.S. Supreme Court has never provided a 'time' assessment in favour of the death row inmate.

213. The adjudicative methods which the court has adopted are complex. They involve the court providing an etymological control over the meaning of words to unreasonably control the assessment of both the science of executing people, and the time and temporality under the capital judicial process. So the national mechanisms to impose death are unfairly protected and unfairly utilised. The majority of the U.S. Supreme Court are not fairly and impartially determining the reasonableness of facts. What has been demonstrated is partiality, bias, and unfairness through horrific reasoning.

214. Professor Harcourt has argued in his legal submissions:

[238] Id. paras 8.5-8.6.

> It is morally repugnant that federal judges have interpreted the Eighth Amendment to impose on persons who are going to be executed the responsibility of pleading and proving that there are more humane methods of execution than the one they are facing. There is nothing in the Eighth Amendment that requires this burden, as a textual, originalist, or contextual matter, and the judicial interpretation is legally obscene. Moreover, there is no other type of § 1983 action that requires a plaintiff to suggest a way for the government to accomplish its goals without violating the plaintiff's constitutional rights.[239]

215. Professor Harcourt's reasoning reflects both the commendable interpretation of the U.S. Constitution, and it also affirms the object, purpose, and spirit, of international human rights law. Fairness and justice, however, has been relegated and banished from the judicial hall, in both the *Baze-Glossip-Bucklew* and *Lackey* decisions. These corpus of cases demonstrate that the U.S. Supreme Court is keeping a distance between the repugnant U.S. practice of the death penalty and the global standards which are trying to make the world a better place by ensuring humanitarian values.

216. The preamble to the Universal Declaration of Human Rights recognises that 'human rights should be protected by the rule of law,' and article 10 states that every person is entitled to a fair and public hearing by an independent and impartial tribunal. States should therefore guarantee both 'independence' and 'impartiality.' It is argued that the *Baze-Glossip-Bucklew* and *Lackey* reasoning for the creation of impossible evidentiary requirements fails the standards of 'impartiality.'

217. The UN *Basic Principles on the Independence of the Judiciary* (1985) preambular states:

> Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law

218. Following the development of the *Baze-Glossip-Bucklew* and *Lackey* jurisprudence, it is argued that considering reasonable standards of fairness and the presentation of facts, the U.S. Supreme Court has failed to demonstrate that it is 'impartial' in the assessment of execution methods and the temporal consideration of the effects of being under the capital judicial process. The case law demonstrates the contrary position in that the court has been 'partial.' It has provided a distortion of the facts and prevented the fairness in both procedure and the substantive consideration of the issues.

219. *Basic Principle* 2 states that the 'judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason,' and *Basic Principle* 6 states that the, 'principle of

[239] Wilson v Hamm, in The United States District Court for the Middle District of Alabama, Southern District, Case 1:19-cv-00284-RAH-CSC, filed 02/23/2024, Petitioner's Fifth Motion for Brady Discovery, filed by Bernard E. Harcourt, The Initiative for a Just Society, Columbia Law School, 435 West 116th Street, New York, New York.

the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.' What has been demonstrated is both a distortion of the facts and a confined reading of the law, to create torture and cruelty in the death penalty. In so doing the only party interests which have been respected in these cases has been those of the States who want to kill people. This has not been achieved in a fair way, but through the violation of the *Basic Principles*, compounded by the violations which have occurred of the ICCPR, the CAT, the ICESCR, and the CRPD.

220. In the latest report of the UN Special Rapporteur on the independence of judges and lawyers, Professor Margaret Satterthwaite, affirms that the core principles underlying her mandate are recognised in the:

> need to reimagine access to justice and the rule of law, paying special attention to the perspectives of those who bear the brunt of deep inequalities, systematic discrimination and persistent marginalization.[240]

221. In the capital judicial system those 'who bear the brunt' are those under sentence of death and the U.S. Supreme Court reasoning in both the *Baze-Glossip-Bucklew* trilogy and the corpus of denials under *Lackey* claims, demonstrate a failure to recognise 'access to justice and the rule of law.' Both of these legal standards are being utilised to thwart Mr Wilson's access to justice and will maintain over him the torture through his execution. It is also recalled that all of the human rights violations he has been subjected to have been compounded by him suffering from Asperger's Syndrome and ADHD. So in the *bearing of the brunt* Mr Wilson is receiving the most severe impact. Professor Satterthwaite further stated:

> But a clear-eyed look at key obstacles, an embrace of international human rights law and norms, and lessons from emerging good practice across the globe suggest that there are ways forward. By carrying out and supporting such work, the mandate can address systemic inequalities within legal systems, safeguard the role of independent judges in checking unaccountable power, advance access to justice and amplify grass-roots justice solutions.[241]
>
> […]
>
> The new mandate holder believes that this moment calls for a fundamental reimagining – or, in some cases, a recommitment to – the rule of law and access to justice. This moment demands the prioritization of the insights of those for whom these systems are falling short, as well as taking into account data, lessons from practice and innovative approaches to entrenched problems.[242]

222. On the one hand, it is very appropriate to acknowledge that the United States should be commended as the U.S. legal system has the highest respect the world over. But on the other hand, it should be meaningfully open to criticism of the way it treats

[240] Reimagining justice: confronting contemporary challenges to the independence of judges and lawyers Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, A/HRC/53/31, 13th April 2023, p. 3
[241] Id.
[242] Id.

capital defendants and those on death row. The U.S. capital judicial process reveals a paradox in the functioning of the law. It seeks to provide super due process to guarantee equal protection of the law, but then there are horrific numerous examples of basic rights being denied and the result is a cruel process, cruel incarceration, and a cruel death. This is a damning indictment and the examples in this complaint add to the call for change. The UN's *Basic Principles on the Independence of the Judiciary, Guidelines on the Role of Prosecutors,* and the *Basic Principles on the Role of Lawyers* and the mandate of Professor Satterthwaite, provide a cogent basis to help ensure that the judiciary and the lawyers perform their roles with the honour and dignity of the legal profession. This is most needed when people's lives are at stake.

223. Indeed, the Special Rapporteur states:

> Reimagining the rule of law also requires a considered look at criminal legal systems and the role of prosecutors, including considering how they can best ensure the human rights of all to security and dignity.[243]

224. Alabama's capital judicial system and the U.S. federal law, has failed to protect the rights of Mr Wilson. The capital legal system and the actions of the prosecutors have not been reflective of upholding the honour and dignity of the legal profession. To compound this unfairness, at trial the defence counsel provided woefully inadequate representation. Since 2004 the legal system has not adequately taken into account or adequately protected his right to mental and physical health. For Mr Wilson, time is running out for the reimagining of the law so that Mr Wilson's rights will be protected. It is going to take some courageous imagination. Both judges and lawyers will have to see clearly what has happened in this case, and Professor Harcourt is to be commended for having such courageous imagination. He is imagining a fair and just legal system that will treat Mr Wilson in the right way and revoke his death sentence. It is not lost on the author that the United Nations has used John Lennon's song, 'Imagine' to promote children's rights in a UNICEF campaign.[244] It should also not be lost on us that in 2004 Mr Wilson was a vulnerable adult and his mental health would have rendered him possessing the mental capacity of a juvenile.

M. The Violations of the Protection of Mental and Physical Health, and Human Dignity

225. The ICESCR article 12 recognises the right to the highest attainable standard of healthcare.[245] In this case, Mr Wilson has not had this healthcare rights protected by the police, the prosecutors or his trial lawyers, and to compound these violations, the State of Alabama wants to still execute him. The UN mandate under Resolution 42/16 for the Special Rapporteur on right of everyone to the enjoyment of the highest attainable standard of physical and mental health, affirms:

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[243] Id. p. 4.
[244] OFFICIAL VERSION: Sing IMAGINE with your favourite stars & John Lennon | UNICEF, https://www.youtube.com/watch?v=rpTzkiul8Iw
[245] See, General Comment No. 14 (2000) The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social, and Cultural Rights, Twenty-second session, Geneva, 25 April-12 May 2000.

the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and emphasizing that all human rights are universal, indivisible, interrelated, independent and mutually reinforcing.[246]

And that:

mental health is an integral part of the right of everyone to the enjoyment of the highest attainable standard of health.[247]

226. Furthermore, the UN mandate under Resolution 53/14 for the Special Rapporteur on the rights of persons with disabilities, affirms:

the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed the full enjoyment of their rights and freedoms without discrimination of any kind.[248]

