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

A. Authors of Complaint

1. This is a joint-authored complaint on behalf of Mr Kenneth Eugene Smith who is currently in the custody of the Alabama Department of Corrections at William C. Holman Correctional Facility. He is under a sentence of death and the State of Alabama has set the execution date as the 25th January 2024.

2. The Authors are:

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.

Dr Joel Zivot, MD, FRCP(C), MA, Associate Professor of Anesthesiology and Surgery, Emory University School of Medicine, 1364 Clifton Road Northeast, Atlanta, GA 30322, United States of America.

3. The international law issues raised in this complaint are:

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

a. In 1992 the United States submitted its deposit for ratification of the International Covenant on Civil and Political Rights (ICCPR).[1] Included were reservations, understands, and declarations. Reservations 2 and 3 concern the application of the death penalty, but the Human Rights Committee has declared them to be 'incompatible with the object and purpose of the Covenant,' and recommended their removal.[2]

b. The ICCPR is cited in various treaty body reviews of the United States.[3] 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.[4] 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.[5]

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

The Right to an Effective Remedy for Human Rights Violations

d. Mr Smith's ICCPR rights have been violated, including:
    i. the right to an effective remedy (ICCPR article 2)
    ii. the right to life (article 6)

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[1] 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.

[2] 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, 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.

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

[4] 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.'

[5] 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, 9 November 2020, https://www.ohchr.org/en/hr-bodies/upr/us-index.

iii. the prohibition of torture and inhumane punishment (article 7)
iv. the protection of the humanity and human dignity of those deprived of their liberty (article 10)
v. the right to a fair trial (article 14)
vi. the prohibition against an arbitrary or unlawful interference with his privacy, family, and home (article 17).

Pre-trial

e. A violation of the ICCPR article 17 occurred following an anonymous confidential informant illegally entering Mr Smith's home to gather evidence for the police which was used at trial by the state prosecutors. This also rendered a violation of the right to a fair trial under article 14.

f. Further article 14 violations occurred when the prosecution failed to disclose exculpatory evidence which proved central to the state's case against Mr Smith. This evidence could have been impeached by the defence in both the guilt/innocence and sentencing phases of the trial. This violation significantly contributed to the death sentence of Mr Smith which produced an arbitrary conviction in violation of article 14, and subsequently constituted an arbitrary deprivation of the right to life under article 6(1).

Capital Trial

g. Both articles 14 and 6 were again violated when the trial judge failed to properly inform the jury of the evidentiary standards for a capital offence. Consequently, Mr Smith was sentenced to death for a murder that he:

    i. had no intention of committing, and;
    ii. did not inflict the bodily harm which caused the death.

h. The murder was committed by Mr John Forrest Parker who was sentenced to death for the capital offense in 1989 and was executed by lethal injection in 2010.[6]

Death Sentence

i. The capital sentence imposed upon Mr Smith in 1989[7] is a violation of 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.'[8] Mr Smith had no such intention and he did not kill the victim. The death sentence is also arbitrary in violation of article 6(1) as it fails to satisfy the confined criteria of 6(2) and constitutes a further violation of articles 7 and 10.

First Attempted Execution (Lethal Injection)

[6] Petition for writ of certiorari denied by the US Supreme Court, Parker v. Alabama, 560 U.S. 962, 130 S.Ct. 3408 (Mem) 10 June 2010.
[7] See, Smith v. State, 620 So.2d 732 (Ala.Cr.App. 1992).
[8] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, p. 8.

j. On 17th November 2022 the State of Alabama Department of Corrections (ADOC) attempted to execute Mr Smith by lethal injection. The execution protocol was not completed as an appropriate vein could not be located and accessed in Mr Smith's body. Torture, cruel, and inhumane treatment resulted in trauma being inflicted upon Mr Smith through repeated needle stabbings over many parts of his body. During the 4-hours (480 minutes) of being strapped to the gurney, he was subjected to spinal injuries from which he still suffers. This constituted a:

    i. botched,[9] and;
    ii. failed, execution.[10]

k. This incident has left a damaging psychological impact upon Mr Smith, and he still suffers from mental trauma. Mr Smith has been subjected to a violation of his rights under articles 6, 7, 10, and 14.

Second Execution Date (Nitrogen Gas)

l. The State of Alabama now seeks to compound this torture with setting a further execution date for 25th January 2024, this time though a new method of forced nitrogen gas inhalation.[11]

m. The medical analysis of a future execution by nitrogen gas demonstrates that this method poses an intolerable risk that Mr Smith will be again subjected to torture, cruel, and inhumane punishment. It is likely that if the protocol is successful and appropriately administers nitrogen for Mr Smith to be forced to breath into his body, that he will die whilst experiencing seizures, the sensation of choking, and great pressure within his internal organs. This is in violation of the international standards determining that executions must be confined to the 'minimum possible suffering',[12] and therefore constitutes a violation of articles 6, 7, and 10.

n. The jurisprudence of the US Supreme Court denies an effective and meaningful challenge to execution methods in violation of article 2. This includes the trilogy of judgments in *Baze v. Rees*,[13] *Glossip v. Gross*[14] and

[9] There are many examples of a botched executions producing a death. In Mr Smith's case, he received a botched execution and is still alive. For examples of botched executions, see the Death Penalty Information Center webpage dedicated to 'Botched Executions,' https://deathpenaltyinfo.org/executions/botched-executions
[10] For example, the failed execution of Clayton Lockett and his death of a heart attack outside the execution chamber, see Katie Fretland, Oklahoma execution: Clayton Lockett writhes on gurney in botched procedure, The Guardian, 30 April 2014, https://www.theguardian.com/world/2014/apr/30/oklahoma-execution-botched-clayton-lockett
[11] 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
[12] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC 1984/50, Safeguard 9.
[13] Baze v. Rees, 553 U.S. 35 (2008)
[14] Glossip v. Gross, 135 S. Ct. 2726 (2015)

Bucklew v. Precythe.[15] Mr Smith's rights under the Covenant are therefore nullified through a federal judicial process that is at variance with articles 2(1) and 2(3).

o. The *Baze-Glossip-Bucklew* trilogy of judgments creates a perverse test which ultimately places the burden of proving the legality of execution methods upon the inmate. International law places the burden of proving the legality of execution methods upon the state. This is because under international law the state is the monopoly holder of legitimate violence, and thus is to be assessed upon the justification of their control over penology and punishment. This corpus of US Supreme Court reasoning is perverse, arbitrary, capricious, and a violation of the right to a fair trial under article 14, and is thus an arbitrary deprivation of the right to life under 6(1) and a violation of human dignity under article 10.

Duration Under the Death Sentence

p. Mr Smith has been subjected to Alabama's capital judicial process for over three decades. He was sentenced to death in 1989 (which was set aside in 1992 but reimposed in 1996)[16] and so he approaches his 29th year under sentence of death and the 34th year of the state inflicting upon him violations of articles 2, 6, 7, 10, 14, and 17.

q. The jurisprudence of the US Supreme Court denies an effective and meaningful challenge to execution methods in violation of article 2. This denial and the precedent for future denials was established in the case of *Lackey v Texas*.[17] Mr Smith's rights under the Covenant are therefore nullified through a federal process which is at variance with article 2(1) and (3). It this creates an unreasonable procedural barrier preventing a meaningful assessment of the violations under articles 6, 7, 10 and 14.

r. Justice Gorsuch in providing the judgment in *Bucklew* attempted to taint the assessment of lethal injections with the application of the doctrine of finality that restricts the assessment of the duration of time between the sentence of death and the execution.[18] This was rejected by Justice Sotomayor in dissent who stated that the capital judicial process needed to ensure adequate time to review execution methods.[19] Providing adequate time, through considering the cumulative factors for the temporal assessment, 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 article 6. Furthermore, this reasoning places the review of the execution methods in the context of the overall assessment of time under the capital judicial process.

[15] Bucklew v. Precythe, 139 S.Ct. 1112 (2019)
[16] In Smith v. State, 620 So.2d 732 (Ala.Cr.App. 1992), the original conviction was set aside due to a Batson violation and the case was then remanded for a new trial.
[17] Lackey v Texas, 514 U.S. 1045 (1995)
[18] Bucklew v. Precythe, 139 S.Ct. 1112 (2019).
[19] Id.

Ultimately, however, the *Baze-Glossip-Bucklew* jurisprudence provides a procedural barrier to legitimate challenges to execution methods under articles 6, 7, and 10, in violation of articles 2(1) and (3).

The Delay of Abolition

s. The attempt to develop a new execution technology is a violation of the application of article 6(6) for the fulfilment of article 6(1) and the prohibition of the arbitrary deprivation of life. Under article 6(6) States shall not invoke any aspect of the article 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 Smith's case, and subsequently in all future death penalty cases, is through the United States' attempt to endorse a continued application of article 6(2) in violation of 6(6). It is therefore an illegitimate continuation of the limited exception which fails to recognise the temporal limitation placed upon executions.

t. Alabama's search for a new execution method constitutes an official penological policy to continue to kill people which will include Mr Smith, and others. This constitutes a national violation of article 6(6) as the State seeks to perpetuate the possibility of the death penalty.

u. 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).

