

Research Article

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A UPR Perspective on Capital Punishment and the Kingdom of Saudi Arabia

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Abstract: The Universal Periodic Review (UPR), established in 2006, has been hailed as an innovative mechanism of the United Nations' Human Rights Council. The peer review mechanism assesses the human rights records of all UN Member States and provides recommendations to further the global promotion and protection of human rights. This article provides an analysis of the Kingdom of Saudi Arabia's third UPR in 2018 with a specific focus on the State's use of capital punishment. It explores the challenges faced by the UPR and issues recommendations to foster meaningful discourse, in the international community, to protect the right to life and engender change at the domestic level.

Keywords: universal periodic review, human rights council, Saudi Arabia, death penalty, right to life, islamic law

1 Introduction

A vocal opponent and critic of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Kingdom of Saudi Arabia is responsible for a significant number of death sentences and executions that occur worldwide. Often viewed as a repeat human rights offender, the country is a staunch defender of capital punishment and one of the top executioners in the world. Amnesty International records at least 149 executions in 2018,¹ 184 executions in 2019,²

¹ Amnesty International, *Global Report: Death Sentences and Executions 2018* (Amnesty International Limited, 2019) 9.

² Amnesty International, *Global Report: Death Sentences and Executions 2019* (Amnesty International Limited, 2020) 9.

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and 27 executions in 2020.³ The sudden decline in 2020 is most likely due to the COVID19 pandemic as this more than doubled to 65 in 2021 when restrictions eased.⁴ Preliminary data for 2022 indicates an exponential increase given that Saudi Arabia executed 81 men in a single day on 12 March 2022, its largest mass execution in recent years.⁵

Saudi Arabia's continued application of the death penalty has always been justified on the basis of religion which forms the foundation of its legal system. There is no penal code or official interpretation of the Shariah that is published by the government and therefore it can be viewed as utilising a fluid interpretation which can allow for a wide scope of the death penalty and a frequent application.

This article examines the Kingdom's use of the death penalty through the lens of the Universal Periodic Review (UPR). The UPR is an innovative mechanism of the United Nation's Human Rights Council established in 2006 which reviews the human rights records of all UN Member States. Each UPR cycle runs for a period of four and a half years.⁶ Under the UPR process, the documents which form the basis of a State's review consist of a national report submitted by the State under Review, a stakeholder report, and a report by the Office of the High Commissioner on Human Rights (OHCHR). The review itself takes shape in the form of an interactive dialogue held at the UN office in Geneva, Switzerland and the proceedings are documented in the Working Group report.⁷

Saudi Arabia's third UPR was held in November 2018, with its fourth due in November 2023, and this article considers how the death penalty is viewed, by the State under Review, as a product of State sovereignty and internal criminal justice rather than human rights and assesses the UPR's contribution to furthering the discourse on this area.

³ Amnesty International, *Global Report: Death Sentences and Executions 2020* (Amnesty International Limited, 2021) 9.

⁴ Amnesty International, *Global Report: Death Sentences and Executions 2021* (Amnesty International Limited, 2021) 10.

⁵ 'Saudi Arabia: Mass execution of 81 men shows urgent need to abolish the death penalty' (*Amnesty* 15 March 2022), www.amnesty.org/en/latest/news/2022/03/saudi-arabia-mass-execution-of-81-men-shows-urgent-need-to-abolish-the-death-penalty/, accessed 20 March 2022.

⁶ UNGA Res 60/251 (3 April 2006) UN Doc A/Res/60/251.

⁷ The reports can be found on the OHCHR website: www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx.

2 Third UPR Cycle

2.1 National Report

Saudi Arabia's national report begins with the methodology undertaken to prepare the submission and lists the full involvement of all governmental and non-governmental bodies, seeking full objectivity and transparency.⁸ It fails to provide details of these consultations such as the time, location or identity of the NGOs actually involved. As a result, the true engagement and/or impact of stakeholders is left unknown and this could include stifling effective discourse on capital punishment. If the document's word limit is a factor for such an omission, then this could always be included as an annex which has not been done.⁹

Failure to engage in meaningful consultations will only hinder the UPR process. One of the main objectives for a national consultation process is to allow the stakeholders to provide valuable input into the national report. A stakeholder involved in the UPR mechanism can therefore contribute towards an accurate and comprehensive portrayal of the human rights situation on the ground (domestically) and reflect progressive efforts made by the state to ameliorate any human rights violations. Additionally, the influence of stakeholders can help identify that the proposed recommendations are substantial, relevant and important.