And that:

in all parts of the world, persons with disabilities continue to face barriers in their participation as equal members of society and violations and abuses of their human rights, and conscious that greater attention and commitment is needed to address these challenges.[249]

Paragraph 1:

Reaffirms the obligations of States to take all appropriate measures to eliminate discrimination against persons with disabilities and to respect, protect and fulfil their human rights.[250]

227. The case of Mr Wilson demonstrates a systematic failure to preserve his rights to physical and mental health. This was experienced through the operations of the police to apprehend him, and the failure of the state and defence lawyers to treat him as a vulnerable adult and adequately provide safeguards to protect him as a 'vulnerable person.' This was necessary to ensure that the court was adequately aware of his diagnoses for an appropriate determination of guilt and then sentencing, and to be informed to ensure the fairness of the post-conviction reviews, including the impact whilst he is incarcerated on death row and awaiting execution. Mr Wilson suffers from Asperger's Syndrome and ADHD, and at each stage of his case, as demonstrated by the facts of the case cited above, the State of Alabama has violated his healthcare rights under the Convention on the Rights of Persons with Disabilities (CRPD):

Article 14

Liberty and security of person

[246] Resolution 42/16 The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/RES/42/16, 7 October 2019.
[247] Id.
[248] Resolution 53/14 Special Rapporteur on the rights of persons with disabilities, A/HRC/RES/53/14, 17 July 2023.
[249] Id.
[250] Id.

> 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
>
> (a) Enjoy the right to liberty and security of person;
>
> (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
>
> 2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

228. The failure to provide adequate safeguards for Mr Wilson as a vulnerable person, rendered his trial and death sentence arbitrary and thus unlawful. Furthermore, there is a concomitant violations of the protection of Mr Wilson's right to liberty under ICCPR article 9, and the Human Rights Committee's *General Comment No. 35*, explains:[251]

> 28. For some categories of vulnerable persons, directly informing the person arrested is required but not sufficient. When children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents, guardians, or legal representatives. For certain persons with mental disabilities, notice of the arrest and the reasons should also be provided directly to persons they have designated or appropriate family members. Additional time may be required to identify and contact the relevant third persons, but notice should be given as soon as possible.[252]

229. The Human Rights Committee has recognised the need for the legal system to adequately protect 'vulnerable persons.' The State of Alabama has completely failed to provide such protection to Mr Wilson. His rights as a vulnerable person were violated during his apprehension, interrogation, his trial and conviction, and has now extended to his time on death row, and in the impending execution.

230. Researchers from the Autism Research Centre at the University of Cambridge have conducted a comparative study of the extent to which criminal justice systems take into consideration autistic people's particular vulnerability.[253] The findings of Professors Rachel Slavny-Cross, Carrie Allison, Sarah Griffiths, and Simon Baron-Cohen, reveal violations of the rights of autistic people in the criminal justice system consistent with those identified within this Complaint. The professors identify the detrimental consequences of the lack of appreciation of the particular mental and physical health conditions of suspects and defendants, and then the criminal justice process' subsequent failure to adopt appropriate safeguarding for such people:

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[251] Human Rights Committee, General Comment No. 35 (2014) Article 9 - Liberty and security of person, CCPR/C/GC/35, 16th December 2014.
[252] Id. para. 28, p. 9.
[253] R. Slavny-Cross, C. Allison, S. Griffiths, & S. Baron-Cohen, Autism and the criminal justice system: An analysis of 93 cases. Autism Research, 15(5), 904–914 (2022).

> Because of their communication and cognitive difficulties, people with intellectual disabilities are likely to struggle with constructing a clear and consistent narrative of events [] misunderstand their legal rights and the implications of what they say to the police []. [254]

231. At no stage of the pre-trial and trial proceedings was there an adequate understanding of Mr Wilson's Asperger's Syndrome and ADHD, and how this would detrimentally affect the trial and the sentence. There is no evidence of the arresting authorities providing appropriate care and provisions for protecting Mr Wilson in his vulnerable state. It would have been appropriate under these circumstances for Mr Wilson to have had with him a person designated or 'relevant third person'[255] or an 'appropriate adult'[256] to help ensure that he understands the circumstances of his apprehension and the resulting questions he would have to answer. His mental health diagnoses render probable the fact that due to the highly coercive nature of the apprehension of Mr Wilson, he would have been susceptible to communication and cognitive difficulties, and would have most likely misunderstood the quality and nature of what the interrogating authorities would have stated and asked of him. This renders a *prima facie* argument against the accuracy of what Mr Wilson included in his statement to the police. Due to the antagonistic environment depriving him of his liberty, without appropriate safeguarding measures and the protection of his mental health, it *prima facie* rendered the beginning of the violation of the right to a fair trial under ICCPR article 14. The concomitant violation of his healthcare rights amounted to an arbitrary deprivation of his liberty and life under ICCPR articles 6 and 9, and CRPD article 14. Neither the arresting authorities nor the trial court treated him as a 'vulnerable adult' consistent with the Human Rights Committee's *General Comment No. 35*. The professors' research demonstrates comparable factual circumstances which affirm that Mr Wilson's treatment is not an isolated incident.[257] Through their research and conducting interviews with lawyers, they identify, 'a systemic barrier in the identification of autistic people as vulnerable adults if they enter the CJS [criminal justice system],' and they state:

> In this study, 35% (31/88) of autistic defendants were not given an AA [appropriate adult] during police investigations and a further 18% (16/88) did

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[254] R. Slavny-Cross, C. Allison, S. Griffiths & S. Baron-Cohen, Autism and the criminal justice system: An analysis of 93 cases. Autism Research, 15(5), 904–914 (2022).

[255] See, General comment No. 35 - Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014:

> 'For some categories of vulnerable persons, directly informing the person arrested is required but not sufficient…For certain persons with mental disabilities, notice of the arrest and the reasons should also be provided directly to persons they have designated or appropriate family members. Additional time may be required to identify and contact the relevant third persons, but notice should be given as soon as possible,' para 28, p. 9.

[256] See, R. Slavny-Cross, C. Allison, S. Griffiths & S. Baron-Cohen, Autism and the criminal justice system: An analysis of 93 cases. Autism Research, 15(5), 904–914, (2022).

[257] Id. 'There are differences in the structure, terminology, and mechanisms among jurisdictions of different nations. For example, the concept of a 'vulnerable adult' is not formally recognized in the American CJS. A person with a disability has rights under the Americans with Disabilities Act of 1990 to 'reasonable accommodations', although it is not clear how this is regularly implemented in practical terms. It is important to understand how autistic adults are disadvantaged in the context of different jurisdictions using broadly comparable mechanisms, such as the use of any adjustments to standard procedure to address the specific needs of the defendant.'

> not have an AA present because their diagnosis was not known to the police. The use of AAs to assist vulnerable adults at the police station is only available in the UK, so these results are not generalisable to other jurisdictions. However, the concept of reasonable adjustments is a requirement under the ADA (1990) in the USA and the Equality Act (2010) in the UK. The identification of vulnerable defendants is a vital first step in ensuring that their right to a fair investigation is upheld. Our data suggest that a proportion of autistic defendants are not identified as vulnerable adults and that this is even evident in cases where an existing diagnosis is present. Shockingly, 38% (23/60) of the autistic defendants in this study were not given any reasonable adjustments at the police station even though their lawyers stated that this would have been beneficial, and 33% (20/60) did not receive any adjustments during police questioning because their autism diagnosis was not known at the time. The current literature on intellectual disabilities and policing demonstrates a more general, global problem with accurately identifying vulnerable people within the CJS [].[258]

232. Alabama is therefore no exception, and the treatment of Mr Wilson by the police included similar deficiencies as identified in the above study. The professors refer to the Americans with Disabilities Act[259] and under this act, there is a significant lost opportunity to protect the rights of person with disabilities in the criminal (capital) justice system. The ADA Section 2 states:

> SEC. 2. FINDINGS AND PURPOSES.
>
> (a) FINDINGS- The Congress finds that--
>
> (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

233. Mr Wilson has had no legal recourse under U.S. law for the discrimination he has experienced due to his Asperger's Syndrome and ADHD, and the ADA has not been applied to provide help in this capital justice context. Nick Dublin writing for Medium[260] has stated:

> If you are on the autism spectrum, your odds of interacting with the police go up a gigantic seven times over your neurotypical or allistic counterparts.
>
> Suppose you find yourself in a police station being questioned. In that case, you'll be in an extremely sensory hostile environment with police officers who will take advantage of your goodwill, honesty, and openness — even as you have the constitutional right to remain silent…And just as consequential, the prosecutor and judge may also have little idea how a misunderstanding or a mistake in social judgment associated with how one takes in information about

