



THE UPR PROJECT AT BCU

A JOINT SUBMISSION BY:

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Centre for Human Rights
Centre for American Legal Studies
Centre for Law, Science and Policy

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ABOUT THE UPR PROJECT AT BCU

The UPR Project at BCU was established by the Centre for Human Rights at Birmingham City University's School of Law in 2018. The Centre for Human Rights promotes the protection of human rights, access to justice, and the rule of law around the world through research, education, and consultancy activity.

The Centre for Human Rights established The UPR Project at BCU to generate public awareness about the UPR; support the development of world-leading UPR-focused research and educational resources; and to facilitate the submission of Stakeholder Reports direct to the UPR. Its Stakeholder Reports harness the academic expertise of both the School of Law's three research centres – The Centre for Human Rights, Centre for American Legal Studies, and Centre for Law, Science and Policy – and its global network of scholars and practitioners.

OUR PARTNER

For this submission the UPR Project at BCU partners with Pace University's Elisabeth Haub School of Law. The Elisabeth Haub School of Law is ranked #1 in Environmental Law by US News and World Report, and offers a J.D. program with concentrations in a variety of areas, including criminal law and procedure. It also offers LL.M. degrees in both Environmental and International Law, a series of joint degree programs, and a Doctor of Juridical Science (S.J.D.) in Environmental Law. The Law School is home to the Pace Criminal Justice Institute, which generates educational opportunities for students and promotes interdisciplinary collaboration among scholars, policymakers and practitioners locally, nationally and internationally. The Pace Criminal Justice Institute supports and encourages creative research, teaching, and discussion concerning the theory and practice of criminal law by those interested in advancing criminal law reforms and promoting the fair and ethical prosecution of crime.

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INTRODUCTION

1. There are nine core international human rights treaties,¹ of which the United States of America (US) is a party to three: the International Covenant on Civil and Political Rights (ICCPR),² the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,³ and the International Convention on the Elimination of All Forms of Racial Discrimination.⁴ The US has significantly restricted its implementation of these treaties through its attachment of reservations, understandings, and declarations (RUDs).⁵
2. There are aspects of the US legal and political structure that have the potential to complicate its ability to implement international human rights norms. The US Constitution binds the federal and state governments and its Bill of Rights sets the scope of individual rights as interpreted by the US Supreme Court. For international treaties to be part of federal law and thus binding on the states,⁶ they must be ratified by two-thirds of the US senate--a supermajority that is often difficult to achieve⁷--and as recent practice demonstrates, treaties can be abrogated at will by the President.⁸
3. The US Constitution establishes a federal system in which power is distributed between the federal government and the states that have so-called "police powers." This means that US states can enact their own laws governing criminal law (including the application of the death penalty and procedures for release from incarceration) and environmental regulation, provided these measures do not infringe upon any of the rights protected by the US Constitution.⁹ The fact that the federal government must respect the

¹ UN OHCHR, 'The Core International Human Rights Instruments and their Monitoring Bodies' <www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [hereinafter referred to as 'ICCPR'].

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 [hereinafter referred to as 'CAT'].

⁴ International Covenant on the Elimination of Racial Discrimination (adopted 21 December 1965, entered in force 4 January 1969) UNGA Resolution 2106 (XX)2 Article 5(a) [hereinafter referred to as 'ICERD'].

⁵ See, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331; 8 ILM 679 (1969) Article 2(1)(d)

⁶ US Const Art VI, para 2 ("The laws of the United States...and all Treaties...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.").

⁷ US Const Art II, section 2.

⁸ The White House, 'Statement by President Trump on the Paris Climate Accord' (1 June 2017) <www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>; See also, Harold Hongju Koh, 'Presidential Power to Terminate International Agreements' (2018) 128 Yale L J 12, arguing that this is a matter for Congress.

⁹ See, e.g., Ann Bradford and Eric A Posner, 'Universal Exceptionalism in International Law' (2011) 52 Harv Intl L J 1, 5.

sovereignty of the states and their rights to regulate for the health, safety, morals, and the general welfare of citizens within their borders, can be raised by the US as a reason for failing to comply with international commitments. The reluctance of the US to engage with international human rights standards and its reliance on its own constitutional provisions as a sufficient guarantee of human rights, is often described as “American exceptionalism.”¹⁰ However, in 2014, President Obama turned this position on its head:

I believe in American exceptionalism with every fibre of my being. But what makes us exceptional is not our ability to flout international norms and the rule of law; it’s our willingness to affirm them through our actions.¹¹

4. Indeed, while the federal political system may limit the extent to which the states can be compelled to comply with international standards, the federal government can initiate policies to encourage state compliance. Nevertheless, US engagement with the Universal Periodic Review has demonstrated a significant level of resistance against implementing domestic change in line with global norms.
5. In this submission, we encourage the US to commit to improving its human rights protection and promotion by engaging meaningfully with the third cycle of the UPR in 2020. This includes giving full and practical consideration to all recommendations made by Member States, effectively implementing the recommendations the US accepts, and actively engaging with civil society throughout the process.
6. This Stakeholder submission focuses upon three themes:
 - a. Capital punishment;
 - b. Climate change and greenhouse gas emissions; and,
 - c. Compassionate release from prison.

¹⁰ See, Michael Ignatieff, *American Exceptionalism and Human Rights* (Princeton University Press 2005) 3-9.

¹¹ President Barak Obama, The President’s Address to the US Military Academy, West Point, May 28, 2014.

CAPITAL PUNISHMENT

A. Normative and Institutional Framework of the US

7. The international law regulating capital punishment is comprised of the ICCPR¹² and its Second Optional Protocol,¹³ the ECOSOC Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty ('Safeguards'),¹⁴ the Report of the Secretary-General on the Question of the Death Penalty,¹⁵ and the UN General Assembly's biennial vote on the Resolution on a moratorium of the death penalty.¹⁶ Furthermore, there are other international human rights agreements relevant to capital punishment, including the International Covenant on the Elimination of All Forms of Racial Discrimination¹⁷ and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.¹⁸
8. There is a growing international consensus against capital punishment. At the end of 2018, more than two-thirds of the world's nations had "abolished the death penalty in law or practice."¹⁹ Nevertheless, the US continues to rely on the RUDs that it has lodged against the international treaties to which it is a party, and to date it has refused to set in motion a national policy to move towards abolition. This limited engagement with international human rights goes against the global trend towards abolition of the death penalty.

B. Implementation of Recommendations from Cycle Two in 2015

9. In 2015, the US received 343 recommendations. Of these, 43 were made regarding the death penalty (or 12.54% of the total number). It accepted 10 of

¹² ICCPR (n 2).

¹³ Second Optional Protocol to the International Covenant on Civil and Political Rights (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.

¹⁴ ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1984/50 (25 May 1984); ECOSOC 'Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1989/64 (24 May 1989); ECOSOC 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' ECOSOC Res 1996/15 (23 July 1996).

¹⁵ See, eg, ECOSOC 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General' UN Doc E/2015/49 (13 April 2015).

¹⁶ See, UNGA Res A/RES/73/175 (17 December 2018).

¹⁷ ICERD (n 4).

¹⁸ CAT (n 3).

¹⁹ Amnesty International, 'Death Penalty in 2018: Facts and Figures' (10 April 2019) <www.amnesty.org/en/latest/news/2019/04/death-penalty-facts-and-figures-2018/>.

the 43 in full or part (or 23% of the death penalty recommendations). Below is a consideration of the action taken on each accepted (in full or in part) recommendation.

10. The US accepted two recommendations regarding the ratification of the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. The recommendation from **Namibia** (para 176.12)²⁰ was accepted as it asked the government to *consider* ratification. In accepting the recommendation from **Gabon** (para 176.14),²¹ the US stated it would consider the ratification of the treaties that the government was already committed to, but this did not include the Second Optional Protocol. It then noted similar recommendations directly asking the US to sign and ratify the Second Optional Protocol (see **Chile**, para 176.11, and others).²² Whilst the US government may have ‘considered’ ratification of the Second Optional Protocol, the current position is non-ratification.
11. The Member States demonstrated an understanding of the distinctions between the different mental health classifications of capital defendants and death row inmates. When making recommendations, they clearly distinguished between not executing those with “intellectual disabilities” (**Spain** para 176.196),²³ and exempting persons with a “mental disability or illness” from the death penalty (**France** para 176.197²⁴; **Sweden** para 176.180).²⁵ The US supported these three recommendations in part and stated that: “[w]e support these recommendations with respect to measures required to comply with U.S. obligations, and with respect to persons with certain intellectual disabilities, but not all persons with any mental illness.”²⁶ This response was unclear, in

²⁰ ‘Consider the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.’ UNHRC, ‘Report of the Working Group on the Universal Periodic Review – United States of America’ [20 July 2015] UN Doc A/HRC/30/12 para 176.12 [hereinafter referred to as ‘Report of the Working Group’].