The national report then proceeds to highlight the normative and institutional framework for human rights in the Kingdom with the theme of religion prevalent throughout the report. At least ten references are made to the Shariah with the report highlighting the State's obligation to protect human rights "on the basis of the principles of Islamic sharia".¹⁰ This demonstrates that human rights are not absolute in the Kingdom but are restricted by religious tenets. The State's frequent reference to the provisions of Shariah affirm the level of primacy afforded to it and is most visible in its first UPR report where it states the Shariah "constitutes the quintessence of the Kingdoms' legislation insofar as it incorporates a number of constitutional principles to ensure protection of and respect for human rights."¹¹

8 UNHRC, 'National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Kingdom of Saudi Arabia' (20 August 2018) UN Doc A/HRC/WG.6/31/SAU/1, para 7.

9 See e.g., OHCHR, 'Guidance Note on 3rd Cycle National Reports' available at www.upr-info.org/sites/default/files/general-document/pdf/ohchr_guidance_national_report_3rdcycle_en.pdf.

10 UNHRC, 'National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Kingdom of Saudi Arabia' (20 August 2018) UN Doc A/HRC/WG.6/31/SAU/1, para 142.

11 *ibid* para 9.

Whilst Saudi Arabia's national report from its first UPR, in 2009, is devoid of any death penalty rhetoric, there is greater engagement seen in its third UPR where it details how the punishment is imposed only “for the most serious crimes and under strict conditions” and:

It requires a final verdict to be delivered by a competent court, after all trial proceedings before all levels of court have run their course. Cases are heard by 13 judges in all, beginning with the court of first instance, consisting of three judges. Even if it has not been appealed by any of the parties, the verdict of the court of first instance is then put before the court of appeal, where it is considered by a panel of five judges. The verdict must then be put before the Supreme Court for consideration by another five judges. If the Supreme Court upholds the verdict, all stages of trial will have been completed, whereupon the public prosecutor shall supervise execution of sentence, ensuring proper execution and the absence of any impediment that may cause execution to be halted or postponed.¹²

Relying on the notion of ‘most serious crimes’ and claiming adherence to international human rights standards is a misleading and inaccurate argument by Saudi Arabia. It fails to identify the evolving jurisprudence on the death penalty which restricts the punishment to intentional killing.

Furthermore, Saudi Arabia's justification for the death penalty suggests the State's attitude to capital punishment is seen as a matter of internal criminal justice which is also reflected in its voting pattern on the UN General Assembly Resolutions on the moratorium on the use of the death penalty and the accompanying *note verbale* of dissociation which records a formal objection to the attempt to create a global moratorium.¹³ Saudi Arabia has consistently voted against these resolutions,¹⁴ including the most recent resolution in 2020, and endorsed the *note*

¹² UNHRC, ‘National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Kingdom of Saudi Arabia’ (20 August 2018) UN Doc A/HRC/WG.6/31/SAU/1, para 63.

¹³ The *note verbale* declares that, ‘[t]he permanent missions wish to place on record that they are in persistent objection to any attempt to impose a moratorium on the use of the death penalty or its abolition in contravention of existing stipulations under international law’. See e.g. UN Doc A/62/658.

¹⁴ Resolution on the Moratorium on the use of the death penalty, UNGA Res. 62/149, 18 December 2007, *adopted by 104 votes to 54, with 29 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 63/168, 18 December 2008, *adopted by 106 votes to 46, with 34 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 65/206, 21 December 2010, *adopted by 109 votes to 41, with 35 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 67/176 20 December 2012, *adopted by 111 votes to 41, with 34 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 69/186 18 December 2014 *adopted by 117 votes to 37, with 34 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 71/187, 19 December 2016 *adopted by 117 votes to 40, with 31 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 73/175 17

verbale each year which emphasises that capital punishment is “first and foremost an issue of the criminal justice system and an important deterring element vis-à-vis the most serious crimes.”¹⁵

Deterrence is one of the most repeated justifications that is advanced for the imposition of the death penalty. Roger Hood and Carolyn Hoyle scrutinise the efficacy of the deterrence argument, maintaining that:

The issue is not whether the death penalty deters some – if only a few – people where threat of a lesser punishment would not, but whether, when all the circumstances surrounding the use of capital punishment are taken into account, it is associated with a *marginally lower rate* of the kinds of murder for which it has been appointed.¹⁶

As identified by Hood and Hoyle, it is extremely difficult, if not impossible, to find empirical data on the deterrent effects of capital punishment. The studies do not provide definitive evidence on the impact of capital punishment when used on an extensive scale such as China and Iran and/or for certain crimes such as drugs¹⁷ or economic crimes.¹⁸ Therefore, States should not rely on the deterrence argument to inform their position on the death penalty.

The *note verbale* further claims that “[e]very State has an inalienable right to choose its political, economic, social, cultural, legal and criminal justice systems, without interference in any form by another State”¹⁹ and that:

All Member States are acting in compliance with their international obligations. Each Member State has decided freely, in accordance with its own sovereign right established by the United Nations Charter, to determine the path that corresponds to its own social, cultural and legal needs, in order to maintain social security, order and peace. No Member State has the right to impose its standpoint on others.²⁰

December 2018 *adopted by 121 votes to 35, with 32 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 75/183, 16 December 2020 *adopted by 123 votes to 38, with 24 abstentions*.