[258] Id.
[259] Americans With Disabilities Act of 1990, 101–336, 104 Stat. 328 (1990)
[260] Nick Dublin, Autism and the Criminal Legal System, Medium, 12 December 2023, https://medium.com/blue-notes-to-myself/autism-and-the-criminal-legal-system-20e9805dc262

> the world could have led you to be seated before them. They may brush off autism as an excuse.[261]

234. These harrowing observations are unfortunately consistent with the experience of Mr Wilson, and Mr Dublin further explains with reference to the ineffectiveness of the ADA for protecting people with autism in the criminal justice context:

> The scenario usually goes something like this: The autistic individual is being charged with a serious crime, the attorney is mounting a fairly lackluster defense and is making no attempt to understand their client's autism, the person doesn't have money to hire a new attorney and the clock is ticking. One would think that the protections of Title II of the Americans with Disabilities Act (ADA) would act as a buffer and offer a layer of accommodations necessary to survive this process, but this is rarely so. It is outrageous that a law can be on the books that mandates specific standards for governmental agencies to be followed but can be willfully ignored either because the mandate is unfunded or it lacks a reliable and consistent enforcement mechanism."[262]

235. Writing for The Marshall Project,[263] Chiara Eisner provides further alarming examples where state officials often fail to identify prisoners with developmental disorders:

> The Americans with Disabilities Act—signed into law 30 years ago this summer—mandates that people with physical and developmental disorders receive equal access to programs and services provided by public institutions, including correctional facilities. But advocates for people with developmental disabilities have long argued that all too often, prisons do not fulfill that promise. One reason may be that many states don't adequately identify prisoners with developmental disorders.
>
> The Marshall Project sent questions to all 50 state corrections departments asking whether and how they screen prisoners for developmental or intellectual disabilities. Of the 38 agencies that responded, 25 reported using screening protocols that several mental health and legal experts said don't meet professional standards. Five states said they don't screen for developmental disabilities at all. When developmentally disabled prisoners go unidentified, they are even less likely to receive services they are entitled to under federal law—such as help understanding prison rules or obtaining medications. That loss of assistance leaves them vulnerable to medical misdiagnosis, isolation in solitary confinement, denial of legal and educational opportunities, sexual abuse and bullying, prisoner advocates and relatives say.[264]

236. It is clear that in Mr Wilson's case, both the state and federal reviews have failed to adequately consider his mental health diagnoses. They have not provided a fair assessment of how his mental health issues have impacted his case, and this absence of

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[261] Id.
[262] Id.
[263] Chiara Eisner Prison Is Even Worse When You Have a Disability Like Autism, The Marshall Project, https://www.themarshallproject.org/2020/11/02/prison-is-even-worse-when-you-have-a-disability-like-autism
[264] Id.

procedural review rendered a failure in the legal proceedings to provide appropriate awareness of his Asperger's Syndrome and his ADHA. A reasonable interpretation of the facts demonstrates that this lack of awareness of his mental health conditions contributed to his unfair capital conviction.

237. Professor Harcourt has argued:

> Trial counsel was ineffective in failing to retain a medical expert to diagnose Mr. Wilson prior to his conviction; post-conviction counsel retained Dr. Robert D. Shaffer, a forensic and neuropsychologist who interviewed Mr. Wilson and his family and who was prepared to testify that Mr. Wilson "suffers from Asperger's Syndrome, a constituent of autism spectrum disorder [ASD]."[265]

238. Unfortunately, the trial court and jury did not have the benefit of Dr Shaffer's testimony as an expert or the supportive testimony of Mr Wilson's wider family, and school teachers. This would have demonstrated the extent of his mental health issues for the trial and appropriately determine guilt or innocence. What is also required is that the criminal justice system needs to adequately consider the impact of his mental health issues on the method of execution.

239. Concerning the impact of Mr Wilson's mental health if he is executed under the nitrogen gas protocol, Professor Harcourt has argued:

> Consistent with Mr. Wilson's ASD and compounding his hyper-sensitivity to physical touch or constrictions, Mr. Wilson's medical records demonstrate that he suffers from atypically high sensitivity to light and has repeatedly requested permission to wear sunglasses. See Appendix C, David Wilson Medical Records. Without sunglasses, bright lights (even mere sunlight) cause Mr. Wilson significant distress. During an execution, Mr. Wilson would be required to stare straight into high-intensity ceiling lights, as the protocol requires him to be strapped to a gurney facing the ceiling. Compounding Mr. Wilson's light sensitivity caused by his ASD, Mr. Wilson has written that direct light also causes him severe migraines if he does not wear sunglasses. His repeated requests for sunglasses show that these migraines are chronic and continue to this day.
>
> According to media witnesses who were present at Mr. Smith's execution, the mask used by the State to carry out executions covers the condemned person's face from "forehead to chin." See Bogel-Borroughs, "A Select Few Witnessed Alabama's Nitrogen Execution. This Is What They Saw."
>
> Mr. Wilson would not be able to wear sunglasses under the full face-mask during any execution and would have to stare straight into the ceiling lights. Therefore, there is significant likelihood that Mr. Wilson would either have to suffer severe migraines during his execution, or, in the alternative, keep his eyes closed and forfeit his last chance to see his family and loved ones before he is killed. Even if the state refuses to allow Mr. Wilson to wear sunglasses in the

[265] See, David Wilson v. John Q. Hamm, Case No. 1:19-cv-284, Doc. 1, Petition for Writ of Habeas Corpus, at 190.

execution chamber, Mr. Wilson wears prescription glasses when there is no strong light. He would not be able to wear those glasses with the mask on either, and therefore would be killed without the opportunity to see his family.

240. To protect Mr Wilson in his vulnerable state suffering from Asperger's Syndrome and ADHD, the physical trauma he will experience in the execution needs to be meaningfully considered. This requires a full assessment and diagnosis of his complete physical and mental health record, and the likely impact of Alabama's nitrogen protocol upon his diagnosis. Ultimately an assessment of the physical and mental pain which Mr Wilson will suffer needs a fully informed expert assessment, and then this assessment applied to appropriately consider the human rights violations. The 2019 Report of the Special Rapporteur on the rights of persons with disabilities outlines the context of the parameters of CRPD article 14,[266] and on the intersection of rights:

> The right to liberty of persons overlaps and interacts with other human rights and fundamental freedoms under the Convention. Those rights include, but are not limited to, equality and non-discrimination (art. 5), life (art. 10), equal recognition before the law (art. 12), access to justice (art. 13), freedom from torture or cruel, inhuman or degrading treatment or punishment (art. 15), freedom from exploitation, violence and abuse (art. 16), integrity (art. 17), liberty of movement and nationality (art. 18), living independently and being included in the community (art. 19), freedom of expression and opinion, and access to information (art. 21), privacy (art. 22), health, including the right to free and informed consent (art. 25), work and employment (art. 27), an adequate standard of living and social protection (art. 28), and participation in political and public life (art. 29).[267]

241. The Committee on the Rights of Persons with Disabilities, Guidelines on the CRPD article 14[268] II. The right to liberty and security of persons with disabilities, states:

> 3. The Committee reaffirms that liberty and security of the person is one of the most precious rights to which everyone is entitled. In particular, all persons with

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[266] Report of the Special Rapporteur on the rights of persons with disabilities, Rights of persons with disabilities, A/HRC/40/54, 11th January 2019, para. 44:

> Article 14 of the Convention articulates the content of the right to liberty and security of person as it applies to persons with disabilities. Article 14 (1) (a) reaffirms the right to liberty and security of all persons with disabilities on an equal basis with others. Article 14 (1) (b) stipulates that persons with disabilities cannot be deprived of their liberty unlawfully or arbitrarily, and further clarifies that disability shall in no case justify a deprivation of liberty. Finally, article 14 (2) reaffirms that all persons with disabilities deprived of their liberty are entitled to procedural and substantive guarantees on an equal basis with others, including conditions of accessibility and reasonable accommodation. States parties thus have an obligation, with immediate effect, to: (a) refrain from engaging in any action that unlawfully or arbitrarily interferes with the right to liberty, and from authorizing such practices; (b) protect this right against practices by private actors such as health professionals, and providers of housing and/or social services; and (c) take positive action to facilitate the exercise of the right to liberty.

[267] Id. para. 45.

[268] Committee on the Rights of Persons with Disabilities, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: the right to liberty and security of persons with disabilities, Adopted during the Committee's 14th session, held in September 2015.