²¹ ‘Adhere to international legal instruments to which it is not yet a party, particularly the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.’ Ibid para 176.14.

²² Ibid paras 176.11, 176.10, 176.13, 176.14.

²³ ‘When continuing to implement the death penalty, do not apply it to persons with intellectual disabilities.’ Ibid para 176.196.

²⁴ ‘Ensure that no person with a mental disability is executed.’ Ibid para 176.197.

²⁵ ‘Introduce a moratorium on the death penalty aiming at complete abolition and take all necessary measures to ensure that the death penalty complies with minimum standards under international law. Exempt persons with mental illness from execution. Commit to ensuring that the origin of drugs being used is made public.’ Ibid 176.180.

²⁶ UNHRC, ‘Report of the Working Group on the Universal Periodic Review – United States of America Addendum 1’ [14 September 2015] A/HRC/30/12/Add1 para 9 [hereinafter referred to as ‘Report of the Working Group Addendum’]. This unsatisfactory understanding of the various mental health conditions was provided through reliance on the then-13 year old US Supreme Court decision in *Atkins v. Virginia*, which held that the execution of those with an intellectual disability (classification through the Diagnostic and Statistical Manual, [DSM-4rev] as “mildly mentally retarded”) is cruel and unusual punishment contrary to the Eighth Amendment of the US Constitution. However, the decision in *Atkins* only exempts those with intellectual disabilities from execution, it does not extend to the execution of those suffering from other severe mental illnesses. It also failed to provide a practicable account of the diagnostic flexibility in determining IQ levels for diagnosis despite in *Hall v. Florida*, Justice Kennedy’s

that it did not set forth the distinctions between mental health classifications, and consequently, how mental health assessment informs who is eligible for the death penalty. The US significantly limited its commitment to its domestic jurisprudence, and consequently nullified the impact of the wider reaching international law protections of persons suffering from mental illness.

12. No action has been taken to implement the supported recommendations made by **Angola** (para 176.194)²⁷ and **France** (para 176.195)²⁸ on eliminating racial discrimination in the death penalty. As there is already a reliable evidence-base for racial discrimination within capital punishment in the US,²⁹ it may be more prudent for Member States to recommend how US states and the federal government can make use of existing studies to provide a basis for reform and/or abolition. For example, in 2018, in *State v. Gregory*,³⁰ the Washington State Supreme Court struck down its capital punishment statute based on a study on race.

13. The US supported in part the recommendation from **Belgium** (para 176.198)³¹ encouraging the US to follow up on the Human Rights Committee's recommendations on avoiding racial bias, preventing wrongful convictions, and providing compensation in wrongful conviction cases. The US stated that, "[w]e support consideration of these recommendations, noting that we may not agree with all of them,"³² demonstrating its inflexibility towards international observations on these human rights violations. A very broad recommendation on wrongful convictions and methods of execution was submitted by the **Democratic Republic of the Congo** (para 176.199).³³ The lack of specificity provided the US with an easy opportunity to limit the response, allowing recommendations to be supported, without taking any further action. States

call for, "our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." See, also, *Madison v. Alabama* 586 U.S. __ (2019).

²⁷ 'Identify the root causes of ethnic disparities concerning especially those sentenced to capital punishment in order to find ways for eliminate ethnic discrimination in the criminal justice system' [sic]. Report of the Working Group (n 20) para 176.194.

²⁸ 'Identify the factors of racial disparity in the use of the death penalty and develop strategies to end possible discriminatory practices.' Ibid para 176.195.

²⁹ Death Penalty Information Center, 'Race: Additional Resources' <<https://deathpenaltyinfo.org/policy-issues/race/race-additional-resources>> accessed 21 September 2019.

³⁰ *State v Gregory* 427 P 3d 621 (Wash 2018); Katherine Beckett & Heather Evans, 'The Role of Race in Washington State Capital Sentencing 1981-2014' [25 August 2016] <<https://files.deathpenaltyinfo.org/legacy/documents/WashRaceStudy2014.pdf>>.

³¹ 'Take specific measures in follow-up to recommendations of the Human Rights Committee to the United States in 2014 with regards to capital punishment such as measures to avoid racial bias, to avoid wrongful sentencing to death and to provide adequate compensation if wrongful sentencing happens.' Report of the Working Group (n 20) para 176.198.

³² Report of the Working Group Addendum (n 26) para 9.

³³ 'Strengthen the justice sector in order to avoid imposing the death penalty on those persons wrongly convicted, and reconsider the use of methods which give raise to cruel suffering when this punishment is applied.' Report of the Working Group (n 20) para 176.199.

should ensure they are using the SMART method when making recommendations.³⁴

14. The US supported the recommendation from **Poland** (para 176.200)³⁵ on ensuring access to effective legal assistance, including in post-conviction proceedings. No action has been taken by the US to implement this recommendation. There is currently no federal constitutional right to post-conviction counsel,³⁶ which is a failure of the necessity for the 'equality of arms' principle to be realised at every level of the proceedings.³⁷ Despite this, some US states, for example Arizona, have legislated to provide a state right to post-conviction counsel.³⁸

15. Of the ten recommendations supported in full or part on capital punishment by the US in 2015, none of them have been implemented.³⁹

C. Further Points for the US to Consider

The Global Norm Against the Death Penalty

16. There are signs that the US could commit to the global trend towards the abolition of the death penalty. Three US states have abolished capital punishment since the 2015 review, with one further state implementing a governor-imposed moratorium.⁴⁰ This is reflective of a change in political sentiment towards the use of the death penalty. In the US, 21 states have now abolished capital punishment and the rate of executions fell to 25 in 2018.⁴¹

³⁴ UPR Info, 'A Guide for Recommending States at the UPR' [2015] <www.upr-info.org/sites/default/files/general-document/pdf/upr_info_guide_for_recommending_states_2015.pdf> 27-29 accessed 21 September 2019.

³⁵ 'Strengthen safeguards against wrongful sentencing to death and subsequent wrongful execution by ensuring, inter alia, effective legal assistance for defendants in death penalty cases, including at the postconviction stage.' Report of the Working Group (n 20) para 176.200.

³⁶ See, *Pennsylvania v Finley* 481 US 551 (1987); *Murray v Giarrantano* 492 US 1 (1989).

³⁷ ICCPR (n 2); UNHRC, 'General Comment No 32' on 'Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial [2007] UN Doc CCPR/C/GC/32.

³⁸ 16A Arizona Revised Statutes Rules Crim.Proc., Rule 32.4(b)(1).

³⁹ This shows a disappointing lack of engagement with the implementation process and reveals that, with regards to the US, the UPR is, "more honour'd in the breach than the observance", Hamlet, Act 1, s. 4. As Human Rights Watch noted in the 2015 US UPR, "[t]he UPR is ineffective if limited to a conceptual exercise, and no country should claim success by accepting recommendations that require no identifiable outcomes or even proof of a deliberative process", HRW, 'United States Universal Periodic Review Stakeholder Submission' (2015) para 4 <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS22.aspx> accessed 21 September 2019.

⁴⁰ Death Penalty Information Center, 'Facts About the Death Penalty' (31 May 2019)

<<https://deathpenaltyinfo.org/documents/FactSheet.pdf>> accessed 21 September 2019. Correct as at 21 September 2019.