Good Faith Interpretation of Treaties

v. Consistent with the violation of article 6(6), the United States has failed to demonstrate a good faith interpretation to uphold the spirit, aims, and objectives of the ICCPR and has therefore contravened the so-called '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.[20]

w. 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:

[20] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

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.[21]

x. It is therefore argued that overall the United States engagement on the death penalty following UN treaty body reviews, and specifically in the case of Mr Smith 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 Smith's case is a practical rejection of the obligation to provide an effective remedy under article 2, and is thus an arbitrary deprivation of the right to life under article 6(1).

The Death Penalty as a Violation of Jus Cogens

y. 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 consequences of peremptory norms of general international law* (jus cogens) 2022[22] 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, which are argued provide new 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.[23] The United States is now in violation of this new international standard.

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

(a) pre-trial investigations,
(b) the capital trial and sentence,
(c) his duration on death row,

[21] 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.
[22] 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
[23] 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

(d) the first botched and failed execution, and
(e) there is an intolerable risk that future violations will occur in the attempted second execution through the untested means of forced nitrogen gas inhalation.

aa. Furthermore, the United States has previously acted inconsistent with a good faith application of international law, and this includes on the question of the death penalty. This is compounded as it is argued here that the state practice consistent with international legal standards has now reached a point in which the death penalty is demonstrated to be a violation of the peremptory norm of general international law (*jus cogens*).

bb. It is argued there is now a legitimate basis for the UN Special Procedure mechanisms to classify the death penalty as a violation of the highest legal norm.

B. UN Special Procedure Mandate

4. This Complaint to Mr Morris Tidball-Binz, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions is respectfully submitted under the Human Rights Council resolution 44/5, particularly:

> (7) Requests the Special Rapporteur, in carrying out the mandate:
>
> > (e) To continue to monitor the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment, bearing in mind the comments made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, and the Second Optional Protocol.[24]

5. We note the appropriateness of this submission to the Special Rapporteur consistent with the mandate holder's statements made in previous death penalty cases in the United States,[25] and also for the state focus of this complaint, pervious mandate holder's letters to the US Secretary of State and the Office of the Governor of

[24] 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.
[25] 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.

Alabama in the complaints submitted on behalf of Mr Tomas 'Tommy' Arthur on 3rd November 2016,[26] and Mr. Doyle Hamm on 15th February 2018.[27]

6. With Professor Deborah Denno (Fordham University School of Law), the authors submitted the Complaint on behalf of Mr Alan Eugene Miller to both Mr Morris Tidbal-Binz, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and to Dr Alice Jill Edwards the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[28]

7. We are also of the opinion that for this Complaint, the due process issues, scope of the sentence, excessive duration on death row, and the unique nature of the method of execution, will be of relevance for the consideration of further Special Procedure mandate holders, for example:

    (a) Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
    (b) Working Group on Arbitrary Detention
    (c) Special Rapporteur on the Rights of Persons with Disabilities
    (d) Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health
    (e) Independent Expert on Human Rights and International Solidarity

C. Facts of the Case

8. Mr Kenneth Eugene Smith was sentenced to death in Alabama in 1989 for the murder of Mrs Elizabeth Dorlene Sennett. For procedural reasons his conviction was set aside in 1992[29], and he was then resentenced to death in 1996. He has been subjected to Alabama's capital judicial process for a total of 34-years, and under sentence of death for 29-years.

9. On the 18th March 1988, Mrs Elizabeth Dorlene Sennett of Colbert County, Alabama, was found dead in her home. She had been subjected to the infliction of trauma through physical beating and stab wounds. Her husband, the Reverend Charles Sennett, a Christian preacher, notified the emergency services but Mrs Sennett was pronounced dead when they arrived at the hospital. The cause of death was identified

[26] 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.
[27] 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.
[28] UA USA 18/2022, 21 September 2022
[29] In Smith v. State, 620 So.2d 732 (Ala.Cr.App. 1992), the original conviction was set aside due to a Batson violation and the case was then remanded for a new trial.

as inflicted through stab wounds. It was reported by a confidential informant that a video recorder and stereo equipment was missing.

10. During the police investigations, the husband, Reverend Sennett was identified as a suspect in the crime. Suspicion was raised when it was discovered he was having an affair, he had accrued substantial debts, and had taken out a life insurance policy on his wife.

11. Reverend Sennett committed suicide before the police had initiated proceedings to arrest him.

12. The Governor of Alabama offered a reward of $11,000 for information which could lead to the arrest and conviction of the persons responsible for Mrs Sennett's death. Following this, a confidential informant gave the police information. The informant then committed trespass to gain evidence from Mr Smith's house. Due to this acquisition of evidence the police arrested Mr Billy Gray Williams, Mr John Forrest Parker, and Mr Smith.

13. The prosecution's case was that Reverend Sennett, had approached Mr Williams, who was a tenant in an apartment owned by the Reverend. He asked Mr Williams to form a group to physically assault his wife for the purpose of intimidating her. Mr Williams then asked Mr Parker and Mr Smith to join in the commission of the crime.

14. On 18th March 1988, Mr Parker and Mr Smith went to the Sennett's home and the prosecution alleged that they carried out their plan to murder Mrs Sennett. Reverend Sennett paid $1000 to Mr Williams, Mr Parker, and Mr Smith. The prosecution argued that the criminal enterprise changed from a plan to assault Mrs Sennett to a plan to kill her. Therefore, according to the prosecution, each party to the enterprise was aware of the change of plan.

15. At trial, the defence acknowledged Mr Smith's participation in the assault of Mrs Sennett and his role in the theft of the video recorder. However, it was argued that Mr Smith was completely unaware of any change in the criminal enterprise from an intention to commit an assault to an intention to commit murder.

16. On this technical legal issue Mr Smith was liable for murder on a felony charge due to his intentional involvement in the assault and robbery. Crucially, this provided the legitimate basis to argue that Mr Smith was not liable for capital murder.

17. Corroborative evidence was collated in support of the defence's position. Three state witnesses provided testimony, which could therefore have been presented as exculpatory evidence. The defence were thus prevented from eliciting corroborative evidence to substantiate the fact that Mr Smith had never intended for the criminal enterprise to kill Mrs Sennett. He had no intention to murder, and therefore possessed the mens rea for only satisfying the legal criteria for the crimes of assault and robbery.

18. The three witnesses were:

    (a) Mr Donald Larry Buckman. He testified that before the killing he was approached by Mr Smith, who sought his help in the commission of an assault.
    (b) Mr William Brent Barkley. He also testified that Mr Smith approached him before the killing. Mr Smith informed him he knew someone who wanted to hire people for the commission of an assault.
    (c) Mr Ralph Earl Robinson. He talked to Mr Smith after the killing. He testified that while playing cards with him and his wife, Mr Smith broke down in tears and told them that he was only supposed to assault Mrs Sennet, but that she had subsequently been killed.

19. The murder was committed by Mr John Forrest Parker who was sentenced to death for the capital offense in 1989 and was executed by lethal injection on the 10th June 2010.[30]

20. However, Mr Smith also received a death sentence even though he never knew Mr Parker was going to kill Mrs Sennett, and Mr Smith did not cause any of the fatal injuries to the victim.

21. Mr Smith's 1989 conviction was set aside in 1992 due to a *Batson* violation (prosecution misapplication of peremptory challenges of jurors) and the case was then remanded for a new trial.[31]

22. Mr Smith was again tried in 1996. The jury convicted him of capital murder but recommended, by a vote of eleven (11) to one (1), that he should not receive the death penalty and instead be sentenced to life in prison. However, the trial judge disregarded the jury's recommendation and gave the sentence as the death penalty.

23. On the 17th November 2022 the ADOC attempted to execute Mr Smith through lethal injection. The protocol was not fully implemented as an appropriate vein was not discovered. For 4-hours (480 minutes) Mr Smith endured repeated attempts by the prison personnel to locate a vein for an appropriate insertion site. The straps were fastened severely and an abuse of the protocol occurred as at one point the prison officials tilted the gurney, forcing his body to face upside-down. Mr Smith suffered significant spinal injuries which have not been effectively treated post-execution attempt. He still has significant back pains. He also continues to suffer from the mental trauma of the failed execution and is suffering from anguish concerning the future attempt to end his life through forced nitrogen gas inhalation.

[30] Petition for writ of certiorari denied by the US Supreme Court, Parker v. Alabama, 560 U.S. 962, 130 S.Ct. 3408 (Mem) 10 June 2010.
[31] Smith v. State, 620 So.2d 732 (Ala.Cr.App. 1992).