> disabilities, and especially persons with mental disabilities or psychosocial disabilities are entitled to liberty pursuant to article 14 of the Convention.
>
> 4. Article 14 of the Convention is in essence a non-discrimination provision. It specifies the scope of the right to liberty and security of the person in relation to persons with disabilities, prohibiting all discrimination based on disability in its exercise. Thereby, article 14 relates directly to the purpose of the Convention, which is to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect of their inherent dignity.[269]

242. In addition to Mr Wilson's Asperger's Syndrome and ADHD, he suffers from pulmonary issues caused by him being infected with COVID-19. His pulmonary issues will exacerbate the pain and torture he will experience during the execution with forced nitrogen gas asphyxiation. Professor Harcourt explains:

> Mr. Wilson's medical records demonstrate that he suffers from pulmonary health problems of long date, including tuberculosis and other respiratory difficulties. These are chronic and permanent conditions that constrict the airways in his lungs, making it difficult for him to breathe. Mr. Wilson was prescribed an albuterol inhaler to treat his respiratory illness when he was detained in the Houston County Jail back in February 2008. See Appendix A. Mr. Wilson has contracted tuberculosis (TB) and tested positive for tuberculosis at Holman Prison. See Appendix B. He was placed on tuberculosis medication for nine months in 2010, and is subject to medical examination every three months for a tuberculosis update to ensure that active tuberculosis does not flare up. Mr. Wilson's airways are chronically clogged by phlegm and other discharge that makes it difficult for him to breathe normally. Mr. Wilson reports coughing up fluid on a regular basis. Mr. Wilson has also had COVID-19 on several occasions, which has impaired his lungs further. Mr. Wilson reports that his lungs often feel inflamed and he has a sensation of burning when he breathes. (p. 15-16).[270]

N. Business Interests and Human Rights Violations

243. In 2011 the United Nations placed a global focus on the role of business and industry for protecting human rights. John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, provided a report on the *Guiding Principles on Business and Human*

[269] Id.
[270] Wilson v Hamm, in The United States District Court for the Middle District of Alabama, Southern District, Case 1:19-cv-00284-RAH-CSC, filed 02/23/2024, Petitioner's Fifth Motion for Brady Discovery, filed by Bernard E. Harcourt, The Initiative for a Just Society, Columbia Law School, 435 West 116th Street, New York, New York.

Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, stating:[271]

> The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[272]

244. The UN's *Guiding Principles on Business and Human Rights*, notes that states should fulfil their existing obligations to respect human rights and that:

> The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights.[273]
>
> *Guiding Principle* 1 states:
>
> A. 1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.

245. The commentary states that this requires 'legal certainty, and procedural and legal transparency.'[274] In redacting the protocol for execution by nitrogen gas asphyxiation, Alabama has adopted an official policy to enable state officials and business enterprises to join together to inflict human rights violations. In this instance in creating the environment, circumstances, and technologies, for an execution through forced nitrogen gas asphyxiation.

246. The *Guiding Principle* 1 B. Operational principles: General State regulatory and policy functions 3, affirms that in meeting their duty to protect against human rights violations, States should:

> (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

247. The *Baze-Glossip-Bucklew* trilogy and the Alabama nitrogen protocol is a violation of this Operational Principle. Businesses are required to conduct a 'human rights due diligence,' including assessing the effect of their products and practices upon 'persons with disabilities.'[275] In *Guiding Principle* 5 and Commentary it states:

> 5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business

[271] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, 21st March 2011.
[272] Id. p. 2.
[273] Id. p. 6.
[274] Id. p. 7.
[275] Id. p. 8.

enterprises to provide services that may impact upon the enjoyment of human rights.

Commentary

States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.[276]

248. This has significant implications for the human rights violations caused by various execution technologies, and that is what the European Union and the Council of Europe[277] have successfully regulated through the resolutions on prohibiting trade in execution technologies. This is supportive international evidence for a 42 U.S.C. § 1983 civil rights action under US constitutional law.

249. *Guiding Principle* 11 under section II 'The corporate responsibility to respect human rights,' states:

A. Foundational principles

11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Commentary

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.[278]

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[276] Id. p. 9.

[277] Regulation (EU) 2019/125 of the European Parliament and of the Council of 16th January 2019 concerning trade in certain goods which could be used for capital punishment, torture and other cruel, inhuman or degrading treatment or punishment. Measures against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment, Council of Europe, March 2021, https://rm.coe.int/publication-measures-against-the-trade-in-goods-used-for-the-death-pen/1680a2cb8b and Recommendation CM/Rec(2021)2 of the Committee of Ministers to member States on measures against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment (adopted by the Committee of Ministers on 31st March 2021 at the 1400th meeting of the Ministers' Deputies)

[278] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, 21st March 2011, p. 13.

250. Business enterprises need to adhere to human rights standards and implement end-use clauses in their contracts. Under *Guiding Principle* 12, the business world must adhere to the standards under the International Bill of Rights,[279] and concerning the death penalty and methods of executions, this means not contributing to arbitrary deprivation of life under ICCPR article 6(1), and torture, cruel and inhumane punishment under the ICCPR article 7, and the CAT, articles 1 and 2.[280] Business enterprises that do not provide execution technologies, gases, and chemical substances, are following *Guiding Principle* 13 which states:

> The responsibility to respect human rights requires that business enterprises:
>
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
>
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

251. All business enterprises which enter into contracts with state prisons (Department of Corrections) to supply technologies, gases, chemicals, and other equipment for use in executions, are violating the *Guiding Principle* and subsequently, their obligations under the International Bill of Rights. Therefore, the State of Alabama and all business enterprises involved in the various execution protocols are called upon to be transparent about the contracts entered into so that a full human rights assessment can be conducted.

252. The argument is presented that in the question of the death penalty, both the state and the corporate world should work together to integrate a, 'single, logically coherent and comprehensive template,' for: (a) refraining from committing torture, cruel, and inhuman punishment, and (b) working together for the abolition of the death penalty.

253. The execution of Mr Kenneth Smith by nitrogen gas asphyxiation on 25th January 2024, and the potential execution of Mr Wilson by the same means, raises significant questions concerning the relationship of government and business enterprises. The Guardian's Chief U.S. Reporter, Ed Pilkington, should be commended for his journalism raising awareness of the issues associated with the death penalty in the United States. His reporting is a primary resource to help review the extent to which the State of Alabama and businesses are acting consistently with the standards recognised in the UN's *Guiding Principles on Business and Human Rights*. Following Alabama's first use of the nitrogen protocol, Mr Pilkington contacted companies who manufacture nitrogen gas for commercial and medical use, and enquired about their policies regarding the authorised end-use of these products. Airgas, Air Products, and Matherson Gas informed him that

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[279] See, OHCHR, International Bill of Human Rights. A brief history, and the two International Covenants, https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights

[280] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, 21st March 2011, Principle 12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

they would not supply gas for use in executions. Mr Pilkington stated that this, 'marks the first signs of corporate action to stop medical nitrogen, which is designed to preserve life, being used for the exact opposite – killing people.'[281]

254. Mr Pilkington noted, '[t]he green shoots of a corporate blockade for nitrogen echoes the almost total boycott that is now in place for medical drugs used in lethal injections',[282] and that:

> Now, nitrogen producers are engaging in their own efforts to prevent the abuse of their products. The march has been led by Airgas, which is owned by the French multinational Air Liquide.
>
> The company announced publicly in 2019 that supplying nitrogen for the purposes of execution was not consistent with its values. The move followed Oklahoma becoming the first state to adopt nitrogen hypoxia as a capital punishment protocol in 2015.
>
> 'Airgas has not, and will not, supply nitrogen or other inert gases to induce hypoxia for the purpose of human execution,' the company said in a statement.
>
> […]
>
> Two other major nitrogen manufacturers have also confirmed to the Guardian that they are restricting sales of their gas. Air Products said that it had established 'prohibited end uses for our products, which includes the use of any of our industrial gas products for the intentional killing of any person (including nitrogen hypoxia)'.
>
> Matheson Gas said that supplying nitrogen gas for use in executions was 'not consistent with our company values', and that it would not do so.
>
> […]
>
> Alabama has shrouded the source of its nitrogen in secrecy, in the hope of obscuring its supply lines and avoiding the kind of boycott that has troubled lethal injection drugs. If it became known that its gas was industrial quality and not approved for human use, that could lead to major legal challenges and puncture its public posture that nitrogen hypoxia is a humane way to end life.[283]

255. What Mr Pilkington has helped to reveal is that Alabama and the companies which are currently supplying nitrogen gas for use in the new protocol, are acting in violation of the *Guiding Principles*. Therefore they are also failing to observe their obligations under subsequent human rights treaties, including the ICCPR articles 6, 7, 10, CAT articles 1 and 2, and in the case of persons suffering from disabilities, the CRPD.