⁴¹ Death Penalty Information Center, 'Executions by Year' [2018] <<https://deathpenaltyinfo.org/executions-year>> accessed 21 September 2019. This policy shift is consistent with the rationale of the recommendations for the signing and ratification of the

Miscarriages of Justice

17. The possibility of wrongful convictions was raised in the second cycle (**Belgium** and the **DRC**).⁴² As of 18 September 2019, the Death Penalty Information Center, based in Washington D.C., recorded that since 1973, there have been 166 wrongful capital convictions in the US. Unfortunately, there are reasonable factual grounds to believe that the US has executed at least sixteen innocent people since 1976.⁴³
18. In *Avena*⁴⁴ and *LaGrand*,⁴⁵ the International Court of Justice held against the US for violating Article 36(1)(b) of the Vienna Convention on Consular Relations, which provides for access to consular assistance in criminal proceedings.⁴⁶ Despite these ICJ judgments, there continues to be a significant number of foreign nationals that have been sentenced to death in the US who are still suffering the consequences of this violation. For example, in 2002, Linda Carty, a dual US and UK citizen, was sentenced to death in Texas. The UK government was not notified of her case until after the trial was completed.⁴⁷ When the UK tried to intervene in post-conviction proceedings, the government's claims were denied for "want of jurisdiction."⁴⁸ The failure of the system to guarantee her right to consular assistance arguably contributed to Carty receiving a death sentence. Her trial counsel was ineffective and made many rudimentary mistakes at the guilt and sentencing phases of the trial,⁴⁹ and the state prosecutor's conduct revealed a "misunderstanding of the discovery rules,"⁵⁰ in the withholding of important potentially exculpatory evidence. Carty did not receive a fair trial and was denied her right to due process of law, rendering her conviction unsafe.⁵¹

Second Optional Protocol (**Namibia, Chile, and Gabon**). It is also reflective of the ICCPR Article 6(6)'s encouragement of all UN member states to abolish the punishment.

⁴² Report of the Working Group (n 20) paras 176.198, 176.199.

⁴³ Carlos DeLuna, Ruben Cantu, Larry Griffin, Joseph O'Dell, David Spence, Leo Jones, Gary Graham, Claude Jones, Cameron Willingham, Troy Davis, Lester Bower, Brian Terrell, Richard Masterson, Robert Pruett, Carlton Michael Gary, and Larry Swearingen. See, Death Penalty Information Center, 'Executed But Possibly Innocent' <<https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent>> accessed 21 September 2019.

⁴⁴ Case Concerning *Avena and Other Mexican Nationals (Mexico v US)* Judgment of 31 March 2004.

⁴⁵ *LaGrand Case (FRG v US)* 2001 ICJ ¶ 1 ¶ 13 (27 June 2001);

⁴⁶ Vienna Convention on Consular Relations ("VCCR"), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, Article 36(1)(b).

⁴⁷ *Carty v Thaler* 583 F 3d 244 (5th Cir 2009).

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Reprieve, 'Linda Carty' <<https://reprieve.org.uk/case-study/linda-carty/>> accessed 21 September 2019. See also ICCPR Art 14 (n 2); United Nations, *Basic Principles on the Role of Lawyers* (7 September 1990); Jon Yorke, 'An Experience of Time in the Capital Judicial Process' (2019) 24 *Tex J on CL & CR* 189.

Methods of Execution

19. Although the US Supreme Court affirmed the constitutionality of lethal injection in *Baze v. Rees*,⁵² there is a significant lack of transparency about the execution protocols in many US states.⁵³ Consequently, states have encountered various difficulties in procuring the requisite drugs for use in executions. There have been examples of state prison maladministration in which inmates have suffered severe pain following the use of unsanctioned drugs,⁵⁴ and other examples where, had the inmate been executed, he could have been subjected to severe pain due to the wrong drugs being used.⁵⁵
20. The situation has been complicated further as, in July 2019, the Department of Justice (DOJ) assumed oversight from the Food and Drug Administration (FDA) over the regulation of execution drugs.⁵⁶ This change in policy could potentially widen the opportunities for executions to take place using unsafe drugs,⁵⁷ which could render “needless suffering”⁵⁸ in executions, violating the Eighth Amendment of the US Constitution.⁵⁹ This would also implicate the prohibition of inhumane punishment under the ICCPR Article 7,⁶⁰ and Safeguard 9.⁶¹

Federal Death Penalty

21. Following the DOJ’s announcement that it would be assuming control over the regulation of execution drugs, the DOJ also announced the resumption of the federal death penalty in July 2019. It produced an addendum to the Federal Execution Protocol, and Attorney-General William P. Barr set five execution

⁵² *Baze v Rees* 553 US 35 (2008).

⁵³ See, UNGA, ‘Moratorium on the Use of the Death Penalty Report of the Secretary-General’ (8 August 2014) UN Doc A/69/288 para 41; Deborah W Denno, ‘When Legislatures Delegate Death: The Troubling Paradox Behind States Uses of Electrocutation and Lethal Injection and What it Says About Us’ (2002) 63 Ohio St LJ 83.

⁵⁴ Clayton Lockett and Charles Warner, both in Oklahoma, See, Oklahoma Department of Public Safety, Executive Summary, The Execution of Clayton D. Lockett: Case Number 14-0189SI; Katie Fretland, ‘Scene at Botched Oklahoma Execution of Clayton Lockett was “A Bloody Mess”’ *The Guardian* (13 December 2014) <www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>.

⁵⁵ The execution of Richard Glossip was stopped because the wrong potassium had been sent to the prison for his execution. See, Oklahoma Executive Department, Oklahoma Executive Order, Number 2015-42 (September 30 2015). Jon Yorke, ‘Comity, Finality, and Oklahoma’s Lethal Injection Protocol’ (2017) 69 Okla L Rev 545, 611.

⁵⁶ United States Department of Justice, ‘Whether the Food and Drug Administration Has Jurisdiction over Articles Intended for Use in Lawful Executions,’ (3 May 2019) <www.justice.gov/olc/opinion/file/1162686/download> accessed 21 September 2019.

⁵⁷ See, e.g., Owen Bowcott, ‘London Firm Supplied Drugs for US Executions’ *The Guardian* (6 January 2011) <www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions> accessed 21 September 2019.

⁵⁸ *Baze* (n 52).

⁵⁹ US Const Amendment VIII.

⁶⁰ ICCPR Article 7 (n 2).

⁶¹ ECOSOC Safeguards 1984 (n 15).

dates between December 2019 and January 2020.⁶² The proposed executions reveal a move away from the rare application of executions at the federal level (the last being in 2003). This now nullifies the arguments presented by previous Administrations that executions predominantly occur within the jurisdictions of the individual states.⁶³

D. Recommendations for Action by the US

- i. The US should fully engage with the recommendations made in the UPR on the death penalty.
- ii. The federal government should legislate to ensure that all people suffering from any mental illness are categorically exempt from the death penalty in compliance with international standards on the right to life, procedural safeguards, and the American Bar Association's Resolution 122A.
- iii. The federal government should establish a federal right to post-conviction counsel, and encourage states to follow states such as Arizona, as an example of good practice in the provision of equality of arms at all stages of the criminal proceedings.
- iv. Under Article 36(1)(b) VCCR, foreign nationals who are charged with a capital offence should be promptly informed of their right to consular assistance. Those who have had this right violated should have their sentences commuted or be granted a retrial.
- v. The US should reverse the decision for the Department of Justice to assume oversight of the regulation of drugs used in lethal injection. Oversight should remain with the Federal Drug Administration.
- vi. In a procedural step towards abolition, the federal government should use its jurisdictional powers to abolish both the federal death penalty and the military death penalty. These federal restrictions would encourage more US states to abolish the death penalty and provide the US Supreme Court with stronger grounds to declare the punishment to be unconstitutional.⁶⁴

⁶² United States Department of Justice, 'Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse' (25 July 2019) <www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> accessed 21 September 2019.

⁶³ See, Report of the Working Group Addendum (n 26) para 2. The Senate Judiciary Committee on the Oversight of the Federal Death Penalty should urgently review these decisions made by the DOJ to resume federal executions.

⁶⁴ These recommendations would be automatically rectified through national abolition of the death penalty in compliance with the trend towards global abolition, and procedural impetus to this end provided within ICCPR Article 6(6). They also affirm the overall aim for the abolition of the death penalty in the US, and for the US to contribute to the growing global community of states against this outdated and inhumane punishment.

CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS

A. Normative and Institutional Framework of the US

22. Climate change is a global problem that the UN believes to be the “defining issue of our time.”⁶⁵ To contribute to the international efforts to tackle climate change, on 4 November 2016, the US signed the Paris Agreement. It committed to participate in, and contribute to, the Agreement’s strategies to keep the global average temperature below 2°C above pre-industrial levels, and to limit the increase to 1.5°C. There are currently 197 state signatories to and 185 state ratifications of the Paris Agreement.⁶⁶
23. The Intergovernmental Panel on Climate Change facilitated the adoption of the 1992 UN Framework Convention on Climate Change,⁶⁷ the Kyoto Protocol in 1997,⁶⁸ and the 2015 Paris Agreement.⁶⁹ The UN’s response to climate change is informed by the UN Special Rapporteur on Human Rights and the Environment, and both individual state and collective global social responsibility is encouraged and empowered through the UN Sustainable Development Goals. Particularly important for this submission is SDG No.13: Climate Action, which focuses upon taking “urgent action to combat climate change and its impacts.”⁷⁰

B. Implementation of Recommendations from Cycle Two in 2015

24. The US received three recommendations regarding climate change in 2015, from **Nicaragua** (para 176.341),⁷¹ **Bangladesh** (para 176.342),⁷² and **Maldives**

⁶⁵ United Nations, ‘Climate Change’ <www.un.org/en/sections/issues-depth/climate-change/> accessed 21 September 2019.

⁶⁶ United Nations Climate Change, ‘Paris Agreement – Status of Ratification’ <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>> accessed 21 September 2019.

⁶⁷ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

⁶⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 161.

⁶⁹ UN Framework Convention on Climate Change Conference of Parties, Twenty-First Session, *Adoption of the Paris Agreement* [12 December 2015] UN Doc FCCC/CP/2015/L.9/Rev.1 [hereinafter referred to as ‘Paris Agreement’].

⁷⁰ UNGA, ‘Transforming our World: The 2030 Agenda for Sustainable Development’ (21 October 2015) A/RES/70/1, Goal 13.

⁷¹ “Take up the commitment to address, in a framework of shared but differentiated responsibility and along with the international community, the world problem of climate change and its negative impact.” Report of the Working Group (n 20) para 176.341.

⁷² “Continue to actively participate in the climate change negotiations for a strong legally binding outcome of the United Nations Framework Convention on Climate Change process.” Ibid para 176.342.

(para 176.343).⁷³ All three recommendations were accepted in part by the US, and focused upon:

- a. The global shared responsibility for climate change as engaged with at the international level; and,
- b. The differentiated responsibility of Member States and the mechanism of US federal law for reducing toxic omissions.

The United States and the Multilateral Initiatives on Climate Change

25. The role of the US in the global shared responsibility for climate change was affirmed and encouraged by **Nicaragua**⁷⁴ and **Bangladesh**.⁷⁵ Both recommended that the US should continue to engage in negotiations within the ongoing climate change discussions, which culminated in the Paris Agreement a year after the 2015 US UPR. The US provided the same response to both recommendations, noting that “[w]e support this recommendation insofar as it encourages domestic action on climate change and international efforts to reach an agreement that is ambitious, inclusive, and applicable to all countries.”⁷⁶ The reason the US only supported these recommendations in part was because it did “not support this recommendation to the extent it attempts to pre-judge the outcome of ongoing negotiations on the UN Framework Convention on Climate Change.”⁷⁷ Despite this, the Obama Administration did take action on these recommendations by signing the Paris Agreement.

26. However, on 1 June 2017, President Trump announced his intent to withdraw the US from the Paris Agreement, signalling a step back from the commitment to a global response to environmental challenges. Through this potential withdrawal, the US will also effectively turn its back on SDG No.13, which will demonstrate a failure to take domestic responsibility for the global impacts of climate change.

Domestic Legislation for the Reduction of Greenhouse Emissions

27. **Maldives** suggested the enactment of federal legislation to “prohibit environmental pollution and reduce greenhouse gas emissions to control

⁷³ “Ensure federal legislation to prohibit environmental pollution and reduce greenhouse gas emissions to control climate change.” Ibid para 176.343.

⁷⁴ Ibid para 176.341.

⁷⁵ Ibid para 176.342.

⁷⁶ Report of the Working Group Addendum (n 26) para 12

⁷⁷ UNHRC, ‘Report of the Working Group on the Universal Periodic Review – United States of America Appendix to the Addendum’ (2015) 18 [hereinafter referred to as ‘Report of the Working Group Appendix to the Addendum 2015’].

climate change.”⁷⁸ The US provided a similar response to the recommendations discussed in paragraph 25 above and supported “the principle of this recommendation, which is to continue our efforts to reduce the impact of pollution and greenhouse gas emissions on the environment.”⁷⁹ However, although the Obama Administration stated that it was committed to tackling greenhouse gas emissions, it did not support “the part of this recommendation asking us to introduce federal legislation to prohibit all environmental pollution.”⁸⁰ The Obama Administration did introduce a Clean Power Plan for regulating power plant emissions⁸¹ and Greenhouse Gas (‘GHG’) Vehicle Standards for fuel economy and tailpipe emissions.⁸²

28. In addition to the announced withdrawal from the Paris Agreement, the Trump Administration has taken action to dilute the effect of the above provisions (as discussed below) and no further action has been taken to implement the recommendations.

C. Further Points for the US to Consider

The United States and the Multilateral Initiatives on Climate Change

29. There is an international trend towards the recognition of a right to a healthy environment. This is set to become a global norm.⁸³ If the US withdraws from the Paris Agreement, it will be out of line with the world-wide progress towards this human rights standard. As the world’s largest economy, the US example matters. There is a real danger that if the US withdrawal from the Paris Agreement does take place, other states, and in particular developing states, will do the same.

30. The study of the Yale Program on Climate Change Communication demonstrates that there is a 5 to 1 ratio of American voters in favour of the US

⁷⁸ Report of the Working Group (n 20) para 176.343.

⁷⁹ Report of the Working Group Appendix to the Addendum 2015 (n 79) 19.

⁸⁰ Ibid.

⁸¹ Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (23 October 2015) 80 Fed Reg 64, 510.

⁸² Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64, 510.

⁸³ The UN Special Procedures has a thematic mandate on this through the Special Rapporteur on Human Rights and the Environment (Mr. John Knox during the US’s UPR in 2015, and currently appointed to Mr. David R. Boyd). In March 2018, the Special Rapporteur argued that a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of a vast range of human rights, including the rights to life, health, food, water and development. UNGA, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (24 January 2018) UN Doc A/HRC/37/59.

remaining a party to the Paris Agreement.⁸⁴ The Climate Action Now Act passed by the House of Representatives in April 2019 recognises this public concern, but needs the support of the Senate to pass.⁸⁵

31. Additional benefits accruing to the US by remaining a party to the Paris Agreement, include:

- a. Participation in the strengthening of the global community for dealing with the effects of climate change through enhanced science, technology, and logistics;
- b. Providing a clear legislative motivation to promote clean energy technologies to benefit the US economy; and,
- c. Helping to reduce the negative effects of climate change on national security and national healthcare.⁸⁶

Domestic Legislation for the Reduction of Greenhouse Gas Emissions and to Limit Emissions from Power Plants

32. In the US, fossil fuels used for electricity, heat, and transportation represent the largest source of GHG emissions. The US Environmental Protection Agency (EPA) has regulated GHG emissions from mobile and stationary sources under the federal Clean Air Act (CAA) since 2011. In line with the 2009 pledge that the US would cut its GHG pollution by 17% from 2005 levels by 2020, and 83% by 2050, this framework provides regulation for power plant emissions and motor vehicle exhaust emissions.

33. The Clean Power Plan (CPP) aimed to reduce carbon dioxide emissions from existing power plants by 30% below 2005 levels by 2030. To that end, the CPP established state-specific targets for reducing emissions from the electric power sector and required US states to develop plans for achieving those targets.⁸⁷

⁸⁴ Anthony Leiserowitz et al., 'By more than 5 to 1, voters say the U.S. should participate in the Paris Climate Agreement' (17 April 2017) *Yale Program on Climate Change Communication* <<https://climatecommunication.yale.edu/publications/5-1-voters-say-u-s-participate-paris-climate-agreement/>> accessed 21 September 2019.

⁸⁵ United States House of Representatives, 'Climate Action Now Act' 116th Congress, 1st Session, Report No 116-41 <www.congress.gov/116/bills/hr9/BILLS-116hr9rh.pdf> accessed 21 September 2019.