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

24. On the 8th June 1992 the United States ratified the International Covenant on Civil and Political Rights.[32] Included in the deposit of ratification to the Human Rights Committee were the government's reservations, declarations and understandings, that the government applies to the application of the ICCPR within its domestic law.[33]

25. The Human Rights Committee considered the reservations to be 'incompatible with the object and purpose of the Covenant,' and therefore should be withdrawn.[34] Since 1992 there has been a significant development in the evolution of international law to restrict the scope of the death penalty, the provisions clarifying the safeguards for capital defendants, multilateral and bilateral encouragement of abolition, and increasingly around the world governments abolishing the death penalty. 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.

26. It is the author's argument that the Special Procedure mandates should proceed in the review of Mr Smith'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.

Reservations[35]*:*

> (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.
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> (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.

27. The last sentence of the government's Reservation 2 is now incompatible with the US Supreme Court's judgment in *Roper v Simmons*,[36] in which it was held that to

[32] See, Status of Ratifications, UN Treaty Body Database, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=USA&Lang=EN
[33] 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.
[34] 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.
[35] See, https://treaties.un.org/pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&clang=_en
[36] Roper v Simmons, 543 U.S. 551 (2005)

sentence a juvenile offender to death would be a violation of the Eighth Amendment's 'cruel and unusual punishments' clause.[37] 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.

28. Concerning methods of execution under Reservation 3, it is incompatible with the object and purpose of the Covenant.

Understandings[38]:

> (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.
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> (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.

29. Contrary to Understanding 1, the trial and conviction of Mr Smith 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.

30. 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. However, it is seen to provide a practical domestic nullification of international law, and thus does not allow for a full review. As Justice Breyer in *Medellin v. Texas* stated:

> 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

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

> State [Texas]…And that is precisely the situation that the Framers sought to prevent by enacting the Supremacy Clause.[39]

31. Justice Breyer affirms 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 seek to act inconsistently with the Covenant, because 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 results in the federal government violating the ICCPR. The key wording in the reservation is 'the state or local government may take appropriate measures for the fulfilment of the Covenant.' In this way 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.

Declarations[40]

> (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 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.

32. 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 an obligation to preserve Covenant rights, not to act 'whenever possible.' Declarations 1 and 2 significantly support the argument that the government is in persistent violation of the Covenant.

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

33. Mr. Smith is arguing he was convicted of capital murder in violation of his rights to due process, and a reliable determination of guilt and sentence. He maintains that the State of Alabama has violated the Sixth,[41] Eighth,[42] and Fourteenth[43] Amendments to the United States Constitution.

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[39] Medellin v. Texas, 552 U.S. 491, 560 (2008)
[40] See, https://treaties.un.org/pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&clang=_en
[41] 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

34. The authors agree and argue that there are comparative violations of international law.

35. In *Khaleel v. Maldives,* the Human Rights Committee affirmed that all aspects of the capital procedure must comply with the 'minimum guarantees' recognised article 14 (3) (d).[44] The Committee found a violation of both article 6 and 14 in that the procedural deficiencies rendered an unfair trial, and therefore when a death sentence was imposed in violation of the right to life.[45] Mr Smith has been subjected to comparable violations during his trial in Alabama and the subsequent federal appeals have not safeguarded his rights.

Exculpatory Evidence

36. The State of Alabama failed to preserve exculpatory evidence rendering the conviction arbitrary in violation of the ICCPR articles 6(1) and 14.

37. 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 impeach the informant's testimony on the witness stand.

38. After Mrs Sennett's death, law enforcement authorities were contacted by an informant who told them that it was Mr John Forrest Parker who brought a knife to

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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.'

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

[43] 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.'

[44] 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.

[45] Khaleel v Maldives, CCPR/C/123/D/2785/2016, 16 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.'

the scene of the crime and that he used the knife and killed Mrs Sennett. This information was clearly both exculpatory and material to the question of assessing Mr Smith's innocence or guilt. It was highly relevant for guaranteeing a fair trial as it would have been material for the jury and the judge's determination of guilt and sentence.

39. Nevertheless, the state failed to preserve the identity of the informant. They assigned her a code name "569S" which made it impossible for Mr Smith to investigate.

40. Under *Brady v. Maryland*,[46] due process requirements oblige the prosecution to provide a criminal defendant with any exculpatory evidence it possesses that is material either to guilt or punishment. The state has therefore been deficient under *Brady*, and has violated the ICCPR articles 14 with 6(1).

Violation of the Duty to Disclose Exculpatory Evidence in International Law

41. Article 14 (3) states that in guaranteeing the right to a fair trial, 'everyone shall be entitled to the following minimum guarantees, in full equality,' and (b) 'To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.' The preservation of exculpatory evidence is a key aspect of the defendant's right to 'adequate facilities.'

42. Concerning the meaning of 'adequate facilities,' 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).[47]

43. 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*.[48] The Human Rights Committee has

[46] 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).

[47] 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.

[48] 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.

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.'[49]

44. To deny Mr Smith access to exculpatory evidence is to discriminate against him in violation of his right to a fair trial under article 14 and his right to life under article 6.

45. The UN's *Guideline on the Role of Prosecutors*[50] 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:
>
> a. Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

46. In suppressing the exculpatory evidence the state prosecutors did not perform their duties fairly and did not respect and protect Mr Smith's human dignity and human rights. Consequently due process was violated and thus the state prevented a smooth functioning of the criminal justice process as Mr Smith was sentenced in violation of his right to life.

47. The UN's *Basic Principles on the Role of Lawyers*[51] 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.[52]

48. Alabama failed to act with honour and dignity and in the act of suppressing exculpatory evidence, denied Mr Smith access to appropriate information, files and documents. It is clear his right to a fair trial was violated.

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

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[49] 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.
[50] 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, 7 September 1990.
[51] 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.'
[52] Id. para. 21.

> 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.[53]

50. The suppression of exculpatory evidence demonstrates there was a 'clear and convincing' alternative explanation of the facts. Consequently, 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.*

Incomplete and Misleading Jury Instruction

51. Due to the fact that Mr Smith did not kill Mrs Sennett, the trial judge should have provided an instruction on the reduced offense of felony murder which was committed in the course of a robbery and assault. This would have been consistent with Alabama law, for example in the cases of, *Starks v. State*[54] and *Womack v. State*.[55]

52. Indeed, Alabama law established:

> [a] defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense…unless that defendant is legally accountable for the murder because of complicity in the murder itself…[56]

53. This is also consistent with the felony murder rule in *Enmund v Florida*,[57] which held that it is a violation of the Eighth Amendment to sentence a person to death who did not kill, attempt to kill, or intend to kill the victim. Therefore those who did not commit the offence of the murder could not be capitally charged with the offence. Mr Smith did not personally commit the murder and so should not have been found guilty of a capital offence.

54. Mr Smith could be guilty of a capital offense only if he aided and abetted the murderer with the specific intent to kill. Mr Smith could not be guilty of a capital offense if he only assisted Mr Parker with the intent to commit a robbery and assault.

55. The jury asked the judge to provide clarity on the different *mens rea* elements of the non-capital offence and the capital offence.

56. However, the judge merely reread to the jury the original instruction and did not provide any cogent clarification on the specifics concerning the intent to kill.

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[53] 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.

[54] Starks v. State, 594 So.2d 187, 193-94 (Ala.Cr.App. 1991).

[55] Womack v. State, 435 So.2d 754, 763 (Ala.Cr.App. 1983).

[56] Ala, Code §13A-5-40(c).

[57] Enmund v Florida, 458 U.S. 782 (1982).

57. The supplemental jury instructions merely maintained the incorrect impression that Mr Parker's intent to kill could be imputed to Mr Smith, if Mr Smith participated in the assault and robbery. Hence, the jury could have convicted Mr Smith of a capital offense even if the members of the jury did not believe that he intended Mrs Sennett's death.

Inadequate Jury Instructions as a Violation of International law

58. There are appropriate international law standards governing a judge's direction to a jury. Such issues fall under the right to a fair trial and the prohibition of an arbitrary deprivation of life. When the death penalty is a possibility the fair trial standards must be scrupulously observed.

59. On the relationship of 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*, stated:

> 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).

60. The trial judge in Mr Smith's case failed to adopt a scrupulous approach to the proceedings to ensure a fair trial and due process.[58]

[58] In Burdyko v. Belaurus 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*, 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.

61. Following the Human Rights Committee decision in *Lubutu v. Zambia*[59] the Committee in its drafting of the *General Comment No 36 – Article 6: right to life*, stated, 'In all cases involving the application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence, including its specific attenuating elements, must be considered by the sentencing court.'[60]

62. The judge sentencing Mr Smith to death did not adhere to such standards, as his instruction to the jury was not sufficient to satisfy the articulation of the personal circumstances of Mr Smith, and also failed to adequately articulate the particular circumstances of the requirement of intention for a capital offence.