15 UNGA, ‘Note verbale dated 13 September 2019 from the Permanent Mission of Egypt to the United Nations addressed to the Secretary-General’ (16 September 2019) UN Doc A/73/1004.

16 Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) 393.

17 See Global State of Harm Reduction, *Regional Overview: Middle East and North Africa* (2016) 4–5.

18 Hood and Hoyle (n 16) 294.

19 See e.g., ‘Note verbale dated 13 September 2019 from the Permanent Representative of Egypt to the United Nations addressed to the Secretary-General’ (16 September 2019) UN Doc A/73/1004, para (e).

20 *ibid.*

Principles of State sovereignty and criminal justice are reflected in the above statement and are being used to prevent scrutiny of States' practice of the death penalty. To declare that all States are adhering to their right to life obligations is a bold assertion and the UPR process itself demonstrates the inaccuracy of such a statement. The UN and stakeholder reports for Saudi Arabia, as discussed below, are a case in point. Furthermore, respecting human rights does not deprive a State of its sovereignty and is a false antithesis to claim otherwise. Whilst all States have the right to punish, including the use of religion to set criminal sanctions, there are limits defined by international human rights and a true application of Islamic criminal sanctions is reflective of the ideology of promoting the right to life.²¹ The Universal Periodic Review is a mechanism that can help affirm such a discourse.

States generally have a vested interest in presenting a sanitised version of their human rights record which does not accurately reflect the ground reality. The polarisation of submissions received from principal actors involved in the UPR process further supports this. However, the presence of actors such as civil society allows for pertinent human rights issues, such as the right to life, to be brought to the fore thus making human rights violations more visible. This can be seen from the UN and stakeholder reports below.

2.2 UN Report

The compilation on Saudi Arabia authored by the OHCHR [hereinafter UN report] draws upon reports submitted by Special Procedures and treaty bodies, including comments and observations by the State concerned, and other relevant UN documentation.²² It identifies Saudi Arabia's failure to ratify a number of core treaties such as the ICESCR, ICCPR, ICCPR-OP-1 and ICCPR-OP-2 and also highlights reservations issued under ICERD, CEDAW, CAT and CRC to which it is a party.²³ This is particularly alarming as the ICCPR, CAT and CRC contribute

²¹ See e.g., Jon Yorke and Amna Nazir, 'Draft Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to Life, Submission to the Human Rights Committee' (October 2017).

²² UNHRC, Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1: Saudi Arabia' (30 August 2018) UN Doc A/HRC/WG.6/31/SAU/2.

²³ See *ibid.*

significantly towards the international human rights framework in safeguarding the right to life and the abolition of the death penalty.

Furthermore, a reservation allows a State Party to exclude itself from the legal effect of specific treaty provisions whilst remaining a party to the treaty in general. It has been defined as:

A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.²⁴

A number of countries have issued reservations to human rights treaties but what makes a State such as Saudi Arabia so distinctive from other reserving States is that it has justified reservations on the basis of Islamic law.²⁵ For example, under the CRC, Article 37(a) prohibits any child to be subjected to “torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed on offences committed by persons below eighteen years of age.” Although a party to this Convention, Saudi Arabia has entered into “reservations with respect to all such articles as are in conflict with the provisions of Islamic law.” Such recommendations are indeterminate, imprecise, and open-ended which is contrary to the certainty required for the acceptance of a clear legal obligation.²⁶ No detail is given explaining how the reservation conflicts with Islamic law. The Committee on the Rights of the Child has therefore urged the State to review its general reservation and either withdraw or narrow it.²⁷ The use of general reservations makes it problematic in determining the extent to which States Parties undertake the obligation to comply with treaty provisions. Ultimately such reservations render States Parties’ commitments to be viewed as more symbolic than substantive.²⁸

24 1969 Vienna Convention on the Law of Treaties, article 2(1) (d).

25 See e.g. Ekaterina Yahyaoui Krivenko, *Women, Islam and International Law: Within the Context of the Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff, 2009).

26 For a complete list of reservations to the CRC, see https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en#EndDec.

27 Committee on the Rights of the Child, Concluding observations regarding Saudi Arabia, 17 March 2006, CRC/C/SAU/CO/2, para 8.

28 Michael L. Buenger, ‘Human Rights Conventions and Reservations: An Examination of a Critical Deficit in the CEDAW’ (2013–2014) 20 Buffalo Human Rights Law Review 67, 72.