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[281] Ed Pilkington, Three top nitrogen gas manufacturers in US bar products from use in executions, The Guardian, 10 March 2024, https://www.theguardian.com/us-news/2024/mar/10/nitrogan-gas-manufacturers-bar-executions-alabama Mr Pilkington received email responses from the 3 companies stating their refusal to allow their nitrogen gas to be used in the death penalty.
[282] Id.
[283] Id.

Airgas, Air Products, and Matheson Gas, and other companies taking the decision to not allow their products to be used in the death penalty, should be commended for their business practice, and it should be affirmed that they are observing the *Guiding Principles*, and subsequently the above international treaties.

256. Furthermore, business leaders are now discussing the general need for their own contributions to the global abolition of the death penalty. A prominent voice in this endeavour is provided by Sir Richard Branson.[284] He launched the Business Leader's Declaration Against the Death Penalty, as part of the Responsible Business Initiative for Justice.[285]

257. The Declaration states:

> We stand united in our belief in a fairer and more equitable world, the rule of law, and universal human rights. As an irreversible and extreme form of punishment, the death penalty is inhumane, and it is irreconcilable with human dignity. Its worldwide abolition is a moral imperative that all of humanity should support.
>
> […]
>
> We Commit to using our voices and our reach as business leaders to support ending the death penalty everywhere.[286]

258. Business leaders are joining forces to take a stand against capital punishment. The Business Leader's Declaration Against the Death Penalty is signed by over 250 key figures from the global business community who represent numerous sectors, countries, cultures and values. They have come together to form a synergistic platform to demonstrate the importance of the role of business for the promotion of human rights.[287] On the Virgin Website, Sir Richard Branson stated, 'business leaders should not stay on the sidelines of this debate. Join the Business Leaders Against the Death Penalty Campaign and use your voice and reach so that governments around the world end executions once and for all.'[288]

O. Searching for New Execution Methods is a Violation of ICCPR Article 6(6)

[284] Sir Richard Branson, A world without the death penalty is a better world, 10 October 2023, https://www.virgin.com/branson-family/richard-branson-blog/a-world-without-the-death-penalty-is-a-better-world
[285] Business Leaders Against the Death Penalty, https://www.businessagainstdeathpenalty.org/
[286] Business Leaders' Declaration Against the Death Penalty, https://www.businessagainstdeathpenalty.org/declaration
[287] Id.
[288] Richard Branson, A world without the death penalty is a better world, Richard Branson's Blog, Virgin,1 0 October 2023, https://www.virgin.com/branson-family/richard-branson-blog/a-world-without-the-death-penalty-is-a-better-world

259. All States parties to the ICCPR must be on an irrevocable path towards the abolition of the death penalty. Article 6(6) states:

> Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

260. So the exception provided in article 6(2) must be interpreted within this temporal lens and be understood to be only a temporary provision. The *Report of the Secretary-General on the question of the death penalty*, states:

> The Human Rights Committee has concluded that article 6 (6) of the Covenant reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. In the Committee's view, the death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and the progressive development of human rights.[289]

261. The exception for the application of the death penalty for the most serious crimes is not intended to be a licence to execute people in perpetuity. There must be a 'foreseeable' end to the punishment, and seeking to develop new execution technologies and methods demonstrates not 'foreseeable' abolition, but the contrary position of continuation. In Alabama seeking to create new execution methods the United States is acting contrary to the abolitionist aims and objectives of the right to life under article 6.

262. Inconsistent with the guidance from the Report of the Secretary-General, the State of Alabama seeks to unnaturally end Mr Wilson's life.[290] Although the state argues that it has been fairly proven that he has committed a most serious crime, and this is refuted above, the guidance is that there should be a realisation that the right to life ultimately prevails, even to protecting those who have committed the 'most serious crimes.' This is because commendable justice systems should teach humanity by refusing to impose death, for example when South Africa abolished the death penalty.[291]

263. The final paragraphs of the Human Rights Council's *General Comment No. 36* are worthy of full citation:

> 50. Article 6 (6) reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of

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[289] Report of the Secretary-General, Question of the death penalty, A/HRC/54/33, 14 August 2023, p. 2

[290] The United States' actions of not abolishing the death penalty but searching for further ways to end criminal's lives is contrary to the aims and objectives of the right to life under the ICCPR article 6. General Comment No. 36 states:

> The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.

[291] State v. Makwanyane, [1995] 3 S.A. 391.

> the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights. It is contrary to the object and purpose of article 6 for States parties to take steps to increase de facto the rate of use of and the extent to which they resort to the death penalty, or to reduce the number of pardons and commutations they grant.
>
> 51. Although the allusion to the conditions for application of the death penalty in article 6 (2) suggests that when drafting the Covenant, the States parties did not universally regard the death penalty as a cruel, inhuman or degrading punishment per se, subsequent agreements by the States parties or subsequent practice establishing such agreements may ultimately lead to the conclusion that the death penalty is contrary to article 7 of the Covenant under all circumstances. The increasing number of States parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, other international instruments prohibiting the imposition or carrying out of the death penalty, and the growing number of non-abolitionist States that have nonetheless introduced a de facto moratorium on the exercise of the death penalty, suggest that considerable progress may have been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment. Such a legal development is consistent with the pro-abolitionist spirit of the Covenant, which manifests itself, inter alia, in the texts of article 6 (6) and the Second Optional Protocol.[292]

264. The search for a new execution method is in violation of the 'pro-abolitionist spirit of the Covenant.'

P. Good Faith Interpretation of International Law and the Vienna Regime

265. To allow the execution of Mr Wilson would be inconsistent with a good faith interpretation of the international law cited above. This good faith interpretation is grounded in the responsibility of sovereign states under the Charter of the United Nations (1945) (UN Charter) for the global furtherance of human rights. The preambular text states that the 'peoples of the United Nations determined' should act in concert to *inter alia*:

> (i) reaffirm faith in human rights, and

[292] General Comment No. 36, p. 11. Citing, Human Rights Committee, general comment No. 6, para. 6. 212 Second Additional Protocol to the Covenant, aiming at the abolition of the death penalty, preamble. 213 CCPR/C/TCD/CO/1, para. 19. 214 Kindler v. Canada, para. 15.1. 215 Ng v. Canada, para. 16.2; European Court of Human Rights, Öcalan v. Turkey (application No. 46221/99), judgment of 12 May 2005, paras. 163–165. 216 Judge v. Canada, para. 10.3; A/HRC/36/27, para. 48; African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), para. 22.

(ii) establish conditions to promote justice and respect obligations under treaties and other sources of international law.

266. Under the UN Charter the 'domestic jurisdiction' of States is established through article 2(7), and article 2(1) recognises the 'principle of the sovereign equality' of states. This national legal authority must, however, be based upon the fundamental principle of furthering human rights. Under article 1(3) the political processes for this endeavour are to create 'conditions' and 'international co-operation' for resolving identified international problems (since the earliest UN reports on the death penalty, it has been identified as a 'problem'[293]). This is achieved through the recognition under article 1(4) that states participating within the UN view the organisation as a 'centre for harmonizing the actions of nations' to attain the 'common end' of protecting human rights.

267. Therefore, consistent with the arguments presented above, the ICCPR articles 6, 7, 10, and 14, the CAT article 1 and 2, the ICESCR article 14, and the CRPD articles 5, 10, 12, 13, 14, and 15, and the texts of the General Assembly *Resolution on the moratorium on the use of the death penalty*, and the Human Rights Council *Resolution on the Question of the Death Penalty*, should all be interpreted to provide a good faith protection of human rights in the context of the capital judicial process.

268. This is consistent with UN Charter article 2(2) 'good faith obligations,' and the enumeration of good faith under the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (1970), and the principle of good faith interpretation reflecting, 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

269. The federal government has a duty to ensure the observance of the VCLT[294] preamble: "Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized," and under articles 26 and 31, Pacta sunt servanda (keep the agreement):

> Article 26
>
> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
>
> Article 31
>
> (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.[295]

[293] See, Capital Punishment: Part 1 Report, 1960; Part 2 Developments, 1961 to 1965, Department of Economic and Social Affairs, United Nations, New York, Sales No.: E.67. IV. 15 1986.
[294] Vienna Convention on the Law of Treaties (1969) 1155 U.N.T.S. 331, May 23, 1969.
[295] As replicated in the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (1986).