63. In *Robinson v Jamaica*, the Human Rights Committee considered the violations of article 14 (1) and (2), on the grounds of improper instructions from the trial judge to the jury, and affirmed:

> the Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or if the judge manifestly violated his obligation of impartiality.[61]

64. The same issue was raised in *Judge v Canada*, as the Human Rights Committee stated that the author:

> refers to alleged errors that occurred during the course of his trial that could have changed the outcome of the case. He refers to a question from the jury which sought to clarify the difference between 1st and 3rd degree murder and manslaughter. The jury's request was not answered, as the author's attorney could not be located. When the attorney appeared the next day, the jury was ready to deliver a verdict without receiving an answer to the request for clarification. A verdict of 1st degree murder was then returned.
>
> The author submits that while a mechanism allowing limited review might be viewed as acceptable in cases in which non-capital crimes have been committed, he contends that this is wholly unacceptable where the defendant's life hangs in the balance, and when he is barred from having any claim of error at trial reviewed.[62]

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[59] Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995).

[60] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, in Section IV. Imposition of the death penalty, stated, 'In all cases involving the application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence, including its specific attenuating elements, must be considered by the sentencing court.,' p. 8.

[61] Robinson v Jamaica, CCPR/C/68/D/731/1996, 13 April 2000, para 9.4.

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

> 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 been notable factual and legal developments and changes in international opinion in respect of the issue raised. The

65. However, *Judge* focused upon the deportation issue in the case[63] and provided an analysis of how it would consider the history of its jurisprudence and the informative fact of the world governments moving towards the abolition of the death penalty.

66. The Human Rights Committee 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,'[64] 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. [65]

67. The judge's instruction to the jury in Mr Smith's case rendered an arbitrary outcome. We argue the judge has applied elements of inappropriateness, injustice, lack of predictability, and failed to meet the standards of due process of law. The judge did not observe elements of reasonableness, necessity and proportionality rendering his death sentence a clear violation of articles 6(1), 10, and 14.

68. 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.[66]

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. para. 10.3

[63] Id. para s 7.7-7.8 the Committee observed that as the author's claim on the judges' direction of the jury (as it reviewed under article 14) was still domestic opportunities for the further appeals in the State of Pennsylvania.

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

[65] 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.

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

F. The Capital Sentence Imposed Upon Mr Smith is a Violation of the ICCPR Article 6(2) Temporary Provision for the 'Most Serious Crimes'

The 'worst of the worst'

69. Due to Mr Smith not possessing the required intention and the fact that he did not initiate the act of killing, he cannot be legitimately considered to have committed a capital offence.

70. As he neither killed, attempted to kill, nor intended to kill, the death penalty could not constitutionally be imposed, as recognised in *Enmund v. Florida*.[67] Mr Smith therefore did not poses the moral culpability for a capital offense. In *Kansas v Marsh*,[68] Justice Souter stated that the death penalty must be reserved for evidence which is used to "identify the worst of the worst."[69]

The 'most serious crimes'

71. In international law the recognition of 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…

72. 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. 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:

> (a) intention, and;
>
> (b) the act of killing.

73. Mr Smith does not satisfy either of the criteria of article 6(2).

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[67] Enmund v. Florida, 458 U.S. 782 (1982).

[68] 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").

[69] 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.").

74. 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.[70]

75. The trial court in Mr Smith's case did not sentence him consistent with the standards of article 6(2). Instead of providing an accurate (restrictive) reading of the facts so as to provide a sentence consistent with applicable intention and direct participation in the murder, the court provided an unjustified expansive reading, and even against the recommendation of the jury, imposed the death penalty.

76. 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.[71]

77. It is clear that under *Enmund v. Florida*[72] the United States already provides a capital judicial process which would have satisfied the "most serious crimes" criteria. However, the US courts have unjustifiably deviated from this standard in violation of the due process and fair trial guarantees.

78. 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.[73]

79. 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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[70] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, p. 8.
[71] Id.
[72] Enmund v. Florida, 458 U.S. 782 (1982).
[73] Resolution on the moratorium on the use of the death penalty, UNGA 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."[74]

80. The *Report of the Secretary General on the Question of the death penalty*, adopted the *General Comment No. 36* interpretation.[75] 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.[76] 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.'[77] 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.'[78]

81. The United States must ensure that 'death sentences are not applied except for the most serious crimes.'[79] The state of Alabama is acting in violation of this standard in sentencing Mr Smith to death as he did not possess the requisite *actus reus* (act of killing Mrs Sennett) or *mens rea* (intention to kill Mrs Sennett). So Mr Smith could not legitimately be sentenced in compliance with ICCPR article 6(2). He committed, and intended to commit, an assault and burglary, but had no knowledge that Mr Parker would kill Mrs Sennett. 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).

82. The decision of the US Supreme Court in *Enmund v. Florida*, and the reasoning of Justice Souter in *Kansas v. Marsh*, are not being applied consistently across the states, and when Alabama sentenced Mr Smith to death it treated him in a discriminatory manner, in violation of equality before the courts, as defined under *General Comment No. 32– Article 14: Right to equality before courts and tribunals and to a fair trial* an, 'Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings.'[80]

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[74] Question of the death penalty, A/HRC/RES/54/35, 17 October 2023, para. 3.

[75] 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

[76] High-level panel discussion on the question of the death penalty, A/HRC/54/46, 25 July 2023.

[77] Id. p. 2.

[78] Id. p. 4.

[79] General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36, p. 1.

[80] 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.

G. The Botched and Failed Execution of Mr Smith (lethal injection)

83. The below (paragraphs 84-102) is a full citation of the events of Mr Smith's botched execution as recorded in the judgment of R. Austin Huffaker, Jr. United States District Judge, in *Smith v. Hamm*.[81]

84. Kenneth Eugene Smith is a death row inmate incarcerated at Holman Correctional Facility (Holman). He was scheduled to be executed by the Alabama Department of Corrections (ADOC) on November 17, 2022. After Smith spent multiple hours strapped to the gurney and underwent one-to-two hours of attempts to establish both a standard intravenous (IV) line and a central-line IV, the ADOC terminated the execution. According to Smith, he suffered, and continues to suffer, extreme physical and psychological pain because of this attempted execution.

85. In the Second Amended Complaint, Smith alleges that the State violated his constitutional rights by subjecting him to an unconstitutional level of pain in attempting to execute him by lethal injection. Additionally, Smith asserts that a second attempt to execute him, generally or by lethal injection specifically, would violate the Eighth and Fourteenth Amendments to the United States Constitution. Finally, Smith claims that the State violated a prior Order of this Court when the State allegedly used intramuscular sedation during the execution attempt. He seeks declaratory and injunctive relief, as well as compensatory and punitive damages.

86. At around 4:30 p.m. that afternoon, Smith was taken to the prison infirmary where a nurse created a body chart. "No member of the execution IV team was present during this visit." Shortly thereafter, Smith was returned to the "death cell." At around 8:00 p.m., Smith was escorted from the death cell to the execution chamber. Smith was told to lie down on the gurney, and he complied. Smith was then tied down to the gurney in a "painfully tight" manner. Over time, he felt as if his circulation was being cut off by the straps. According to the Second Amended Complaint, Smith was painfully strapped to the gurney for approximately two hours even after the Eleventh Circuit stayed his execution. Additionally, Smith says he was never informed of the Eleventh Circuit's stay. The experience of being painfully strapped to the gurney for hours—with no explanation and anticipating that he would die soon—caused Smith extreme distress.

87. At approximately 10:00 p.m., the IV team, consisting of three men, entered the execution chamber and began to repeatedly stab Smith's arms and hands with needles, attempting to access a vein to establish an IV line to administer the lethal injection drugs. Since he does not know the names of the men on the IV team, he refers to each one as "Green Scrubs," "Blue Scrubs," and "Red Scrubs," based on the color of their scrubs. Three individuals wearing suits were also in the execution chamber. Because

[81] Smith v. Hamm, United States District Court, M.D. Alabama, Northern Division, 2023 WL 4353143, 5 July 2023.

Smith does not know these individuals' names, he refers to them as "Suits." Defendant Wood and several correctional officers were also present in the execution chamber. Around this same time, the Supreme Court vacated the stay of execution.

88. Green Scrubs placed himself on Smith's right side, and Blue Scrubs placed himself on Smith's left side. Red Scrubs appeared to be supervising the other two team members. Blue Scrubs placed a tourniquet around Smith's upper arm and placed a pad under his arm. He then began sticking a needle into Smith's arm. At one point, Smith cried out that Blue Scrubs was sticking the needle into Smith's muscle, causing him pain. Blue Scrubs responded, "No I'm not." Red Scrubs then told Blue Scrubs he "need[ed] to back it up," which he did, followed shortly by attaching tubing to the needle. Meanwhile, one of the "Suits" appeared to be taking photographs with his phone.

89. Next, Green Scrubs examined Smith's right hand and slapped it in order to find a vein. Green Scrubs then began puncturing Smith's skin with needles in several places on his hand. Smith felt the needle "going in and out multiple times" and moving under his skin, causing him great pain. He cried out several times, but the personnel in the room ignored him. Smith then asked the "Suits" if they had any authority to call the court to report that his constitutional rights were being violated, but they did not respond.