Saudi Arabia's UN report referred specifically to two main treaty bodies when discussing the State's role in preserving the right to life, the Committee Against Torture and the Committee on the Rights of the Child.²⁹ The Committee Against Torture expressed concerns about the State's ongoing use of the death penalty and increasing number of executions. It encouraged the State to initiate a moratorium on executions and to commute all existing death sentences. Similarly, the Committee on the Rights of the Child urged Saudi Arabia to immediately suspend executions for persons who were under 18 years of age at the time of the offence; commute the death sentences issued against children; amend legislation to prohibit the imposition of the death sentence on children; and immediately release children sentenced to death for the exercise of their right to freedom of opinion and expression.

Unfortunately, Saudi Arabia's cooperation with human rights mechanisms remains an issue of concern. Regarding the procedural requirement to submit treaty reports, the State claims in its national report that it has "submitted all its national reports on the human rights conventions to which it is a party on time".³⁰ This is a false narrative as the State has consistently failed to submit its reports on time to both the Committee Against Torture and the Committee on the Rights of the Child, and this reflects the State's obscure practices towards this human rights issue. At the time of writing, reports to both treaty bodies remain outstanding from 2020 to 2021 respectively.³¹ Failure to commit to treaty body reporting deadlines suggests that it is not deemed as increasingly important on the State's agenda. This might be purposeful, but we are prevented from knowing because of the opaque practices galvanised by the propositions of State sovereignty.

The UN report makes it clear that lack of information or focus on a specific issue could be due to the State under Review's non-ratification of a relevant treaty and/or lack of cooperation with international human rights mechanisms. In Saudi Arabia's case, this would suggest a lack of discussion on the right to life is due to non-ratification of the ICCPR; however, through various treaty bodies and Special Procedures, this has been addressed to some extent especially when taking the limited length of the UN report into account. Nonetheless, the OHCHR's contribution in the UPR, viz-à-viz the UN report, allows for greater transparency on the

²⁹ UNHRC, Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1: Saudi Arabia' (30 August 2018) UN Doc A/HRC/WG.6/31/SAU/2, paras 25–32.

³⁰ UNHRC, 'National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Kingdom of Saudi Arabia' (20 August 2018) UN Doc A/HRC/WG.6/31/SAU/1, para 135.

³¹ See 'Reporting status for Saudi Arabia' (OHCHR), https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=SAU&Lang=EN, accessed 5 March 2022.

Kingdom's human rights obligations and enables a more constructive and open dialogue for its review.

2.3 Stakeholder Report

The stakeholder report presents a summary of thirty-one stakeholder submissions to Saudi Arabia's UPR.³² The infringement of the right to life and administration of the law are identified as key concerns across the submissions.³³

In order to improve the efficacy of written submissions new guidelines have been issued to stakeholders for the third cycle onwards, and this includes the use of matrices of recommendations for the State under Review.³⁴ The aim of the matrix is to document accurate and specific information regarding the implementation of previously supported and noted recommendations. It offers a list of thematically clustered recommendations, such as the death penalty, and provides space for "assessment/comments on level of implementation".³⁵

Stakeholders are encouraged to download their country matrix, complete the relevant section, and attach it as an annex to the main submission.³⁶ Saudi Arabia's review had a total of 31 submissions, but no stakeholder made use of the matrix. There seems to be little engagement with the matrix which needs to be utilised by civil society in order to identify "challenges or needs of technical cooperation"³⁷ where recommendations have not been implemented and to ensure submissions remain relevant and specific.

32 UNHRC, 'Summary of Stakeholders' submissions on Saudi Arabia: Report of the Office of the United Nations High Commissioner for Human Rights' (24 August 2018) UN Doc A/HRC/WG.6/31/SAU/3. Stakeholder submissions are cited as '(name of stakeholder) UPR submission'. These can all be located on UPR-Info's online repository at www.upr-info.org/en/review > select country > select 'civil society and other submissions.'

33 *ibid* paras 12–17.

34 OHCHR, 'Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders' written submissions', paras 5–6. The table of matrices is available from the OHCHR website at www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx.

35 *ibid*. The matrices clearly identify each recommendation (HRC report, cycle, paragraph number, recommendation number and recommending country) which will contribute better to report on the status of implementation and follow-up to the preceding reviews.

36 OHCHR, 'Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders' written submissions', para 5e.

37 *ibid* para 5d.