⁸⁶ See, Justine Sullivan, '7 Reasons the United States Needs the Paris Agreement' (April 2017) *UN Foundation* <<https://unfoundation.org/what-we-do/>> accessed 21 September 2019.

⁸⁷ Dena Adler, Jessica Wentz, and Romany Webb, 'Four Important Points About EPA's Affordable Clean Energy Rule' *Columbia Law School Climate Law Blog* (20 June 2019) <<http://blogs.law.columbia.edu/climatechange/2019/06/20/four-important-points-about-epas-affordable-clean-energy-rule/#more-6474>> accessed 21 September 2019.

34. The CPP has now been replaced by the Affordable Clean Energy (ACE) rule. The provisions of the ACE rule direct US states to set standards of performance for individual power plants, but do not set limits to the emissions. According to the EPA, the current ACE rule will reduce carbon dioxide emissions by just 11 million short tons in 2030, whereas the CPP would have delivered emissions reductions of 415 million tons (both relative to a no action baseline).⁸⁸ The provisions of the ACE are significantly weaker than those of the CPP.

Regulation of Motor Vehicle Exhaust Emissions

35. Section 202(a)(1) of the CAA requires the Administrator of the EPA to establish standards “applicable to the emission of any air pollutant from...new motor vehicles or new motor vehicle engines, which in [his or her] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁸⁹

36. In response to the ruling in *Massachusetts v. EPA*⁹⁰ and the EPA’s science-based ‘Endangerment Finding’, on 7 May 2010, the EPA and the National Highway Traffic Safety Administration finalised the *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards Rule* (LDV Rule).⁹¹ The LDV Rule set standards for model years 2012 through 2016, which the EPA estimated would prevent 960 million metric tons of CO₂-equivalent emissions from being emitted to the atmosphere and save 1.8 billion barrels of oil over the lifetime of the vehicles subject to the rule.⁹²

37. The EPA has issued draft *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards* for model years 2021-2026. This relaxes previous requirements that mandated year-on-year increases in fuel economy and tailpipe emissions stringency, by freezing fuel economy standards at 2020 levels and freezing vehicle CO₂ standards at 2021 levels. Additionally, the rule would withdraw California’s existing CAA waiver, which has so far entitled the state to set its own stricter-than-federal vehicle emission standards for greenhouse gases.

⁸⁸ Ibid.

⁸⁹ 42 USC § 4521(a)(1).

⁹⁰ *Massachusetts v EPA* 549 U.S. 497 (2007).

⁹¹ 75 Fed Reg 88 (7 May 2010) 25324-25728.

⁹² 75 Fed Reg 25397.

38. Domestically, key findings of the American Lung Association (ALA) report, *The "State of the Air" 2019*, found that, in 2015-2017, more US cities had high days of ozone and short-term particle pollution compared to 2014-2016, and many cities measured increased levels of year-round particle pollution. The findings add to the evidence that a changing climate is "making it harder to protect human health."⁹³ Nevertheless the Report finds there has been progress since the previous 2016 Report which covered the years 2012-2014, "thanks to the tools in the Clean Air Act."⁹⁴ The Report strongly recommends that these tools remain in place.

D. Recommendations for Action by the US

- i. The US should rescind its withdrawal from the Paris Agreement, scheduled for 4 November 2020. The US is still in time to re-establish global leadership on environmental protection. If withdrawal goes ahead, the US will join Nicaragua and Syria as the only countries that are not parties to the Agreement and will be the only country to reject it as being too onerous.⁹⁵
- ii. The US should comply with the commitments of SDG No.13, to "[t]ake urgent action to combat climate change and its impacts."⁹⁶ Instead of pushing coal-fired power plants to become more efficient, the US should invest in renewable energy and low-carbon technologies.
- iii. The federal government should acknowledge the emerging human right to a healthy environment by providing a legal framework for access to effective remedies for violations of environmental rights. Climate change-related effects have direct and indirect implications for the enjoyment of human rights, such as rights to life, water and sanitation, food, health, housing, self-determination, culture, and development. The US should recognise such a link and consider climate change to be a human rights challenge.
- iv. The US should adhere to a policy of stringent application of the GHG standard emissions and review them upwards on a rolling basis. The Clean Air Act must remain intact and enforced, in order to enable the nation to continue to protect all Americans from the dangers of air pollution.

⁹³ American Lung Association, 'The State of the Air 2019' [2019] 4 <www.lung.org/assets/documents/healthy-air/state-of-the-air/sota-2019-full.pdf> accessed 21 September 2019.

⁹⁴ *Ibid.*

⁹⁵ Michael Greshko, 'Map Shows How Paris Reversal Isolates U.S. from the World' *National Geographic* (2 June 2017) <<https://news.nationalgeographic.com/2017/06/climate-change-paris-agreement-map>> accessed 21 September 2019.

⁹⁶ UNGA, 'Transforming our World: The 2030 Agenda for Sustainable Development' (n 70).

COMPASSIONATE RELEASE FROM PRISON

A. Normative and Institutional Framework of the US

39. The vulnerability of prisoners is recognised across international human rights instruments. Article 10 ICCPR specifically provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁹⁷ The Standard Minimum Rules for the Treatment of Prisoners--‘The Nelson Mandela Rules (NMRs)’--promulgate specific standards, including for the administration of corrections facilities and personnel, prisoners’ living conditions, and health(care).⁹⁸ The NMRs were adopted unanimously by the UN General Assembly in 2015.⁹⁹
40. Under domestic law, US states must provide adequate healthcare for prisoners (*Estelle v. Gamble*, 429 U.S. 97 (1976)). Compassionate release procedures allow prisoners to apply for early release, typically due to terminal illness, serious non-terminal illness, and/or age-related health issues. This section urges the US to establish compassionate release procedures that enable the US to realise the standards set, both domestically and internationally, to protect the human dignity of prisoners.¹⁰⁰

⁹⁷ ICCPR (n 2) Article 10.

⁹⁸ United Nations Standard Minimum Rules for the Treatment of Prisoners, UNGA Resolution 70/175, Annex, adopted on 17 December 2015 [hereinafter referred to as ‘Mandela Rules’].

⁹⁹ *Ibid.*

¹⁰⁰ Prisoner health is an urgent human rights issue in the US, where incarceration rates are “historically unprecedented and internationally unique.” (National Research Council of the National Academies, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Committee on Causes and Consequences of High Rates of Incarceration, J. Travis, B. Western, and S. Redburn, Editors. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press, 2.) America has the highest incarceration rate in the world, imprisoning approximately 2.2 million people. It also has an aging prison population, with one third of prisoners expected to be aged 55+ by 2030. (American Civil Liberties Union, ‘At America’s Expense: The Mass Incarceration of the Elderly’ (2012) i.) This situation has “drawn greater attention ...to the relationships between incarceration and health.” (National Research Council 203). The NMRs provide that “Prisoners should enjoy the same standards of health care that are available in the community...” (Nelson Mandela Rules (n 98) Rule 24). In the US, prisoners alone have a constitutional right to health care, with the state being required to provide adequate medical care for the incarcerated. (Vera Institute of Justice, ‘On Life Support: Public Health in the Age of Mass Incarceration’ (2014)12 (citing to “*Estelle v Gamble* 429 US 97 (1976); and Robert B. Greifinger, “Thirty years since *Estelle v. Gamble*: Looking forward, not wayward,” in *Public Health Behind Bars* (New York: Springer, 2007), pp. 1-10.”). A deliberate indifference to a prisoner’s serious illness or injury violates the Eighth Amendment of the US Constitution’s prohibition on cruel and unusual punishment, although inadvertent and/or negligent failures to provide adequate care will not. Compassionate release procedures typically allow prisoners to apply for early release based on ill-health. The federal government and the vast majority of US states operate compassionate release procedures, but researchers have repeatedly raised concerns about their effectiveness, calling for reform, including the creation of “a national ...compassionate release guideline.” (National Research Council, ‘Health and Incarceration - A Workshop Summary’ (2013) 22).

B. Implementation of Recommendations from Cycle Two in 2015

41. Although not expressly referenced in the 2015 US UPR, four themes of recommendations made in cycle two are connected to compassionate release.