90. Blue Scrubs and Green Scrubs next looked at Smith's bare feet, but after shaking their heads, Blue Scrubs began shining a blue light over Smith's arms and hands. Either Blue Scrubs or Green Scrubs jabbed needles in Smith's right arm again, sliding it back and forth multiple times with each stick. Smith felt the needles going into his muscle and cried out in pain. He again asked to speak to his lawyers or the court, and he gave this case number to the personnel in the room.

91. Red Scrubs then claimed he did not need the blue light and began jabbing Smith's right arm with a needle multiple times, and he ignored Smith's pleas that the jabs were causing him "severe pain." The pain was so severe that Smith lost his composure, which he was trying to maintain for his family and the witnesses and so he could say his final words. Various persons in the execution chamber appeared to be taking photographs of the procedure and Smith with cell phones.

92. Next, Blue Scrubs asked the attendant correctional officers to tilt the gurney backwards so that Smith's feet would point upwards, which they did. Smith was then left "hanging from the gurney in an inverse crucifixion position with his feet elevated, which caused pain in his neck, shoulders, and back." According to Smith, nothing in Alabama's lethal injection protocol permits an inmate to be suspended from the execution gurney in this manner. Smith asked the officers and others in the room what was happening, but they gave no response. The IV team and the "Suits" then left the room for a period.

93. When the personnel returned, Red Scrubs appeared next to Smith wearing a surgical gown, a face mask, and a clear plastic face shield. None of the IV team members had worn face masks or face shields prior. The guards then raised the gurney to Red

Scrubs's height. Someone subsequently unbuttoned Smith's shirt and pulled it away from his chest.

94. Red Scrubs asked Smith to turn his head to the left. Although he did not resist, Smith indicated that he could not participate in his own execution. Wood then approached Smith from behind. At this time, someone rubbed a cold solution on Smith's neck and collarbone region, and Red Scrubs placed a blue paper drape over Smith's face which had a clear plastic insert in the face region. Smith again asked what they were doing, and no one responded.

95. Next, Smith saw a clear syringe with a needle coming towards him, which terrified him and caused great emotional distress. He was also concerned he might be injected with a sedative. He told the IV team to stop and pleaded for someone to call the court. He nevertheless felt multiple needle jabs in his neck or collarbone from Red Scrubs, causing him severe pain. Smith asked for the court and counsel again and asked in anguish "Is there no one who can stop this?" No one responded to his questions. He then was injected with a sedative and/or anesthetic.

96. Next, Red Scrubs stepped back, and Smith then saw a large gauge needle—the biggest needle he had ever seen. Wood held Smith's head in both of his hands and then torqued it to the side, saying, "Kenny, this is for your own good." Smith expressed his disagreement but did not resist. Red Scrubs began inserting the needle into Smith's collarbone region, which Smith believed was an attempt to establish a central line. Smith "felt like he was being stabbed in the chest and could feel the needle sliding under his collarbone." "Mr. Smith's body contorted away from the pain and against the restraints, injuring his right shoulder. He was in such physical pain that he had difficulty breathing and his voice weakened."

97. Meanwhile, "Blue Scrubs snarled, 'You can't feel that' even as Mr. Smith was writhing and shaking uncontrollably, eventually causing his shower shoes to come off and become wrapped in the sheet at his feet." Smith responded that he did feel pain.

98. Red Scrubs then repeatedly jabbed Smith's chest with the large needle. "Mr. Smith's pain was so intense that he could hardly breathe and was sweating so profusely ... that he feared he had urinated on himself."

99. After an indeterminate amount of time, Red Scrubs removed the paper drape from Smith's face, and the IV team and the Suits left the chamber again. Meanwhile, Smith remained strapped to the gurney. "His heart was pounding, and he was hyperventilating and crying." The IV team came back into the chamber and started picking up items off the floor. No one told Smith what was happening or whether the execution was still going forward. "[A]t some point before midnight, Green Scrubs placed a hand on Mr. Smith and asked if his pain had eased up at all yet. Mr. Smith responded, 'No, sir.' Green Scrubs stood over Mr. Smith and said, 'everything is going to be alright.' " Green Scrubs then said the execution was over.

Aftermath of the Execution Attempt

100. Blue Scrubs removed the remaining needle from Smith's arm, while Green Scrubs offered Smith some water, held his hand, and said he would pray for him. Smith remained strapped to the gurney for another ten minutes and continued to hyperventilate. After another ten minutes, guards came to remove him from the gurney. Officers had to support Smith's arms to place him in handcuffs. He was unable to sit up on his own and felt dizzy and faint when the guards propped him up.

101. Smith also could not stand up on his own, and two officers had to support him on either side to return him to the death cell. Smith was taken to the infirmary and was assisted onto the examination table. Smith reported to the nurse that he had severe pain in his shoulder and neck pain and was dizzy. After the nurse created a body chart, Smith was returned to the death cell. He was unable to undress and then dress without assistance, and he was unable to sleep for most of the night. Smith was also not offered anything to drink or eat. A few hours later, Smith was returned to his cell on Holman's death row.

102. Smith has experienced lingering pain in his arm and in the area around his collarbone since the execution attempt. He also experiences back spasms from being tightly strapped to the gurney. On the morning of November 19, 2022, Smith was found crying in his cell, and officers were so concerned about his level of distress that he was taken for immediate medical treatment and observation.

H. The Medical Analysis of Execution by Nitrogen Gas as Proposed by the Alabama Department of Corrections

103. Alabama Department of Corrections (ADOC) intends to use forced nitrogen gas inhalation as a method of execution. This method of execution has never been done before and the written protocol supplied by ADOC contains redacted sections and missing information making it difficult to evaluate this new method. To understand the use of nitrogen in this setting, it is necessary to review the chemistry of nitrogen, the predicted physiologic response to nitrogen inhalation, and how the medical and scientific community would normally evaluate novel usage of chemical effects on the body.

104. Nitrogen is a ubiquitous chemical element with the symbol N and an atomic number of 7. Nitrogen is classified as a nonmetal and exists as a colorless, odorless gas at room temperature. Nitrogen constitutes 78% of the air by volume. The remainder of air consists of 21% oxygen and other gases in small quantities including carbon dioxide, hydrogen, and neon. Nitrogen is generated by the distillation of liquid air and is an important element in a variety of biological and chemical processes. Nitrogen gas was first isolated in the 1760's by both Henry Cavendish and Joseph Priestley by removing the oxygen from air. Neither recognized or characterized the remaining gas as an element. In 1772, Scottish physician Daniel Rutherford finally recognized it as such and reported its formal

discovery. Cavendish and Priestly both observed however that a burning candle in a pure deoxygenated environment would soon be extinguished and similarly, a mouse exposed to that same environment would die. After the formal discovery of what became known as nitrogen, Antoine Lavoisier first suggested the newly discovered gas be called *azote*, from the ancient Greek word meaning "no life."

105. Nitrogen gas is inert and contributes to the low reactivity of the atmosphere. Oxygen, while necessary for life, is highly reactive and toxic to cells when they are exposed to higher concentrations contained in ambient air. Human respiration under normal conditions therefore benefits from the dilution of pure oxygen. For human respiration, the purpose of nitrogen is to be the inert diluent and creates a working concentration of oxygen. More than simply inert, breathing 80% nitrogen is not noxious or detectable as a component of normal air. When air is inhaled, oxygen is taken up as cellular fuel and is replaced 1:1 with carbon dioxide, a waste product of cellular metabolism. In a single breath, not all oxygen is removed and exhaled gases contain a functionally unchanged quantity of nitrogen, a lesser quantity of oxygen and now the new addition of carbon dioxide. Nitrogen gas can be taken up by tissues in a problematic way during SCUBA diving. When air is inspired from a SCUBA tank at depth, a sudden rise to the lower ambient pressure at the surface causes nitrogen gas in tissues to expand. This phenomenon is known as "the bends" and can lead to a variety of serious morbidities. When nitrogen gas in air is inhaled under very high ambient pressures, it further has a dangerous intoxicating property referred to as "nitrogen narcosis."

106. Certain molecules and elements in gaseous forms have anesthetic properties including pain control, obtundation, muscle relaxation, and impairment of recall. When these gases are used in this way, they must exert these properties by using minimal concentrations. If an anesthetic gas requires more than 80% concentration of total volume to be effective, that gas has no value as it permits only to be combined with a quantity of oxygen less than in air. Pure nitrogen provides no anesthetic advantage in any workable concentration. Nitrogen has been used as a gas in the setting of medical experimentation to investigate the physiologic effects of low oxygen states known as hypoxia.

107. 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 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.

108. Rapid fall in ambient oxygen is a different concern. The experience of being short of breath is extremely uncomfortable. This response first functions as a nonspecific warning sign for a person to increase inspired oxygen. The discomfort of low oxygen can be hard to parse but the experience is distressing. When oxygen levels are slowly reduced, the body may be temporarily misled and think all is well. Chemoreceptors not only detect a fall in oxygen, but a rise in blood carbon dioxide. When we hold our breath, carbon dioxide levels rise rapidly. Even a slight elevation of blood carbon dioxide is very poorly tolerated and experienced as an increasingly overwhelming need to breath. Most individuals can breathe hold for between 30 seconds to 2 minutes. If one hyperventilates prior to a breath hold, it is possible to extend that breath hold for a longer period. In simple breath holding experiments, the sensation to breath may occur before significant hypoxia. If carbon dioxide levels are maintained in the normal range, hypoxia may also be better tolerated. A hypoxia lower limit does exist and at some point, hypoxia becomes distressing even when carbon dioxide levels are maintained.