After receiving all stakeholder submissions, the OHCHR compiles them into a single summary report and lists the human rights issues thematically. For a more in-depth consideration of a particular issue, individual submissions should be consulted. The question of the death penalty was raised by six stakeholders in Saudi Arabia's UPR: Amnesty International, Human Rights Watch, Al-Karama, Joint Submission (JS)1, JS5, and JS10.³⁸

The stakeholders noted the increasing use of the punishment over the past five years with number of executions in 2015 (188) reaching twice as many in 2013 (79). The death penalty was imposed for a wide range of offences including non-violent offences such as drug trafficking and adultery.³⁹

JS10 highlighted that in all capital cases since 2016 which involved Specialized Criminal Court decisions against protestors and political opponents, no prior notice of an execution was afforded to defendants' families.⁴⁰ The disproportionate targeting of migrant workers and foreign nationals in KSA's application of the death penalty was also of concern to JS5. Since 2014, 37% of all individuals executed were foreign nationals and the majority of them were convicted under drug offences. JS5 recommended KSA review its narcotics legislation with a view to abolishing the death penalty for drug related offences and immediately commute death sentences related to such crimes.⁴¹

A group of stakeholders also noted the government's sending to death of members of the shia minority on terror charges as a result of participation in peaceful assemblies and protests. At least 42 men, mostly shia, were on death row and 7 of whom were minor at the time of the alleged offence. They recommended Saudi Arabia to immediately halt executions of those who were minors at the time of the offence, prohibit death sentences, and release and pardon all prisoners of conscience and prisoners detained on assembly, protest, and religion-related crimes, who are on death row.⁴²

The concept of most serious crimes is to be construed in the narrowest of circumstances as identified in the UN Human Rights Committee General Comment 36. It is evident that the death penalty is being imposed for crimes that do not meet the most serious threshold. Stakeholders have recognised this and, using the platform of the UPR, challenged Saudi Arabia's position on the death penalty under international law. It is submitted that stakeholders should make reference to

38 UNHRC, 'Summary of Stakeholders' submissions on Saudi Arabia: Report of the Office of the United Nations High Commissioner for Human Rights' (24 August 2018) UN Doc A/HRC/WG.6/31/SAU/3, Section 2.

39 *ibid* 9.

40 *ibid*.

41 *ibid*.

42 *ibid* para 10.

the relevant law and evolving jurisprudence on the question of the death penalty to further strengthen their submissions.

2.4 The Review

The third review of Saudi Arabia took place on 5 November 2018 during the fortieth session of the Working Group on the Universal Periodic Review.⁴³ A list of questions was prepared in advance by a number of countries of which the United Kingdom, Switzerland, Belgium and Slovenia addressed the question of capital punishment and fair trial guarantees. The questions were transmitted to Saudi Arabia through its troika: Belgium, China and Tunisia.⁴⁴

A review of the Working Group report indicates that the State under Review did not answer these questions and, to further complicate matters, there is no formal procedure in place that identifies whether a question has been answered or not, and to what extent. It would prove more beneficial if the State under Review is allotted a time frame within which to respond to any advance questions received or make clear reference to those when giving its presentation.

Whilst the State did not directly address the issue of capital punishment in its overview, it provided clarification on its criminal legislative framework, highlighting the supremacy of the Shariah noting that “no penalty shall be made against any individual except for an offence that is prohibited according to the sharia and the law”.⁴⁵ Nonetheless, it received a number of death penalty recommendations. During the interactive dialogue stage, 96 delegations delivered statements. Saudi Arabia received a total of 258 recommendations of which 27 were on the issue of capital punishment. Only one recommendation in this area was accepted, 13 partially accepted and the rest noted. Nonetheless, this shows a 40% increase in capital punishment recommendations compared to the previous cycle (20), and a 250% increase compared to the first cycle (8), which highlights a greater engagement and awareness on this issue.

The recommending States were largely from the EU and expressed concern at the State’s use of the death penalty, the number of offences punishable by death and juvenile executions. It is important to note that the death penalty has been

43 UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Saudi Arabia’ (26 December 2018) UN Doc A/HRC/40/4, para 1.

44 *ibid* para 2.

45 See live stream of review at UN Web TV available at <https://media.un.org/en/webtv>, at time 1:31 and 1:39. See also UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Saudi Arabia’ (26 December 2018) UN Doc A/HRC/40/4, para 43.

abolished in the European Union and is enshrined in the European Convention on Human rights⁴⁶ hence EU States' recommendations are reflective of this.

None of the OIC or Arab League States spoke on this subject which is reflective of their attitudes on the death penalty. This can be seen in the Cairo Declaration on Human Rights in Islam and Arab Charter on Human Rights, both of which allow derogation from the right to life pursuant to Articles 2 and 10 respectively.

It is important to note that the idea that a recommendation is only ascribed to the country which proposes it garnered widespread acceptance amongst States during the UPR's development. As a result, States can avoid having their names attributed to specific recommendations which would technically mean that the Working Group does not adopt the recommendations *per se*.⁴⁷ This is particularly useful for States who may not agree with recommendations that conflict with their own cultural or religious norms. Hence Slovenia's recommendation to Saudi Arabia to "immediately declare a moratorium on the death penalty"⁴⁸ would not be endorsed by States such as Pakistan, Iran, or Sudan who cite Islamic law as a barrier to such a step.