Engagement with International Human Rights Standards

42. **Estonia** (para 176.45)¹⁰¹ recommended that the US ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT), and that it should “take swift measures to ensure the human rights of convicts and persons in custody.”¹⁰² The US supported this recommendation in part, stating “[w]e support the part of this recommendation asking us to promote, protect, and respect the human rights of those convicted of crimes and persons in custody...We do not support the part of this recommendation asking us to ratify the OP-CAT.”¹⁰³ However, similar to the recommendations regarding ratification of the Second Optional Protocol to the ICCPR, the US accepted the recommendation from **Mauritius** (para 176.17)¹⁰⁴ to *consider* ratification of OP-CAT. Although the US may have ‘considered’ ratifying OP-CAT, the current status is non-ratification.

Reformation of Sentencing Regimes

43. Certain sentencing practices in the US are viewed as contributors to its large and aging prison population.¹⁰⁵ The US accepted the recommendation from **Nigeria** (para 176.275) to pass legislation reforming mandatory minimum sentences, furthering the Smart on Crime Initiative.¹⁰⁶ It supported in part recommendations to end Life Without the Possibility of Parole (LWOP) sentences for juveniles (**Austria** para 176.234¹⁰⁷ and **Fiji** para 176.51)¹⁰⁸ and for

¹⁰¹ “Ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and take swift measures to ensure the human rights of convicts and persons in custody.” Report of the Working Group (n 20) para. 176.45.

¹⁰² Ibid.

¹⁰³ Report of the Working Group Appendix to the Addendum 2015 (n 79) 3.

¹⁰⁴ “Consider ratifying the Convention on the Elimination of All forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights and also consider acceding to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.” Report of the Working Group (n 20) para.176.17.

¹⁰⁵ National Research Council (n 100) 4.

¹⁰⁶ “Accelerate the process of passing a legislation to reform the mandatory minimum sentences begun with the Smart on Crime initiative.” Report of the Working Group (n 20) para 176.275.

¹⁰⁷ “End the use of life imprisonment without parole for offenders under the age of 18 at the age of crime, regardless of the nature of that crime.” Ibid para 176.234.

¹⁰⁸ “Pass legislation domestically to prohibit the passing of life imprisonment without the possibility of parole on offenders who were children at the time of offending.” Ibid para 176.51.

non-violent offences (**Benin** para 176.235).¹⁰⁹ The US supported these recommendations to the extent they reconcile with existing domestic law and policy/legislative agendas.¹¹⁰ Despite this, LWOP and mandatory minimum sentences continue to be employed in the US, and the Smart on Crime Initiative was rescinded by the Trump Administration in 2017.¹¹¹

Improvement of Prison Conditions

44. The US accepted recommendations to improve conditions in its prisons (**Sudan** para 176.239¹¹² and **Japan** para 176.236)¹¹³ and to prevent torture and inhumane treatment in prisons (**Azerbaijan** para 176.213¹¹⁴ and **Malaysia** para 176.246).¹¹⁵ However, the systematic improvement of prison conditions across the US remains an issue for further action.

Enhance Access to Healthcare

45. The US accepted recommendations to enhance access to healthcare both generally and specifically for vulnerable populations, which includes prisoners (**South Africa** para 176.313;¹¹⁶ **Cote d'Ivoire** para 176.315;¹¹⁷ **Serbia** para 176.317).¹¹⁸ The US supported in part the recommendation from **Spain** (para 176.314) to “[c]ontinue efforts regarding access to the right to health.”¹¹⁹ However, the US supported this with regards to improving health services, but not “to the extent it asks us to assume obligations under international instruments to which the United States is not a party.”¹²⁰

¹⁰⁹ “Abolish life imprisonment without the possibility of parole for non-violent offenses.” Ibid para 176.235.

¹¹⁰ See, Report of the Working Group Appendix to the Addendum 2015 (n 79).

¹¹¹ See, with regards to the rescinding of the Smart on Crime Initiative: www.prisonlegalnews.org/news/2018/mar/6/despite-ags-policy-change-oig-reviews-smart-crime-initiative/ (“However, current Attorney General Jeff Sessions rescinded the [Smart on Crime] initiative in a May 10, 2017 memo...He ordered federal prosecutors and law enforcement officials to disregard direction from the Obama administration and pursue charges that typically result in mandatory minimums.”) See, for example, with regards to continuing use of Mandatory Minimums, www.uscourts.gov/news/2017/07/25/mandatory-minimum-sentences-decline-sentencing-commission-says. See, for example, with regards to the continuing use of LWOP, www.uscourts.gov/news/2015/08/13/life-sentences-federal-justice-system.

¹¹² “Improve living conditions in prisons in particular in Guantanamo.” Report of the Working Group (n 20) para 176.239.

¹¹³ “Take further steps to improve the current conditions of its prisons.” Ibid para 176.236.

¹¹⁴ “Prevent torture and ill-treatment in places of detention.” Ibid para 176.213.

¹¹⁵ “Make further progress in fulfilling its commitment to close the Guantanamo detention facility and abide by the ban on torture and inhumane treatment of all individuals in detention.” Ibid para 176.246.

¹¹⁶ “While recognizing economic, social and cultural measures, strengthen efforts in ensuring equal access to health-care and social services.” Ibid para 176.313.

¹¹⁷ “Strengthen measures promoting access of vulnerable population to public and social and health services” Ibid para 176.315.

¹¹⁸ “Further efforts in this positive direction with a view to strengthen national health-care programmes so that health care is easily accessible, available and affordable for all members of society.” Ibid para 176.317.

¹¹⁹ “Continue efforts regarding access to the right to health.” Ibid para 176.314.

¹²⁰ See, Report of the Working Group Appendix to the Addendum 2015 (n 79) 17-18.

46. The above summaries demonstrate there is both an international and American consciousness of the need to provide minimum standards for prisoners. The design and implementation of research-informed compassionate release procedures will enable the US to further realise both international and domestic standards.

C. Further Points for the US to Consider

47. There is considerable scholarship discussing compassionate release in the US,¹²¹ including research unpacking the design and function of existing procedures.¹²² These efforts have culminated in generally consistent findings and recommendations for reform.¹²³ The US is urged to acknowledge:

48. **Existing Procedures:** In addition to a federal procedure,¹²⁴ there are approximately 88 identifiable compassionate release procedures across the 50 US states and Washington D.C.,¹²⁵ with research identifying a range of 0-4

¹²¹ There is significant scholarship discussing issues associated with compassionate release and health in prison. Broadly, this literature includes scholarship examining the relationship between incarceration and health, the evolution and application of domestic and international law frameworks related to prisoners, and the intersection of compassion with politics and the purposes of punishment. It also covers issues associated with specific medical conditions such as HIV, and “special populations” such as elderly, female, and juvenile prisoners. There is also considerable literature discussing the issue of terminal illness in the prison context, and the roles and competencies of specific stakeholders such as correctional facilities, healthcare professionals, and parole boards. See, for example, Vera Institute of Justice (n 100); National Research Council (n 100); Philip M Genty, ‘Confusing Punishment with Custodial Care: The Troublesome Legacy of *Estelle v. Gamble*’ (1996) 21 Vt L Rev 379; Alvin J Bronstein & Jenni Gainsborough, ‘Using International Human Rights Laws and Standards for U.S. Prison Reform’ (2004) 24 Pace L Rev 811; Robert B Greifinger, ‘Commentary: Is it Politic to Limit Our Compassion?’ (1999) 27 JL Med & Ethics 234; William W Berry III, ‘Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release’ (2009) 68 Md L Rev 850, 873-881; William B Aldenberg, ‘Bursting at the Seams: An Analysis of Compassionate-Release Statutes and the Current Problem of HIV and AIDS in U.S. Prisons and Jails’ (1998) 24 New Eng J on Crim & Civ Confinement 541; Nadine Curran, ‘Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It’ (2000) 26 New Eng J on Crim & Civ Confinement 225; Ronald H Aday, ‘Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates, Fed. Probation’ (June 1994); Jalila Jefferson-Bullock, ‘Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders’ (2015) 83 UMKC L Rev 521; Nancy Neveloff Dubler, ‘The Collision of Confinement and Care: End-of-Life Care in Prisons and Jails’ (1998) 26 JL Med & Ethics 149; and Bryant S. Green, ‘As the Pendulum Swings: The Reformation of Compassionate Release to Accommodate Changing Perceptions of Corrections’ (2014) 46 U Tol L Rev 123.