109. The practice of medicine is not responsible for ensuring methods of execution are constitutionally valid. To be so, that method must satisfy the 8th amendment requirement that death occurs by a method deemed not cruel. Medical practice is concerned with suffering in the context of caring for a patient. A prisoner dying by execution is not a patient by dint of the presence of a doctor. Though nitrogen has no therapeutic nor anesthetic uses, it is possible to speculate how dying by the inhalation 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.

110. 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.[82] 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 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.[83] 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.

111. 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.

112. 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.

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[82] Quine JP, Buckingham W, Strunin L. "Euthanasia of small animals with nitrogen; comparison with intravenous pentobarbital." Can Vet J. 1988 Sep;29(9):724-6. PMID: 17423118; PMCID: PMC1680841.

[83] Ernsting J, "The effect of brief profound hypoxia upon the arterial and venous oxygen tensions in man." J Physiol 1963; 169:292

113. Alabama Department of Corrections (ADOC) intends to use forced nitrogen gas inhalation as a method of execution. This method of execution has never been done before and the written protocol supplied by ADOC contains redacted sections and missing information making it difficult to evaluate this new method. To understand the use of nitrogen in this setting, it is necessary to review the chemistry of nitrogen, the predicted physiologic response to nitrogen inhalation, and how the medical and scientific community would normally evaluate novel usage of chemical effects on the body.

114. This goes against the phenomenon known as the 'medicalisation' of the the execution process, which describes the procedures for managing and internalising the trauma inflicted to produce the death. What lethal injection sort to create was a seemingly peaceful death and the external appearance of the body concealing inside the internal organs. However, th numerous botched executions in the US has demonstrated this to be a fallacy, and the proposed execution via nitrogen will create further graphic and torturous examples. Nitrogen will very likely bring the trauma inflicted by executions outside so that it will be clearly visible on the body and physiological expressions of the pain felt inside.

I. The Botched and Failed Execution Attempts as a violation of ICCPR Articles 6, 7 and 10

115. Mr Smith has been subjected to both a: (a) botched and, (b) failed, execution.

116. United States law currently does not adequately provide assessment for the particular situation of when an execution protocol creates and inflicts both a botched and failed execution on a condemned person. Mr Smith's lawyers are currently challenging the second execution attempt on the grounds that its administration will be cruel and unusual in violation of the Eighth Amendment of the Constitution of the United States.

117. The included information has demonstrated the 'cruel' treatment of Mr Smith by the ADOC, but he has also been treated in an 'unusual' manner. Botched executions are commonplace and Alabama is no exception demonstrated by the recent egregious examples of the treatment of Mr Joseph Nathan James, Alan Eugene Miller, and the first execution attempt of Mr Smith.

118. The 'unusual' aspects are: (a) he received a 'failed' execution, and (b) will be the first person in the world to be executed by nitrogen gas.

119. A failed execution is extremely rare, and the physiological and psychological impact of such an event, with the prospect of a second attempt, has not been adequately researched. Hence there is a substantial, and therefore, intolerable, risk

he will be subjected to torture, cruel, and inhumane punishment in violation of articles 6(1), 7 and 10.

120. The fact that Mr Smith will be subjected to an execution by forced nitrogen gas inhalation is tantamount to a 'medical experiment.'[84] He will be the first person to be executed by such means. As is detailed above, we simply do not adequately know the risks to Mr Smith's physiology and psychology, but it is most likely that he will be exposed to intense pain, suffering, and humiliation. Due to the lack of knowledge of the impact of death by nitrogen inhalation, there is an intolerable risk that he will be subjected to a violation of articles 6(1), 7 and 10.

121. 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.'[85] It does not ask the inmate to provide these details. The onus is upon the government. 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.'[86]

122. 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.[87]

123. Both the UN's General Assembly and the Human Rights Council's resolutions place the onus upon the state governments to ensure humane methods of execution. 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 resolutions on the death penalty. The General Assembly and the Human Rights Council are UN intergovernmental bodies and the US is an active member of both.

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[84] In violation of the WMA Declaration of Helsinki - Ethical Principles for Medical Research Involving Human Subjects, Adopted by the 18th WMA General Assembly, Helsinki, Finland, June 1964 and amended by the 64th WMA General Assembly, Fortaleza, Brazil, October 2013.
[85] Moratorium on the use of the death penalty, A/RES/77/222, 15 December 2022, para. 7(i).
[86] Question on the use of the death penalty, A/HRC/RES/54/35, 17 October 2023, preambular text.
[87] Id. para. 9.

The government, therefore, should ensure that it acts consistent with the aims and purpose and ordinary meaning of the text of the resolutions.

124. The use of nitrogen by Alabama has an intolerable risk of violating the Economic and Socia Council's *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.* Safeguard 9 states, 'where capital punishment occurs it shall be carried out so as to inflict the minimum possible suffering.'[88]

125. In finding a violation of both articles 7 and 10, the Human Rights Committee in *Robinson v Jamaica*, considered the 'inhuman and degrading prison conditions in general,' and this should now include what happens in the execution chamber.[89] Inadequate medical facilities were brought under article 10, and so a 'condition' of the prison should also include the facility of the execution chamber, and the standards of health applied within the fulfilling of the death warrant and the execution protocol, and to assess how this impacts upon the inmate during the botched execution, and then his return to the cell. If dignity is applied to prison conditions, it should be applied to the complete prison environment which the inmate is exposed to and the implementation of the execution which the protocol designs under both articles 7 and 10.

126. Nothing in the Committee jurisprudence places a burden onto the inmate to identify appropriate execution technologies.

127. The state needs to provide to the defence: (a) access to information and precise procedures, and (b) ensure transparency of the execution protocol and its application.

128. These have not been provided by the state of Alabama. Not only does the state restrict access to information on the new execution method of Nitrogen, but the jurisprudence of the US Supreme Court places an unreasonable burden on the defendant to find a constitutional execution procedure.

The Baze-Glossip-Bucklew Trilogy

129. The US Supreme Court's jurisprudence in *Baze*, *Glossip*, and *Bucklew*, has created a federal standard which has the practical effect of denying victims their process rights under the ICCPR article 2. This is achieved through procedures which place the burden upon the inmate to identify an execution method which would satisfy the standards under the Eighth Amendment of the US Constitution.

[88] See also, *Strengthening of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,* para 5.

[89] Robinson v Jamaica, 'The author has claimed a violation of articles 7 and 10, paragraph 1, on the ground of the conditions of detention to which he was subjected while detained at St. Catherine's District Prison. To substantiate his claim, the author has invoked three NGO reports...The Committee notes that the author refers to the inhuman and degrading prison conditions in general,' para 10.1.

130. In *Baze v. Rees,*[90] a plurality of the Court held that 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."[91]

131. Subsequently, in *Glossip v. Gross,*[92] a majority of the Supreme Court clarified that the plurality opinion in *Baze* and held that it was controlling. The court stated that the Eighth Amendment does not guarantee a painless death—only 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.' "[93]

132. In *Bucklew v. Precythe,* it was affirmed that the Eighth Amendment does not guarantee a painless death, only one that intensifies the physical and mental trauma with a "superaddition of terror, pain, or disgrace" and "the Eighth Amendment does not guarantee a prisoner a painless death...." [94] The key issue the majority of the Supreme Court affirmed was that even though Bucklew presented significant medical evidence concerning how lethal injection would cause him to experience excessive pain, that 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 implemented.

133. The burden is on the defendant to prove the execution method, " 'superadds' pain well beyond what's needed to effectuate a death sentence." "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." The burden of proof has been placed upon the defendant to demonstrate this to an unreasonably elevated burden of proof. Hence, this will make it practically beyond defendants to have an effective access to a remedy under both the constitution and the ICCPR article 2.

134. International law does not distinguish between 'as-applied' and 'facial' challenges because the burden is not on the individual to prove that one execution method over another substantially reduced 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.

[90] Baze v. Rees, 553 U.S. 35 (2008)
[91] Id. at 52.
[92] Glossip v. Gross, 576 U.S. 863 (2015).
[93] Id. 877
[94] Bucklew v. Precythe.

135. 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 Convention remedies. The ICCPR Article 2 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.[95]

135. The inmate has no control over the feasibility and implementation of execution technologies, and the burden to prove the risks of pain 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 his obligations under article 2.

136. The Supreme Court has never held that a method of execution is cruel and unusual, as Chief Justice Roberts affirmed in *Baze* at 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."[96]

The Violation of International Law Through the Baze-Glossip-Bucklew Trilogy

137. The *Baze-Glossip-Bucklew* trilogy creates a damning precedent and the end result is that the United States is now implementing, through executions, *pain for pain's sake*. 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.