Recommendations are therefore considered to be, in essence, 'bilateral recommendations made through the multilateral forum of the Universal Periodic Review'⁴⁹ and this is reflected in the language employed at the end of all outcome reports which states that, '[a]ll conclusions and recommendations contained in the present report reflect the position of the submitting states and the state under review. They should not be construed as endorsed by the Working Group as a whole'.⁵⁰

Argentina, Costa Rica, Georgia, Iceland, Italy, and Slovenia recommended that Saudi Arabia "establish a moratorium on the death penalty" whilst Australia, Ireland, Lichtenstein, Mexico, Norway, Spain, and Sweden also added eventual abolition as the end goal.⁵¹ These were all noted by Saudi Arabia. The

⁴⁶ See Jon Yorke and Christian Behrmann, 'The European Union and the Abolition of the Death Penalty' (2013) 4 *Pace International Law Review* 1.

⁴⁷ *ibid*.

⁴⁸ UNHRC, 'Report of the Working Group on the Universal Periodic Review: Saudi Arabia' (26 December 2018) UN Doc A/HRC/40/4, recommendation 122.104.

⁴⁹ Alex Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism' (2011) 9 *New Zealand Yearbook of International Law* 189, 195.

⁵⁰ See for example, UNHRC, 'Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland' (6 July 2012) UN Doc A/HRC/21/9 at para 111.

⁵¹ UNHRC, 'Report of the Working Group on the Universal Periodic Review: Saudi Arabia' (26 December 2018) UN Doc A/HRC/40/4, recommendations 122.102–122.106. Switzerland and Montenegro also issued similar recommendations: "Abolish the death penalty and corporal punishment" and "Abolish the death penalty and amend laws imposing a mandatory death sentence".

recommendations did not make use of the SMART principle, i.e. they should be smart, measurable, achievable, relevant and time-bound, and this was also reflected in the lack of citation to relevant law. They did not acknowledge the review criteria as laid down in HRC Resolution 5/1 which states that the review is based upon five elements: the UN Charter, UDHR, voluntary pledges and commitments, human rights instruments the State has ratified, and applicable international humanitarian law. Failing to cite the source of the recommendation implies that the recommending State is not overly familiar with the UPR framework and/or has not invested time and effort to formulate a concrete and specific recommendation which is in line with the objectives of the UPR.

Since Saudi Arabia has not ratified the ICCPR, reference to Article 6(2) has less domestic relevance however a recommending State could still refer to Article 3 UDHR which provides for the right to life. It is interesting to note that none of the recommendations pertinent to the question of capital punishment made any reference to Article 3 UDHR.⁵² As Saudi Arabia is not a State party to ICCPR, Article 3 UDHR would form the basis of any recommendation to the State. This would mean that States, such as Saudi Arabia, which have not ratified certain treaties would not be able to evade scrutiny in the UPR process.

Austria, Australia, Chile, Cyprus, France, New Zealand, and Portugal all raised the issue of the juvenile death penalty and recommended the State to prohibit sentence of death for offences committed below the age of 18. The construction of these recommendations varied from broad to specific. Austria, France and New Zealand were the only two States to make specific reference to any relevant law namely, “the Convention on the Rights of the Child, that Saudi Arabia has ratified”.⁵³ Other recommendations such as “Reduce the number of offences punishable by death”⁵⁴ lacked any specificity or measurable outcome.

It is interesting to note that nearly half of all the death penalty recommendations (13) were partially endorsed by Saudi Arabia. The State clarified that partial endorsement of recommendations reflected its positive approach to the UPR and whilst part of a recommendation might impede its full support, the remaining part, representing the goal or substance of certain recommendations, might be acceptable. As a result, it considered it inappropriate to fully exclude a recommendation from the ambit of supported recommendations.⁵⁵ However, the State

⁵² On the significance of Article 3 UDHR, see William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) ch1.

⁵³ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Saudi Arabia’ (26 December 2018) UN Doc A/HRC/40/4, recommendation 122.101, 122.111.

⁵⁴ *ibid* recommendation 122.99.

⁵⁵ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Kingdom of Saudi Arabia Addendum’ (26 February 2019) UN Doc A/HRC/40/4/Add.1, para 3.

failed to clarify what parts were accepted but it is most probably those that do not require the State to abolish the death penalty.

Another partially accepted recommendation came from Chile to “start a review of criminal legislation in order to reduce the crimes for which the death penalty can be applied”.⁵⁶ It is more confusing here to ascertain which part of the recommendation is endorsed as both parts of the recommendation are interlinked. This is because the appraisal of the criminal justice system is advocated for the purpose of reducing the number of capital crimes, not as an afterthought.