270. The American Law Institute, Restatement of the Law Fourth, The Foreign Relations Law of the United States (2018), s. 306(1), states that, '[a] treaty is to be interpretated in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.' Consistent with VCLT article 31(1), in *Sanchez-Llamas v. Oregon*,[296] the U.S. Supreme Court affirmed, 'an international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose' (Citing: Restatement of the Law Third). This principle was affirmed by the U.S. Supreme Court in *Abbott v. Abbott,*[297] and *Kadic v. Karadzic,* affirmed the principle that the 'federal common law incorporates international law.'[298]

271. The Supremacy Clause is included in the Constitution, Article VI, cl. 2, and states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Article I, 'To define and punish…and offences against the Law of Nations.').

272. In interpreting the Supremacy Clause, in *Ware v. Hylton*, it was held, '[i]t is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State.'[299] *The Paquete Habana,* held that, '[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.'[300]

273. The ordinary meaning of the above cited international law is that the world should be moving towards global abolition of the death penalty. This is the law that should now be affirmed in the U.S. and specifically for the benefit of Mr Wilson, as in the ICCPR article 6(6) '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.' Furthermore, in the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty (1989), the preambular affirms that article 6, 'refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable.'

274. The UNGA *Resolution on the moratorium on the use of the death penalty* (2022), preambular, notes the political process for the 'technical cooperation among Member States,' and paragraph 1, 'Reaffirms the sovereign right of all countries to develop their own legal systems.' This is the *procedural* observation on territorial jurisdiction and the right to create criminal law and punishment. The *substance* of appropriate jurisdictional standards is identified in paragraph 7(l), '[t]o establish a moratorium on executions with

[296] Sanchez-Llamas v. Oregon, 548 U.S. 331, 346 (2006).
[297] Abbott v. Abbott, 560 US. 1, 20 (2010).
[298] Kadic v. Karadzic, 70 F.3d 232 246 (2009).
[299] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796).
[300] The Paquete Habana, 175 U.S. 677, 700 (1900).

a view to abolishing the death penalty,' and under paragraph 8 abolitionist states cannot reintroduce the punishment and are called to share experiences with other states. Therefore, the role of 'sovereignty' under the UNGA resolution is to: (i) establish a moratorium; and (ii) help promote the revocation of capital judicial processes globally.

275. The Human Rights Council's Periodic Reports and the Universal Periodic Review demonstrate that the United States is acting inconsistently with the good faith interpretation of international law on the death penalty. For the Fifth Periodic Report the Human Rights Council stated in its Concluding Observations:

> Death penalty
> 30. While welcoming the reinstatement of a temporary moratorium on federal executions and the increasing number of states that have abolished the death penalty, the Committee remains gravely concerned at the continuing use of the death penalty and at racial disparities in its imposition, with a disproportionate impact on people of African descent. It is also concerned at reports of a high number of persons wrongly sentenced to death and at the lack of compensation or adequate compensation for persons who are wrongfully convicted in retentionist states. It regrets the lack of information regarding the allegations of the use of untested lethal drugs to execute prisoners and about reported cases of excruciating pain caused by the use of these drugs and botched executions (arts. 2, 6, 7, 9, 14 and 26).
>
> 31. In the light of the Committee's general comment No. 36 (2018) on the right to life and recalling its previous recommendations, the State party should:
> (a) Establish a de jure moratorium at the federal level, engage with retentionist states to achieve a nationwide moratorium, and take concrete steps towards abolition of the death penalty;
> (b) Adopt further measures to effectively ensure that the death penalty is not imposed as a result of racial bias;
> (c) Strengthen safeguards against wrongful sentencing to death and subsequent wrongful execution, guarantee effective legal representation for defendants in death penalty cases, including at the post-conviction stage, and ensure adequate compensation for persons wrongfully convicted as well as appropriate support services such as legal, medical, psychological and rehabilitation services;
> (d) Guarantee that all methods of execution fully comply with article 7 of the Covenant.[301]

276. Alabama had previously violated ICCPR article 7 in the execution of Mr Kenneth Smith through the use of nitrogen gas, and now seeks to also violate Mr Wilson's article 7 rights and inflict torture, cruel and inhuman punishment upon him. The world is moving towards the abolition of the death penalty and under the ICCPR article 6(6), the United

[301] Most recently the Concluding observations on the fifth periodic report of the United States of America, CCPR/C/USA/CO/5, 3 November 2023.

States should apply a good faith interpretation of international legal progress and join this commendable goal. As a demonstrative step, it should set aside the death penalty for Mr Wilson.

Q. The United States Death Penalty is a Violation of a Peremptory Norm of General International Law (*Jus Cogens*)

277. During the 8th World Congress Against the Death Penalty held in Berlin 15th-18th November 2022, leading academics on the death penalty presented a statement on the proposition that the punishment is now a violation of the highest legal standards recognised by the peremptory norms of general international law (*jus cogens*).[302] The statement was presented by REPECAP – Academics for the Abolition of the Death Penalty and Cruel Punishment, and was drafted by Professors William Schabas, Luis Arroyo Zapatero, Jon Yorke, and Antonio Munoz Aunion.

278. The signatories to this statement included the former Prime Minister of Spain, José Luis Rodríguez Zapatero, Mr Robert Badinter, the former Minister of Justice of France, Dr Roberto Carles, the Ambassador of the Republic of Argentina to Italy, and Mr Federico Mayor Zaragoza, the Director-General of the United Nations Educational, Scientific, and Cultural Organization (UNESCO). Importantly for this submission for the UN Special Procedure mandate, the statement was also signed by Juan Mendez, the former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2010-2016).

279. The REPECAP statement, 'Abolition of the Death Penalty as a Peremptory Norm of General International Law (*Jus Cogens*),' is reproduced in full:

(1) This 8th World Congress Against the Death Penalty occurs in the year of the 15th anniversary of the UN General Assembly's first vote on the Resolution on the moratorium against the death penalty. In 2007 the resolution received 107 votes in support and there have been a subsequent rise to 123 in 2020. During this period Amnesty International recorded that the abolitionist countries in the world had increased from 144 to 170. This is a clear demonstration of a global trend solidifying the legal standards for a world free of the death penalty.

(2) Following this rate of change we have reached a significant moment in the history of the death penalty. The temporary exception in ICCPR article 6(2) which allows for the application of the punishment for the 'most serious crimes,' is now starkly brought into focus through article 6(6) which states '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment.' This is a time-sensitive feature which allows us to question the retentionist member states' claims they can justifiably continue to use the death penalty in perpetuity.

[302] The drafting team were members of the Academic Network for the Abolition of the Death Penalty and Cruel Punishment. For the full statement and list of signatories, see *Statement – Abolition of the Death Penalty as a Peremptory Norm of General International Law* (*jus cogens*), on the Occasion of the 8th World Congress Against the Death Penalty, Berlin 15-18 November 2022, https://www.academicsforabolition.net/en/blog/abolition-of-the-death-penalty

(3) Today over two-thirds of states affirm this abolitionist position. We are now within a new moment in the promotion of global synergy for abolition. All countries should join the abolitionist community, as General Comment no. 36 on the right to life:

> reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable […] and necessary for the enhancement of human dignity and progressive development of human rights

(4) As humanity has evolved and we reflect upon the sanguinary history of sovereign power's relationship with capital punishment, we should utilise our refined interpretive tools of the ICCPR to demonstrate what is legitimate in a government's application of punishment.

(5) The United Nations has provided a multi-faceted review to achieve this assessment. The UN has clearly signalled and created mechanisms for the aspiration of global abolition, in that:

- The international legal mechanism for abolition is articulated in the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

- Article 6(2) is often misunderstood. It is not a licence to execute but rather a necessary imposition of restrictions on the use of capital punishment by those States that still cling to the barbaric practice.

- The ECOSOC Safeguards (and amendments) identifying minimum standards in the capital judicial processes should be observed and be interpreted to provide impetus for governments to consider national abolition.

- The Secretary General's Quinquennial Report on the death penalty assesses state compliance with the Safeguards and identifies practices inconsistent with treaty standards.
- The Human Rights Council's High-Level Panel discussions on the question of the death penalty considers dialogues on pertinent issues of the punishment and observes global trends leading towards abolition.