¹²² See, Mary Price, *Families Against Mandatory Minimums, Everywhere and Nowhere: Compassionate Release in the States*, 17 (2018); Nancy R. Gartner & Rolando V. del Carmen, *Releasing the Ailing and the Aging*, 16 (2016); Sarah L Cooper, *State Compassionate Release Approaches in the USA: A Blueprint for Discussion* (unpublished, on file with author). Note: The *State Compassionate Release Approaches in the USA: A Blueprint for Discussion* Report provides a provisional analysis of a 2017-2018 study – undertaken by researchers at Stakeholder Institution, Birmingham City University and funded by a Leverhulme Trust/ British Academy Small Research Grant - to identify and unpack compassionate release procedures across US states. It aimed to learn from, and build on, the methodological approaches, findings, and recommendations of existing literature, and particularly the studies undertaken by FAMM, Russell, and Gartner and del Carmen. This section aims to summarize this body of work in the context of this submission. It should be noted that this is a challenging, evolving, and voluminous area of research; every effort has been made to summarize, comment, and cite as clearly and accurately as possible.

¹²³ *Ibid.*

¹²⁴ See, US Department of Justice, ‘Compassionate Release/Reduction in Sentence’ (17 January 2019) <www.bop.gov/policy/progstat/5050_050_EN.pdf> accessed 21 September 2019.

¹²⁵ See, Price (n 122); Cooper, (n 122). The Blueprint Study cross-checked/counted the procedures identified by the FAMM Study against those identified by the Blueprint Study. It is acknowledged that there may be overlap across some of these procedures.

relevant procedures per state.¹²⁶ Iowa is seemingly the only state without a clearly identifiable procedure.¹²⁷ All states should establish identifiable procedures.

49. Method & Labelling: Compassionate release methods include, parole,¹²⁸ executive clemency/commutation,¹²⁹ reprieves,¹³⁰ sentence modifications,¹³¹ extended confinement with supervision,¹³² respite programs,¹³³ and furloughs.¹³⁴ Approximately 50 different labels exist,¹³⁵ with ‘Medical Parole’ being the most common.¹³⁶ This reflects that parole--in its general form or in a specific form--is the most common method of compassionate release. Methods employed should harness decision-maker expertise. For example, physicians should only be required to make medical decisions and parole authorities should not be required to make prognoses.¹³⁷ Many of the labels used across these procedures are not an obvious shorthand of the procedure they describe, particularly for lay persons. For example, “extension of confinement,” “recall and resentencing,” and “supervised community

¹²⁶ See, e.g., South Carolina is an example of a state with 4 procedures. SC Code Ann § 24-21-715 (2016) (South Carolina’s Parole for Terminally Ill, Geriatric, or Permanently Disabled Inmates procedure); South Carolina Board of Pardons and Paroles, Policy and Procedure, § D3, D.5 (April 2015), <www.dppps.sc.gov/content/download/68278/1576111/file/Parole+Board+Manual+April+2015.pdf> (South Carolina’s Parole for Medical Reasons and Special Parole of Veterans for Psychiatric Treatment procedures); SC Code Ann § 24-3-210 (South Carolina’s Furlough/Extension of Confinement procedure). Wisconsin is an example of a state with one procedure. See Wy Stat Ann § 7-13-424 (Wyoming’s Medical Parole procedure).

¹²⁷ See Iowa State Memo from Families Against Mandatory Minimums study <https://famm.org/wp-content/uploads/Iowa_Final.pdf> accessed 21 September 2019. (Note, however, as the memo indicates, media reports there has been a compassionate release case in Iowa, but there is no identifiable procedures).

¹²⁸ See, e.g., Wy Stat Ann § 7-13-424 (2018) (Wyoming’s “Medical Parole” procedure); Ark Code Ann § 12-29-404 (Arkansas’ procedure for “[m]edical parole for a terminal illness or permanent incapacitation”); Conn Gen Stat § 54-131a (Connecticut’s procedure for “[r]elease of an inmate on medical parole”).

¹²⁹ See, e.g., Ariz Rev Stat § 31-403 (2018) (Arizona’s statute granting inmates eligibility for commutation if “in imminent danger of death due to a medical condition”); 220 Ind Admin Code § 1.1-4-1.5 (describing Indiana’s procedure for “Special medical clemency”); Michigan Department of Corrections, Executive Clemency Process Summary <www.michigan.gov/corrections/0,4551,7-119-1435_11601-223452--,00.html> accessed 21 September 2019 (Michigan’s policy allowing recommendation for commutation for inmates with “a deteriorating and/or terminal medical condition”).

¹³⁰ See Ga Const art IV, § II, part II (e) (granting Georgia’s parole board power to “issue a medical reprieve to an entirely incapacitated person”); 37 Tex Admin Code § 143.34 (granting the Texas parole board to consider applications for “medical emergency reprieve”).

¹³¹ See Del Code Ann title 11, § 4217 (giving Delaware courts the power to modify sentences for, among other things, “serious medical illness or infirmity”); Wis Stat § 302.113 (allowing sentence modification for “an extraordinary health condition”).

¹³² See, e.g., Maine Rev Stat Ann title 34-A, § 3036-A.10 (including “[t]erminally ill or incapacitated” inmates in Maine’s “Supervised community confinement” procedure); Wis Stat § 302.113 (describing Wisconsin’s “Release to extended supervision” procedure).

¹³³ See West Virginia Division of Corrections, Annual Report: FY2018, 45 <https://dcr.wv.gov/resources/Documents/annual_reports/WVDOC%2018%20Annual%20Report.pdf> accessed 21 September 2019 (charting releases under West Virginia’s “Medical Respite” procedure).

¹³⁴ See, e.g., Ariz Rev Stat § 31-233 (allowing inmates to seek “medical treatment not available” to them); Vt Stat Ann title 28, § 808 (allowing inmates to be “placed by a court on treatment furlough”); Ala Code §§ 14-14-1-14-14-7 (comprising a range of statutes referred to in the text as the “Alabama Medical Furlough Act”).

¹³⁵ Cooper (n 122) 20 (on file with author).

¹³⁶ Ibid 21 (terms such as “medical/medically”; “extraordinary”; “special”; “geriatric/age”; and “compassionate” feature multiple times too).

¹³⁷ Ibid 44. See, e.g., as an example of a requirement that a physician make a prognosis, Cal.Penal Code § 1170 (requiring a physician employed by the department of corrections to determine whether a prisoner has six months or less to live).

confinement” are arguably unclear. Labels should be lay-friendly, clearly reflecting the procedure’s function.

50. **Exclusions:** Prisoners can be excluded from compassionate release procedures even if they meet ill-health-related eligibility criteria. Exclusions are relatively common, with grounds including categories of offenders;¹³⁸ parole eligibility;¹³⁹ minimum sentencing requirements;¹⁴⁰ age requirements;¹⁴¹ and more nuanced reasons.¹⁴² Exclusions should be minimal, relevant to the circumstances, and clearly articulated.¹⁴³

51. **Eligibility:** Eligibility for compassionate release generally relates to terminal, non-terminal, and/or age-related health issues. Non-terminal conditions are described varyingly,¹⁴⁴ but typically require prisoners to be subject to serious medical conditions/disabilities that significantly incapacitate them. Mental health is occasionally included.¹⁴⁵ Age is referenced in different ways.¹⁴⁶ Tens of procedures expressly reference “terminal” within eligibility criteria, with many including a temporal reference.¹⁴⁷ These requirements range from death being “imminent,” to death occurring within 24 months.¹⁴⁸ Eligibility should be underpinned by “medical, end-of-life, and geriatric criteria”¹⁴⁹ that is based “on evidence and best practices, with input from medical experts.”¹⁵⁰ Terminal illness should be approached broadly. If included, time references should be flexible and clear. Other factors such as risk to public safety, prisoner well-being, and cost, can also inform decision-making. Such requirements should not be “strict and/or vague.”¹⁵¹ For example, risk to public safety should be

¹³⁸ See, e.g., Cal Penal Code § 3055 (excluding inmates convicted of first-degree murder of a “peace officer”); NJ Stat Ann § 30:4-123.51c (excluding inmates convicted of “violent offenses” like murder, manslaughter, and aggravated sexual assault).