The only death penalty recommendation accepted by Saudi Arabia was received from Germany who recommended that Saudi Arabia “forgo the application of the death penalty or at least restrict it to the most serious crimes”.⁵⁷ It is not surprising that this recommendation was accepted because first, it provides the option of retaining the punishment and second, restricts the application to the most serious crimes without defining what this encompasses or making reference to relevant international law. According to Saudi Arabia, it is already confining the punishment to the most serious crimes as stated in its national report. In other words, the recommendation does not require any substantive change to the death penalty laws therefore making it easy to accept without requiring any tangible efforts by the State under Review.

During the inter-state dialogue, Saudi Arabia only addressed the issue of the juvenile death penalty and failed to discuss the question of capital punishment in and of itself. It noted that under Article 15 of the Juveniles Act, “if a crime committed by a juvenile was punishable by death, the sentence would be reduced to a maximum of 10 years of imprisonment in the appropriate case.”⁵⁸ However, it is worth noting its response in the previous (Second) cycle, where it argued that:

The death penalty is imposed only for the most serious crimes and strict procedures are applied to safeguard human rights when the death penalty is imposed insofar as the judgements are reviewed by 13 judges at the three levels of jurisdiction, in a manner consistent with international standards. *Saudi Arabia notes that international law does not prohibit capital punishment if it is imposed in accordance with international standards.*(emphasis added) It requests States to consider all aspects of this issue in view of the considerable disparity between viewpoints thereon.⁵⁹

⁵⁶ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Saudi Arabia’ (26 December 2018) UN Doc A/HRC/40/4, recommendation 122.97.

⁵⁷ *ibid* recommendation 122.107.

⁵⁸ *ibid* para 115.

⁵⁹ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Saudi Arabia’ (26 December 2013) UN Doc A/HRC/25/3, para 97.

Saudi Arabia's insistence on retaining the death penalty is justified here on the basis of international law. Whilst it is true that international law, specifically ICCPR Article 6, does not explicitly prohibit the death penalty, it is clear that it envisioned its eventual abolition, as noted by the Human Rights Committee:

States parties that are not yet totally abolitionist should be on an irrevocable path towards complete abolition of the death penalty *de facto* and *de jure*, in the foreseeable future...It would appear to run contrary to the object and purpose of article 6, paragraph 5 for States parties to increase *de facto* the rate and extent in which they resort to the death penalty, and to reduce the number of pardons and commutations they grant.⁶⁰

A refusal to fully engage with the question of the death penalty during the interactive dialogue stage is telling of Saudi Arabia's attitude to this fundamental human rights issue, particularly when considering its remarks during its previous cycle.

Furthermore, during the review, the delegation explained that accession to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights was still under review and affirmed that there was no legislative vacuum that could either obstruct or delay the implementation of human rights.⁶¹ This would be a major step towards ratifying an international treaty that restricts the use of the death penalty, the ICCPR, however this seems to be political rhetoric employed by Saudi Arabia as, to date, the State has not indicated any change to its current position with both treaties yet to be ratified.

3 Implementation and Follow-Up

The UPR extends beyond mere reaffirmation of human rights standards by requiring States to explicitly accept or note recommendations. As a result, the State under Review is faced with expectations that it will take progressive steps to implementation.⁶² The subsequent review focuses on the extent to which the previous cycle's recommendations have been implemented.

The third cycle of the UPR has laid particular emphasis on the implementation of accepted recommendations from previous cycles and the current fourth cycle

⁶⁰ CCPR/C/GC/R.36/Rev.2, para 52.

⁶¹ UNHRC, 'Report of the Working Group on the Universal Periodic Review: Saudi Arabia' (26 December 2018) UN Doc A/HRC/40/4, para 119.

⁶² Walter Kalin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014) 37–38.

has continued this trend. The OHCHR now sends letters to each Minister of Foreign Affairs after the HRC adopts the UPR outcomes. These letters, which are publicly available in a spirit of transparency, are sent as part of a constructive engagement with Member States and identify 10–15 areas for attention and action in advance of the next UPR cycle.⁶³ In his letter to Saudi Arabia, the High Commissioner encouraged the State to submit a midterm report by 2021 and highlighted areas in need of particular attention such as safeguarding the right to life by encouraging the State to abolish the death penalty, impose a moratorium and commutation of all existing death sentences, amend its legislation to prohibit the juvenile death penalty and to reduce the number of death penalty offences.⁶⁴

Implementation is one of the central challenges affecting the Universal Periodic Review. In order to promote human rights on the ground level and ameliorate violations, the UPR needs to translate the recommendations and commitments made into measurable improvements”.⁶⁵ Recommendations on the death penalty, therefore, need to be SMART in order to facilitate implementation. For example, a recommendation to simply, ‘consider restricting the death penalty’ lacks any specificity for application. Rather, this could be replaced with a recommendation to ‘adopt the punishment only for the “most serious crimes” under Article 6(2) and present to Parliament a motion for a moratorium within two years’ which is both measurable and achievable.⁶⁶