- The UN Special Procedures are regularly using their mandates to denounce the death penalty around the world. Reports have noted the global norms towards abolition and specific communications in capital cases identifying treaty violations.

- The concluding observations of UN committees call retentionist countries to adhere to treaty standards, highlight issues of unfairness and discrimination in capital trials, inhumane conditions on death row, and the cruelty and torture imposed through executions.
- The Universal Periodic Review has witnessed increased recommendations for retentionist states under review. Following the three completed UPR cycles,

there is a corpus of recommendations for the initiation of moratoriums, de jure abolition, and the ratification of the Second Optional Protocol. Both recommending states and civil society organisations are using this peer-review mechanism to bring transparency concerning the inhumanity of the death penalty.

- The abolition of the death penalty is seen as reflective of the Sustainable Development Goals. SDG 16 provides for 'Strong Institutions and Access to Justice and Build Effective Institutions,' but the application of the death penalty is inconsistent with this goal. Specifically, SDG 16.1, aims to reduce death rates, promote equal access to justice and protect fundamental freedoms. The use of the death penalty does not signal legitimate strength in institutions, but renders counterproductive and inhumane consequences, including a brutalising effect upon society.

(6) This sophisticated UN framework aiming to rectify the problem of the death penalty demonstrates that the punishment should now be considered as a violation of the inalienable dignity and the rights of the person.

(7) No capital judicial process can be seen to consistently maintain the legal protections necessary to satisfy fair criminal proceedings under the ICCPR article 14.

(8) The death penalty is not a justifiable form of governmental and societal retribution, and it cannot be proven to possess a special deterrent effect for the prevention or reduction of crime over and above terms of imprisonment.

(9) Today we have extensive empirical knowledge about the modes of execution and we know that these generally result in a cruel and inhumane way of killing. This has been seen from the phenomenon of death row to the evident failure of procedures once presented as the most humane, which have also systematically incurred inhumane production of pain and suffering, as well as in the form of "botched executions".

(10) Methods of execution are cruel and cannot protect the condemned from the psychological and physiological impact of the death penalty. It is inherently a cruel and inhumane invasion of the condemned person, and when it is administered there are negative impacts upon the families and the community.

(11) In seeking to create humane ways to protect society and appropriately punish violations of the criminal law, we find ourselves in a historical moment. As a global community which advances principles of human rights we are in a position of normative legitimacy to maintain that the death penalty is a per se violation of human rights. There is cumulative evidence to suggest that the abolition of the death penalty is now a new global norm, a peremptory norm of general international law (*jus cogens*).

(12) Abolition would therefore enable people within the jurisdictions of retentionist countries to benefit from this advancement in understanding. The leading research on the death penalty demonstrates:

(a) It is not a justifiable function of legitimate government;
(b) It violates human rights; and therefore,
(c) It contravenes the peremptory norms of general international law (*jus cogens*)

(13) For all of the above reasons, the undersigned understand that the proscription of the death penalty from punitive systems is a demand based on the right to life and the right not to subject human beings to torture or inhuman treatment, which we consider to be rights integral to jus cogens.

(14) We therefore call for a global abolition of the death penalty. The death penalty has no place in our world today.

280. The argument for the death penalty being a violation of *jus cogens* also finds support in the Separate Opinion of Judge Cançado Trindade in the *Jadhav* case (India v Pakistan) in the International Court of Justice:

> there is evidence that there is an evolving customary international law of prohibition of the death penalty, as sustained by an opinio juris communis. There are nowadays, as already observed, international treaties on the abolition of the death penalty. There remain some States, however, that in practice seem to overlook this relevant development, in keeping on applying the death penalty; yet, they cannot at all pretend to exclude themselves from the evolving customary international law in prohibition of the death penalty. This would amount to a breach of it, in the present case interrelated with the breach of Article 36 (1) (b) of the VCCR.[303]

281. The *Report of the Secretary-General on the Question of the death penalty* affirms that all state parties to the ICCPR, 'should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future.'[304] In 2023, during the Human Rights Council's *high-level panel discussion on the question of the death penalty*, which focused on the issue of the most serious crimes, Mr Václav Báleck, the President of the Human Rights Council, stated that:

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[303] Jadhav (India v. Pakistan), I.C.J. Reports 2019, 418. Judge Cançado Trindade on opinion juris (Order, 18 May 2017), 16. ('The insertion of the matter under examination into the domain of the international protection of human rights, counted early on judicial recognition (cf. Part III, supra), "there being no longer any ground at all for any doubts to subsist as to an opinio juris to this effect"; in effect — as I further pondered in my aforementioned concurring opinion in the IACtHR's Advisory Opinion No. 16 of 1999 — the subjective element of international custom is the opinion juris communis, and "in no way the voluntas of each State individually."

> "it is no longer possible to consider the right to information on consular assistance (under Article 36 (1) (b) of the 1963 Vienna Convention on Consular Relations) without directly linking it to the corpus juris of the ILHR" (IACtHR's Advisory Opinion No. 16 of 1999, para. 29).")

[304] Report of the Secretary General, Question of the death penalty, A/HRC/51/7, 25th July 2022, p. 2.

> the United Nations had opposed the death penalty for many years, a position that affirmed the promise of the Charter of the United Nations to uphold the highest standards of protection of all human beings. The death penalty, as the most severe and irreversible of punishments, was profoundly difficult to reconcile with human dignity and the fundamental right to life. The death penalty also led to innocent people being killed because no justice system was perfect.[305]

282. In his submission to the high-level panel, Mr Volker Türk, the High Commissioner for Human Rights stated, 'until every nation had abolished the death penalty, the road to defending human dignity would never be fully complete.'[306]

283. As the world moves towards world-wide abolition the 'ordinary meaning' of the ICCPR evolves with this change. This was envisaged within the ICCPR article 6(6) as the text is future looking. The future of the right to life under article 6, should see the need for subsections 2-5 to become legally redundant as states should abolish the death penalty. The foundational nature of the right to life is located in article 6(1), and to help this right to be fully realised, article 6(6) was included. It was both an aspirational and visionary construction of the text to lead to a future better protection of life, the prohibition of torture, and inhuman punishment, and the safeguarding of human dignity.

*i. The International Law Commission's Draft Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)*

284. In 2022, under the guidance of the Special Rapporteur, Dire Tladi, the International Law Commission (ILC) conducted work for the publication of the, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).[307] Building upon the enumeration of peremptory norms of general international law as identified in articles 53 and 64 of the Vienna Convention on the Law of Treaties,[308] the ILC has provided detailed advice for decision makers on how to determine the identification, scope, and legal consequences of the peremptory norms of general international law (*jus cogens*), and examples are provided in the Annex through a non-exhaustive list.[309]

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[305] Human Rights Council, High-level panel discussion on the question of the death penalty, A/HRC/54/46, 25th July 2023, p. 2
[306] Id. p. 3.
[307] See the Analytical Guide to the Work of the International Law Commission, Peremptory norms of general international law (*jus cogens*), https://legal.un.org/Ilc/guide/1_14.shtml
[308] The Vienna Convention on the Law of Treaties (1969) article 53, states, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention a peremptory norm of general international law is 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," and article 64 states, "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."
[309] See, International Law Commission, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)* 2022,

285. Whilst specific consent is required for customary international law, the declaration of a norm as *jus cogens* requires a more holistic review of the criteria. It looks to general state practice but also situates this with other evidentiary aspects. This distinguishing principle has been endorsed by U.S. courts. In *Siderman de Blake v. The Republic of Argentina*,[310] Judge Fletcher identified that:

> While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm.[311]

286. So the principle of state consent is intrinsic to the recognition of customary international law. However, the court goes on to explain the difference in the content of *jus cogens* as:

> In contrast, *jus cogens* embraces customary laws considered binding on all nations [] and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations []. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent.[312]

287. In the International Court of Justice decision in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[313] it was affirmed that the determination of peremptory norms can have, 'far reaching implications,' and it is necessary to identify a, 'generally accepted methodology,'[314] which reflects the 'conscience of mankind,' the 'moral law,' and the 'spirit and aims of the United Nations,' that are recognised to form the fundamental values shared by the international community

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https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf provides the non-exhaustive list in paragraph 16 which states:

> The norms in the annex are presented in no particular order. Their order does not, in any way, signify a hierarchy among them.
>
> Annex
>
> (a) the prohibition of aggression;
> (b) the prohibition of genocide;
> (c) the prohibition of crimes against humanity;
> (d) the basic rules of international humanitarian law;
> (e) the prohibition of racial discrimination and apartheid;
> (f) the prohibition of slavery;
> (g) the prohibition of torture;
> (h) the right of self-determination.