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[95] 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.

[96] Baze v. Rees, 553 U.S. 35 (2008) 48.

138. The US 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*.[97]

139. In *Ng*, the Human Rights Council reviewed the US death penalty through the lens of article 7's prohibition of torture, cruel, and inhumane punishment.

140. The primary and exclusive focus is on the state to provide an execution process which complies with the Covenant. There is no scope for the state to shift the burden of proof upon the inmate to prove that a selected method of execution violates the Covenant. It is the sole responsibility of the state.

141. Likewise the UNGA and HRC resolutions do not place the burden on the person to be executed to assist the state in any way to create a humane execution method.

142. 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.'[98]

143. 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 the article 6 for the condemned individual help the state to kill him or her. However, 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.

144. During the Fourth treaty body review of the United States by the Human Rights Committee in 2014 the lack of transparency of the execution protocols and their ineffectiveness were highlighted.[99] The same concerns have remained in the Fifth review which occurred on 17-18 October 2023.[100] Concerning the management of pain in the initiation of an execution, the Human Rights Committee has 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.[101]

145. From the evidence presented it is clear that Mr Smith experienced and continues to experience, physical and mental suffering which exceeded the 'least possible.' Due

[97] Ng v. Canada, CCPR/C/49/D/469/1991, 7 January 1994.
[98] Human Rights Council, High-level panel discussion on the question of the death penalty, A/HRC/54/46, p. 4.
[99] 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.
[100] United States of America – 17/18 October, 139 Session (09 Oct 2023 - 03 Nov 2023), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2637&Lang=en
[101] 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.

to the failed first execution, he has already been subjected to levels of pain and suffering which exceed this threshold. The second execution attempt will only increase the pain and suffering which will further exceed the international law standards.

146. Applying the ICCPR and the General Assembly and Human Rights Council resolutions, 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 and quixotic process, which is arbitrary, unequal, inhumane, and denies human dignity.

147. 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.

148. This is an exorbitant level of cruelty which the state seeks to impose on those within the capital judicial system.

149. 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.[102]

150. It is argued that forced nitrogen gas inhalation constitutes an example of "other painful and humiliating methods of execution" which is "unlawful under the Covenant." Mr Smith will very likely be subjected to excruciating pain, but unlike the motivation for lethal injection to mask the trauma internally, the seizures that Mr Smith will experience will increase the humiliating aspect of execution by nitrogen gas.

151. In *Ng v. Canada* the Human Rights Committee considered California's execution method of death by cyanide gas asphyxiation.[103] The author of the communication argued:

> As to the method of execution in California, cyanide gas asphyxiation, counsel argues that it constitutes inhuman and degrading punishment within the meaning of article 7 of the Covenant. He notes that asphyxiation may take up to twelve minutes, during which condemned persons remain conscious,

[102] 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.
[103] Ng v. Canada, CCPR/C/49/D/469/1991, 7 January 1994.

> experience obvious pain and agony, drool and convulse and often soil themselves (reference is made to the execution of Robert F. Harris at San Quentin Prison in April 1992). Counsel further argues that, given the cruel character of this method of execution, a decision of Canada not to extradite without assurances would not constitute a breach of its Treaty obligations with the United States or undue interference with the latter's internal law and practices. Furthermore, counsel notes that cyanide gas execution is the sole method of execution in only three States in the United States (Arizona, Maryland and California) and that there is no evidence tosuggest that it is an approved means of carrying out judicially mandated executions elsewhere in the international community.[104]

152. We argue that there are consistent factual examples in execution through the use of nitrogen and cyanide. There will be both a prolonged and traumatic ending of life, and neither process is safe with regards to protecting the inmate from torture and inhumane punishment.

153. Following the language in *Ng*, it is likely that Mr Smith 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.[105]

154. 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.'[106] This is also true of Alabama's use of nitrogen. It would be the first use in the world.

155. In *Ng*, the time lapse of 12 minutes for the inmate to die was considered a violation of article 7, whereas the failed attempt of Mr Smith took 4-hours.

156. The legal consideration of the temporal issues which contributed to the assessment of article 7, demonstrate that Mr Smith has already been subjected to cruel, inhumane and degrading punishment. The future execution attempt 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.

157. 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

[104] Id. para. 11.10.
[105] Id.
[106] Id.

mental suffering', and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant.[107]

158. The Committee used 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.' We argue that the same conclusion should be applied to Alabama's use of nitrogen gas to kill Mr Smith. To execute Mr Smith through the use of nitrogen will create the intolerable risk that he will be subjected to an intolerable pain. 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 articles 7 and 10.

J. The *Lackey* Jurisprudence as a Violation of the International Law on the Death Row Phenomenon

159. The United States assessment of the constitutionality of the duration of time spent on death row is contrary to international law under both procedural and substantive assessments.[108]

160. Mr Smith has been subjected to Alabama's criminal judicial process for 34-years (since 1989) and has been under a sentence of death for 29-years.

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

161. In *Lackey v. Texas*,[109] the question for certiorari concerned whether executing an individual spending seventeen (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.

162. 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 state's and the defendant's use of time.

163. 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:

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[107] 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.
[108] 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.
[109] Lackey v Texas, 514 U.S. 1045 (1995).

> [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.[110]

164. Justice Stevens did not take into account the assessment from the moment a person is subjected to a capital charge.

165. However, Justice Stevens' dissection assessment for the portioning of responsibility would fundamentally challenge the state's ability to privilege linear time in its favour and establish a fairer duration assessment. The majority of the U.S. Supreme Court, however, have not been able to endorse this fairer time-use assessment.

166. Indeed, the Court has dug in its heels as exemplified by Justice Thomas in his concurring judgments, in which he refused to allow the designation of equal time usage and responsibility of each party's portion. He unreasonably rejected the appropriate adjudicative methodology.

167. In *Knight v. Florida* and *Moore v. Nebraska*,[111] Justice Thomas focused on the role of the inmate, 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.[112]

168. 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."[113] 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 record.

169. In *Knight*, Justice Breyer dissented and provided a fairer time-usage assessment through utilizing Justice Stevens' "portions" 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."[114]

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[110] Id. 1046-47.
[111] Knight v Florida and Moore v Nebraska, 528 U.S. 990 (1999).
[112] Id.
[113] Thompson v McNeil, 556 U.S. 1114, 1117 (2009).
[114] Knight, at 991.

170. For Justice Breyer, "it is fair, not unfair, to take account of the delay the State caused."[115] 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.[116]

171. This is material for Mr Smith's case as his death sentence is 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 incomplete and misleading direction to the jury. This is the primary reason for Mr Smith's 'time on death row.'

172. 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 defense stakeholders in the process, and this creates an error in measurement which sustains an illegitimate legal outcome.

173. More reasonably, as recognized by Justices Stevens and Breyer, this measurement necessitates consideration of multiple causes for assigning responsibility and blame for the different portions of the duration under sentence of death (which we argue 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.

174. In *Johnson v. Bredesen*,[117] Justice Stevens, joined by Justice Breyer, issued a statement of disagreement with the Court's denial of *certiorari*. Johnson was convicted 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.

175. 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.

176. 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."[118] 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

[115] Thompson, at 1120-21
[116] Boyer v Davis, 2016 LEXIS 2928.
[117] Johnson v. Bredensen, 558 U.S. 1067 (2009)
[118] Id. 1068-69.

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.

177. So to keep people on death row in the United States, the state can unfairly control the assessment of time. This may also occur in Mr Smith's case.

178. For all reasonable readings, it therefore becomes procedurally impossible for a death row inmate to identify the appropriate time to appeal, because the state through its legislation may control whether he or she will be within constitutionally accepted reaction times.

179. 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.

180. This is the malleability of time through a procedural mechanism which has the practical effect of legitimizing a time incoherence. 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.

181. However, the practical impossibility of doing this is realised because here we enter the world of H.G. Wells' *Time Machine*.[119]

182. 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"[120] provides the key paradox inherent within *Lackey* claims.

183. 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."[121] 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."[122]

184. A hastened process would satisfy finality in the death penalty.[123] 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 may be killed.

[119] H.G. Wells, *The Time Machine*, (Penguin, 2005).
[120] Marc Wittman, *Felt Time: The Science of How We Experience Time*, (MIT Press, 2017), p. xii
[121] Knight, 990 n. 1.
[122] Id.
[123] As referred to by Justice Sotomayor in her dissent in Bucklew, 1147-48.

But determining the question of 'too long' necessitates the use of cycles, reversibility, and alternative branching of time.

185. 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 conflict it reveals the ever-presence of at least "two underlying evils of intolerable delay."[124]

186. 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 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."[125]

187. 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."[126] 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.

188. 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.'[127] 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, much less for the raising a *Lackey* claim, may be unclear, and in any case may be currently outside the realm of the science-litigation interface.

189. It is therefore very likely that if Mr Smith submits a *Lackey* claim to assess his duration on death row (34-years under the criminal judicial process and 29-years on death row), that he will be subject to the judicially imposed legal paradox on the assessment of time. 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 US Supreme Court to allow executions. Time is utilised to continue the death penalty, rather than viewing it as a lens to bring into clear focus the violation of human rights.