Unfortunately, due to the absence of any formal guidance or official mechanism in place, tracking implementation is not a straightforward task. Therefore, engaging with the extent to which the State under Review, such as Saudi Arabia, has implemented recommendations relating to its use of capital punishment cannot be accurately assessed. One way to counteract this is through the submission of a midterm report which all States are encouraged to provide, on a voluntary basis, to the HRC in relation to the accepted recommendations.⁶⁷ Unfortunately, Saudi Arabia failed to produce a midterm report for its previous two UPRs and has also failed to submit one for its third UPR. This is particularly disappointing given that its fourth periodic review is due next year in November 2023.

⁶³ UPR: Overview of the Voluntary Fund for Implementation, 5.

⁶⁴ OHCHR, ‘Letter from OHCHR on Implementation in 3rd Cycle: Pakistan’ (13 April 2018) 4 available at www.upr-info.org/sites/default/files/document/pakistan/session_28_-_november_2017/letter_for_implementation_3rd_upr_pak_e.pdf.

⁶⁵ Conte (n 49) 201.

⁶⁶ See Amna Nazir, ‘The Universal Periodic Review and Muslim States’ Engagement’ (2019) 15 *Journal of International Law and Islamic Law* 1, 24.

⁶⁷ UNHRC Res 16/21, ‘Review of the work and functioning of the Human Rights Council’ (12 April 2011) UN Doc A/HRC/RES/16/21, para 18.

4 Conclusion

This article has analysed Saudi Arabia's engagement with the UPR, its justification for the use of the death penalty, and the manner in which principal actors such as stakeholders and the UN address this human rights violation. As a Kingdom whose legal structures are based primarily on Islamic law and principles, this is clearly reflected in the State's interaction in the UPR.

During its third cycle review, the State addressed the question of the death penalty, erroneously justifying the punishment based on the 'most serious crimes' concept. This was not surprising given its pro death penalty position. It has consistently signed the *note verbale* of dissociation, for the General Assembly Resolution on the moratorium on the use of the death penalty, arguing that capital punishment is primarily a matter of criminal justice and also an important deterrent.

Whilst Saudi Arabia provided a generally self-affirming national report in its UPR, submissions from the OHCHR aimed to provide a more balanced picture and scrutinised the Kingdom's position on capital punishment. Other Member States also made recommendations on Saudi Arabia's use of the death penalty; however, a large number of these States issued vague recommendations such as, 'establish a moratorium on death penalty as a first step towards its total abolition' and failed to cite the source of their recommendations (e.g. Article 3 UDHR or Article 37(a) CRC) which suggested a lack of time and investment in the UPR process. States need to go beyond mere lip-service to the UPR and provide concrete S.M.A.R.T recommendations to the State under Review in order to facilitate legislative change for the preservation of life. If a recommendation is too vague it can result in insufficient actions by the State under Review or actions which are contrary to the goal in mind.

During the interactive dialogue, the State chose to respond to concerns regarding the use of the juvenile death penalty arguing that capital crimes committed by minors will result in a reduced sentence of 10 years. However, civil society revealed the inaccuracy of such a statement. Civil society engagement in the Universal Periodic Review brings independent and impartial perspectives which are needed throughout the whole process in order to provide a balance to the State's performance. It also gives a voice to the marginalized and vulnerable groups which highlights the universality and indivisibility of human rights. Civil society is considered a 'legitimate representative for the right holders' due to their non-governmental nature. It therefore has a cogent role to play when a State's human rights record is being reviewed.

Amnesty International identified that Saudi Arabia imposed the death penalty for non-violent offences, had sentenced minors to death, and noted its extensive use in defiance of international standards. The NGO's global report on death sentences and executions revealed that at least 146 individuals were executed in 2017, the year before its third UPR.⁶⁸ Stakeholders noted that the authorities frequently violated international standards for fair trial and safeguards for defendants in capital cases. They recommended Saudi Arabia declare an official moratorium on all executions; amend legislation to limit its application to the most serious crimes; prohibit the execution of minors and review the cases of all prisoners currently under a death sentence with the aim of commuting their sentences.

This polarisation of submissions is a common pattern that transpired from the UPR mechanism and it is clear that Saudi Arabia must do more to improve its human rights situation, namely protecting the right to life, and utilise the UPR mechanism effectively in order to do so. With its fourth review just 18 months away, one must question to what extent the State will engage with the question of the death penalty, will it be a platform for constructive dialogue or more of the same?

⁶⁸ Amnesty International, *Global Report: Death Sentences and Executions 2018* (Amnesty International Limited, 2019) 6.