Para. 16., page 89.

[310] Siderman de Blake v. The Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992). '*Jus cogens* is related to customary international law (the direct descendent of the law of nations),' 714.

[311] Id. 715.

[312] Id. Internal quotations marks omitted. The judgment cites, Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 Yale J. Int'l L. 332, 350-51 (1988). Affirmed in Saleh v. Bush, 848 F.3d 880, 893 (9th Cir. 2017).

[313] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, pp. 15, 23.

[314] Id.

as established. These values and obligations were also affirmed in, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* to 'protect essential humanitarian values.'[315] The conscience of humankind, morality of the law, and the aims of the UN, all intersect and have a synergistic quality to provide the holistic evaluation of an issue to determine whether a peremptory norm of international law exists, and if a meaningful application of this synergy occurs this results in a good faith assessment and determination of a *jus cogens* norm.

288. Draft Conclusion 2 states:

> Peremptory norms of general international law (*jus cogens*) reflect and protect *fundamental values of the international community*. They are *universally applicable* and are *hierarchically superior* to other rules of international law.[316] (emphasis added)

289. There are three essential characteristics associated with the determination of a peremptory norm. These are identified through the: (a) recognition of 'fundamental values,' that are, (b) 'universally applicable,' and constitute a norm which is, (c) 'hierarchically superior' to other norms or has evolved to become so.[317] The fundamental values reflect the observations in the case law cited above and constitute actions of governments which would violate the conscience of humankind as reflected within the aspirations of the United Nations. In the problem of the death penalty the global humanitarian values and the aims of the UN must therefore be considered. The primary standard is found in ICCPR article 6(6) in which it promotes global humanitarian values by calling for the abolition of the death penalty by all States parties. The good faith reading of the ICCPR, under the interpretive lens of the VCLT, is therefore brought into focus under the standards recognised in Draft Conclusion 2. Hence, this is how it can be interpreted that the abolition of the death penalty is reflective of a peremptory norm of general international law (*jus cogens*). The ICCPR Preambular states, '[r]ecognizing that these rights derive from the inherent dignity of the human person,' and article 6(6) provides that, '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.' The ordinary meaning

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[315] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro, I.C.J. Reports 2007, p. 104, para. 147. See also, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), I.C.J. Reports 2015, p. 4, para. 87.

[316] The International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries, 2022, A/77/10, p. 18.

[317] In 1968 during the First Session of the United Nations Conference on the Law of Treaties it was stated: 'in a properly organized international society there was a need for rules of international law that were of a higher order than the rules of a merely dispositive nature from which States could contract out.' Official Records of the United Nations Conference on the Law Treaties, First Session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, A/CONF.39.11, 53rd meeting. In Prosecutor v. Anto Furundžija (Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Judicial Reports 1998, vo. I,

of the ICCPR is that its object and purpose is to help create a world without the death penalty.

290. Draft Conclusion 3 provides definitional standards such that the peremptory norm is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.'[318] These are taken up in more detail in Draft Conclusions 4-6. The norm must meet the necessary criteria in Draft Conclusion 4 (a) that it is a 'norm of general international law.'[319] The Commentary states that for the methodology of 'accepted and recognized' it is to be considered a 'single composite criterion,' and although the 'two criteria are cumulative'[320] they are to be determined through the lenses of Draft Conclusions 5-9. Whilst the criteria of 'accepted and recognized' and 'States as a whole' is indicated in Draft Conclusion 4, it is taken up again in Draft Conclusion 6. For establishing the requirement of 'states as a whole' and the 'international community of States as a whole,' Draft Conclusion 7(2) provides guidance:

> Acceptance and recognition by *a very large and representative majority of States* is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition *by all states is not required*. (emphasis added).

291. In the Fifth Report by the Special Rapporteur, Dire Tladi, it was noted that during the discussions with governments on the meaning of 'states as a whole,'[321] Columbia stated that it should comprise, 'a very large majority,'[322] Viet Nam affirmed that a, 'community of States as a whole [is] represented,'[323] Singapore stated that, 'acceptance and recognition be across regions, legal systems and cultures.'[324] Spain submitted on the word, 'representative,' and explained, '[t]hat expression (at least in Spanish) not only means a very large majority (quantitative criterion), but also requires geographical (regional groups) and situational representativeness, and does not imply unanimity.'[325] Interpreting these state contributions, the Commentary affirms that concerning Draft Conclusion 7(2), 'a very large and representative majority of States' is required, in which the meaning is derivable from the phrase, 'community of states' as opposed to simply 'States,' and that:

> The combination of the phrases 'as a whole' and 'community of States' serves to emphasize that it is States as a collective or community that must accept and

[318] Draft conclusions and commentary, p. 3.
[319] There is a certain inelegance to the final editing of numerous parts of the Draft Conclusions, and I have sympathy with the United States' observations which state….
[320] Id. p. 29, para 3.
[321] Fifth Report on peremptory norms of general international law (jus cogens), by Dire Tladi, Special Rapporteur, A/CN.4/747, 24 January 2022, p. 13.
[322] Id.
[323] Id.
[324] Id. pp. 29-30.
[325] Fifth Report on peremptory norms of general international law (*jus cogens*), by Dire Tladi, Special Rapporteur, A/CN.4/747, 24 January 2022, fn. 203, p. 30-31.

> recognise the non-derogability of a norm for it to be a peremptory norm of general international law (*jus cogens*).[326]

292. Over two-thirds of the world's states have rejected the death penalty and in each region a majority is represented and therefore the community of abolitionist states clearly fits this criteria. There is a collective understanding that once the death penalty is abolished it cannot be reintroduced, and so the abolitionist principle is reflected as non-derogable. Each of the human rights regions are progressing towards abolition, as reflected in the majority vote in the UNGA *Resolution on the moratorium on the death penalty*. This is demonstrative of a community of states, which for the majority of the world's states, 'as a whole,' are seen to promote a world without the death penalty. This collective aspiration elevates the norm against the death penalty to satisfy the highest thresholds of the hierarchy of international law.

293. The holistic quality of the evidence necessary to establish *jus cogens* can be seen to be reflected within the High-Level Panel of the Human Rights Council which occurred on 4th March 2015 which, 'exchange[d] views on the questions of the death penalty, and [addressed] regional efforts aiming at…abolition.'[327] Mr. Joachim Rücker, President of the Human Rights Council, noticed the, 'major achievement,'[328] that a significant majority of countries around the world had, 'either abolished the death penalty, introduced a moratorium or did not practice it.'[329] In language consistent with the criteria to demonstrate a peremptory norm, Ms. Ruth Dreifuss, former President of the Swiss Confederation, affirmed, 'humanity had made considerable advances towards the universal abolition of the death penalty.'[330] The panel concluded that in considering each of the human rights regions it is, 'possible to move gradually towards abolition through dialogue and advocacy,' and this is because the death penalty is, 'not about any particular culture or any religion.'[331] Abolition of the death penalty is therefore a universal ideal.[332] The High-Level Panel's conclusions are consistent with the observation of governments as recorded in the ILC's Fifth Report. Hence they are all expressions of the global standards satisfying Draft Conclusion 7 as the principle of 'states as a whole,' in identifying a *jus cogens* norm against the death penalty.

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[326] Draft conclusions and commentaries, page 40, para 6.
[327] High-level panel discussion on the question of the death penalty, Report of the United Nations High Commissioner for Human Rights, UNGA, A/HRC/30/21, 16 July 2015, p. 2.
[328] Ibid.
[329] Ibid.
[330] Ibid.
[331] Ibid., p. 12.
[332] On 26 February 2019 a further HRC high-level panel focused on the associated human rights violations and concluded:

> [i]t is fundamentally unjust for a State to decide who deserved to live and who did not…the panel encouraged societies to seek reconciliation rather than meeting violence with violence by applying the death penalty.

High-level panel discussion on the question of the death penalty, A/HRC/42/25, 26 February 2019, p. 10.

294. We have now reached the threshold of the ‘states as a whole’ rejection of the death penalty satisfying the ILC’s clarifying methodology. This position is consistent with the protection of global humanitarian values as the basis of peremptory norms. Hence the death penalty should now be interpreted to violate such norms.

295. It is now an appropriate moment for the relevant Special Procedure mandates to declare that the death penalty is a violation of the peremptory norm of general international law (*jus cogens*).

Respectfully submitted:

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