The Assessment of Duration under the Death Penalty in International Law

[124] Johnson, 1071
[125] Id.
[126] Knight, 995.
[127] Paul Arthur Schillp, *The Philosophy of Rudolf Carnap: Intellectual Autobiography*, (1963), p. 37.

190. Consequently, the US Supreme Court's *Lackey* jurisprudence violates the right to an effective remedy under ICCPR article 2, and imposes an arbitrary deprivation of the right to life under article 6(1), torture, cruel, and inhumane punishment under article 7, and denigrates human dignity under article 10.

191. 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, including solitary confinement, and when sentenced persons are particularly vulnerable due to factors such as age, health or mental state.[128]

192. Unlike some regional courts[129] and state courts,[130] in previous jurisprudence, the Human Rights Committee refused to apply the assessment of the time duration on death row under the Covenant.[131] This was a previous approach similar to that of the US Supreme Court's *Lackey* jurisprudence.

193. However, the Human Right Committee is now prepared to appropriately assess duration on death row. In *Persaud and Rampersaud v. Guyana,*[132] it considered a case in which the peititoners 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.[133]

194. Consistent with the interpretive methodology for assessing history and contemporary state practice in the evolution of international law, as established in

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[128] 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.

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

[130] 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.

[131] 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.

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

[133] Id. para. 7.3.

Judge v Canada, it is very likely that a future Committee decision will provide a 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 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.[134]

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

196. Mr Smith has been under Alabama's criminal jurisdiction for 34-years and under sentence of death for 29-years. It is clear this length of time is a violation of articles 7 and 10.

197. The increased abolition of states globally, and the solidification of the UNGA and HRC votes in their resolution on the death penalty (cited above), 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 the opinion 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 (in the question of the assessment of duration on death row). A future

[134] 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).

interpretive decision will identify that duration on death row implicates a full and specific review under an article 6, 7, and 10 assessment.

198. For the assessment of the various contributory factors extending the 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.[135]

199. Therefore, it is reasonable for the Special Rapporteurs to reflect upon how this 'totality of time' could be articulated within relevant mandates. There is an interpretive affirmation that prolonged detention on death row can be a violation of articles 6, 7, 10, and 14, and in the case of *Lumanog and Santos* the US capital judicial system and specifically in Mr Smith's duration on death row, can be compared 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.[136]

200. The Committee is of the view that, under the aforesaid circumstances, there is no justification for the delay in the disposal of the appeal, more than eight years having passed without the authors' conviction and sentence been reviewed by a higher tribunal. Accordingly, the Committee finds that the authors' rights under article 14, paragraph 3 (c) of the Covenant, have been violated.[137] The Committee

[135] 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
[136] Id. para. 8.5.
[137] Id. paras 8.5-8.6.

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. Likewise in Mr Smith's case his violation of the right to a fair trial by the State of Alabama is the major cause of his time on death row. The state's contribution to Mr Smith being exposed to an excessive duration of capital judicial time, is a violation of his human rights.

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

201. 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.

202. So the exception provided in article 6(2) must be interpreted within this temporal lens. 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.[138]

203. The exception for the death penalty as the most serious crimes is not intended to be a licence to execute people in perpetuity. There must be a "foreseeable" end to the death penalty.

204. In seeking to create new execution methods the United States is acting contrary to this aim and objective of the right to life under article 6.

205. Inconsistent with this guidance from the Secretary-General's Report, the State of Alabama seeks to unnaturally and prematurely end Mr Smith's life.[139] Although the state argues that he has committed the most serious crime, and this is refuted above, the guidance is that there should be a realisation that the right to life

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

[139] 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.

ultimately prevails, even to ultimately protecting those who have committed the 'most serious crimes.'

206. This is because commendable justice systems should teach humanity by refusing to impose death, for example when South Africa abolished the death penalty.[140]

207. 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 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 desirable211 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.[141]

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

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

[141] Id. 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.

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

209. To allow the execution of Mr Smith would be inconstant 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.

210. The preambular text to the UN Charter states that the 'peoples of the United Nations determined' should act in concert to *inter alia*:

> (i) reaffirm faith in human rights, and
>
> (ii) establish conditions to promote justice and respect obligations under treaties and other sources of international law.

211. Under the UN Charter the "domestic jurisdiction" of States is established under 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. 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.

212. Therefore, consistent with the arguments presented above, the ICCPR articles 6, 7, 10, and 14, and the texts of th 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 be interpreted to provide a good faith protection of human rights in the context of the capital judicial process.

213. This is consistent with UN Charter article 2(2) 'good faith obligations,' 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,' under the Vienna Convention on the Law of Treaties (1969) article 31(1).[142]

214. 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 affirmed, as stated above, 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," and 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."

[142] As replicated in the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (1986).

215. 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 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.

216. 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 mposed 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.[143]

217. The world is moving towards the abolition of the death penalty and under the ICCPR article 6(6) the United States should apply a good faith interpretation and join this commendable goal. As a demonstrative step, it should set aside the death penalty for Mr Smith. He should be re-sentenced to a term in prison.

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

218. During the 8th World Congress Against the Death Penalty held in Berlin 15-18 November 2022, leading academics on the death penalty presented a statement on the proposition that the death penalty is now a violation of the highest legal standards recognised by the peremptory norms of general international law (*jus cogens*).[144] 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.

226. 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).

227. 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.

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

[144] 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

(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.

(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.

228. 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.[145]

[145] 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."

229. 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.'[146] 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:

> 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.[147]

230. 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.'[148]

231. 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 safeguard of human dignity.

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

232. 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*).[149] 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,[150] the ILC has provided detailed advice for decision makers on how to

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"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).")

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

[147] Human Rights Council, High-level panel discussion on the question of the death penalty, A/HRC/54/46, 25 July 2023, p. 2

[148] Id. p. 3.

[149] 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

[150] 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

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.[151]

233. 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 US courts. In *Siderman de Blake v. The Republic of Argentina*,[152] 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.[153]

234. 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.[154]

235. In the International Court of Justice decision in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[155] it was affirmed that the

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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."

[151] See the 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/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.

[152] 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.

[153] Id. 715.

[154] 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).

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

determination of the peremptory norms can have, 'far reaching implications,' and it is necessary to identify a 'generally accepted methodology,'[156] 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 as established. These values and obligations are also recognised in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* which 'protect essential humanitarian values.'[157] 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.

236. 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.[158] (emphasis added)

237. 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.[159] The fundamental values reflect the observations in the case law cited above and which 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 for all States parties. The good faith reading of the ICCPR, under the lens of the VCLT, is therefore brought into focus under the standards recognised in Draft Conclusion 2. Hence, this is how we can interpret that the abolition of the death penalty is reflective of a peremptory

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[156] Id.

[157] *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.

[158] 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.

[159]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,

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

238. 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.'[160] These are taken up in more detail in Conclusions 4-6. The norm must meet the necessary criteria in Conclusion 4 (a) that it is a, 'norm of general international law.'[161] 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'[162] they are to be determined through the lenses of Conclusions 5-9. Whilst the criteria of 'accepted and recognized' and 'States as a whole' is indicated in Conclusion 4, it is taken upon again in Conclusion 6. For establishing the requirement of 'states as a whole' and the 'international community of States as a whole,' 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).

239. 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,"[163] Columbia stated that it should comprise, "a very large majority,"[164] Viet Nam affirmed that a, "community of States as a whole [is] represented,"[165] Singapore stated that, "acceptance and recognition be across regions, legal systems and cultures."[166] 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."[167] Interpreting these state contributions, the Commentary affirms that concerning Draft Conclusion 7(2), "a very large and representative majority of States" is required, in

[160] DC and commentary, p. 3.
[161] 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….
[162] Id. p. 29, para 3.
[163] 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.
[164] Id.
[165] Id.
[166] Id. pp. 29-30.
[167] 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.

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 recognise the non-derogability of a norm for it to be a peremptory norm of general international law (*jus cogens*).[168]

240. 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, and each region provides a 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.

241. The holistic quality of the evidence necessary to establish *jus cogens* can be seen 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.'[169] Mr. Joachim Rücker, President of the Human Rights Council, noticed the, 'major achievement,'[170] that a significant majority of countries around the world had, 'either abolished the death penalty, introduced a moratorium or did not practice it.'[171] 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.'[172] 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.'[173] Abolition of the death penalty is therefore a universal ideal.[174] The High-Level Panel's conclusions are consistent with the

[168] Draft conclusions and commentaries, page 40, para 6.
[169] 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
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid., p. 12.
[174] 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, p. 10.

observation of governments as recorded in the ILC's Fifth Report. Hence they are all expressions of the global standards satisfying Conclusion 7 as the principle of 'states as a whole,' in identifying a *jus cogens* norm against the death penalty.

242. 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.

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

Respectfully submitted:

Professor Jon Yorke

Dr Joel Zivot