¹³⁹ See, e.g., Cal Penal Code § 3055 (excluding inmates sentenced to life without the possibility of parole); Kan Stat Ann §§ 22-3728 (excluding inmates sentenced to death, or life without the possibility of parole).

¹⁴⁰ See, e.g., Colo Rev Stat § 17-2-201 (setting 20-year and 10-year limits on eligibility for inmates convicted of Class 1 and Class 2 felonies, respectively); NY Exec Law § 259-r (requiring inmates convicted of certain violent crimes to complete one-half of the sentence to become eligible for medical parole).

¹⁴¹ See, e.g., Cal Penal Code § 3055 (for inmates 60 years of age and older); Va Code Ann § 53.1-40.01 (for inmates 65 years of age and older).

¹⁴² See, e.g., Ala Code § 14-14-3 (requiring inmates to qualify for Medicare or Medicaid).

¹⁴³ See Mary Price, Families Against Mandatory Minimums, *Everywhere and Nowhere: Compassionate Release in the States*, 17 (2018); Nancy R. Gartner & Rolando V. del Carmen, *Releasing the Ailing and the Aging*, 16 (2016).

¹⁴⁴ See Cooper (n 122) 67 (including chronic, debilitating, extraordinary, incapacitation, disabled, severe, and grave).

¹⁴⁵ See, e.g., Colo Rev Stat §§ 17-22.5-403.5 (Colorado’s “Special Needs Parole”); Ala. Code § 14-14-2 (including “mental condition” in definition of incapacitation).

¹⁴⁶ Cooper (n 122) 31 (1. procedures that are for the exclusive use of elderly prisoners, and which determine eligibility by reference to a specific age; 2. procedures that include elderly prisoners – as a specifically eligible cohort – within a broader procedure that is available to other prisoners; and 3. procedures that consider age generally as part of the decision-making process).

¹⁴⁷ See Cooper, *List of Procedures with Temporal Reference* (2019) (unpublished report) (on file with author).

¹⁴⁸ *Ibid.*

¹⁴⁹ Price (n 122) 21.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* 13.

nuanced, requiring decision-makers to determine if there are *material* concerns about public safety.

52. **Process:** Processes vary. Processes should (1) be streamlined, including time-limits that reflect the need for expedited review;¹⁵² (2) use competent decision-makers, specifying who they are and what their competence is;¹⁵³ (3) specify eligible petitioners, taking a broad approach (e.g., “any interested party” including correctional staff, family, and lawyers);¹⁵⁴ (4) label and itemise supporting evidence requirements, focusing on medical evidence;¹⁵⁵ (5) include an appeals process;¹⁵⁶ (6) be publicly available and signposted to prisoners;¹⁵⁷ and (7) include information about the terminology used across the procedure.¹⁵⁸

53. **Release Requirements:** Release conditions are typical but vary considerably, ranging from agreeing to the public release of medical records¹⁵⁹ and placements,¹⁶⁰ and being subject to periodic medical evaluations,¹⁶¹ to intensive supervision¹⁶² and fee payments.¹⁶³ Release revocation based on a change in circumstances is also typical.¹⁶⁴ Release requirements should be tailored to individual circumstances, clear in both terms and consequences,¹⁶⁵ and there should be support available for pre- and post-release planning.¹⁶⁶ The releasing authority should be clearly stated.¹⁶⁷

54. **Reporting:** Generally, procedures lack comprehensive reporting and tracking systems, including systems that record applications, decisions, and reasons for

¹⁵² See Gartner & del Carmen (n 122) 18; Cooper (n 122) 67.

¹⁵³ See Price (n 122) 14; Cooper (n 122) 53.

¹⁵⁴ See Gartner & del Carmen (n 122) 18; Cooper (n 122) 37.

¹⁵⁵ See Price (n 122) 21; Gartner & del Carmen (n 122) 16.

¹⁵⁶ Price (n 122) 21.

¹⁵⁷ *Ibid* 7; Gartner & del Carmen (n 122) 19.

¹⁵⁸ See Gartner & del Carmen (n 122) 17.

¹⁵⁹ See, e.g., Alaska Admin Code 22 AAC 20.605© (“An applicant for special medical parole must provide the Parole Board and the Department of Corrections with full access to all medical records, and must sign a release assuring that access by the Department of Corrections and the Parole Board for the full duration of the period of parole.”).

¹⁶⁰ See, e.g., Con Gen Stat Ann §54-131d(a) (“The Board of Pardons and Paroles shall require as a condition of release on medical parole that the parolee agree to placement and that he or she is able to be placed for a definite or indefinite period of time in a hospital or hospice or other housing accommodation suitable to his or her medical condition, including his or her family’s home, as specified by the Board of Pardons and Paroles.”)

¹⁶¹ See, e.g., Rev Stat Ann of the State of New Hampshire §651-A:10-a(IV) (“The Adult Parole Board may request, as a condition of medical parole, that such inmate submit to periodic medical examinations while on medical parole...”).

¹⁶² See, e.g., Nev Rev Stat Ann 213.380(2)(c) (“Require intensive supervision of the offender, including unannounced visits to his or her residence or other locations where the offender is expected to be in order to determine whether the offender is complying with the terms and conditions of his or her confinement.”)

¹⁶³ See, e.g., Missouri Department of Corrections, ‘Rules Governing the Conditions of Probation, Parole and Condition Release’ 10 <<http://doc.mo.gov/Documents/prob/White-Book.pdf>> accessed 21 September 2019 (“a monthly intervention fee in an amount set by the Missouri Department of Corrections”).

¹⁶⁴ See, e.g., Ark Code Ann §12-29-404(e) (“The Parole Board may revoke a person’s parole supervision if the person’s medical condition improves to the point that he/she would initially not have been eligible for parole supervision.”).

¹⁶⁵ *Ibid* 16.

¹⁶⁶ Price (n 122) 21.

¹⁶⁷ Gartner & del Carmen (n 122) 17.

decision-making.¹⁶⁸ Procedures should include mandatory reporting requirements, and be subject to regular review and evaluation.

55. **Cross-cultural competencies:** Compassionate release procedures can involve various actors and institutions, who should be supported to develop cross-cultural competencies. Suggestions include publicising compassionate release procedures and policies across institutions,¹⁶⁹ and establishing educational programs, such as training for corrections personnel to understand eligibility criteria, and training for parole authorities (or other decision-making bodies) to interpret medical evidence.¹⁷⁰

D. Recommendations for Action by the US

56. To further realise international and domestic standards for prisoners, particularly in the context of prisoner health, it is recommended that the federal government and US states:
- i. Establish clearly identifiable compassionate release procedures in all jurisdictions.
 - ii. Label compassionate release procedures clearly and logically. For example, “Parole for Prisoners with Serious Health Conditions” or “Sentence Modification Procedure for Prisoners with Ill-Health”.
 - iii. Establish and clearly set out minimal and relevant exclusion criteria.
 - iv. Establish common-sense (e.g., considering what is medically appropriate and deliverable within corrections institutions), objective (e.g., age), and evidence-based (e.g., medical science-informed) eligibility criteria, which includes interpretative guidelines for decision-makers.
 - v. Establish streamlined, transparent, and common-sense processes, including a defined sequence of actions; a wide variety of petitioners (e.g., prisoners, lawyers, family, friends, corrections personnel); itemised supporting evidence requirements; expertise-driven decision-making; clearly stated standards to be applied by decision-makers; expeditious time-limits; and an appeals process.
 - vi. Include fair and reasonable release requirements that consider individual circumstances (e.g., release conditions tailored to the prisoner’s individual medical circumstances, such as their mobility and cognitive ability). Clearly

¹⁶⁸ Price (n 122) 19.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

state the consequences for the breach of release requirements, particularly in what circumstances release can be revoked.

- vii. Provide pre- and post-release planning support, including support in relation to applying for public assistance, benefits, housing and medical placements, Medicaid and/or Medicare.
- viii. Establish regular, and publicly available reporting and tracking systems, which include the number and nature of applications, decisions, revocations and reasons for decisions.
- ix. Establish mandatory, regular evaluation programs for compassionate release procedures with a view to identifying areas of good practice and development needs.
- x. Establish procedures and policies to support actors involved in compassionate release procedures.¹⁷¹

¹⁷¹ Recommendations formulated with the findings, observations, and recommendations of existing studies and wider literature in mind.