THE USA'S ENGAGEMENT WITH THE UN'S HUMAN RIGHTS COMMITTEE ON THE QUESTION OF CAPITAL PUNISHMENT

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Abstract

The engagement of the United States of America ("USA") with international human rights is fractious. The U.N. treaty bodies monitor U.N. Member States' implementation of human rights treaties, which takes place through cyclical reviews. The treaty bodies are led by independent human rights experts, and, in recent years, civil society organizations have also been able to submit reports to these reviews. In order to provide an example of how the USA interacts with international human rights, this article uses the case study of the USA's engagement with the Human Rights Committee (the Committee) on the question of capital punishment. The Committee is the treaty body attached to the International Covenant on Civil and Political Rights ("ICCPR"), a seminal multilateral agreement that provides numerous protections relating to the death penalty.

The USA has been reviewed three times by the Committee, in 1995, 2006, and 2014. To create a comprehensive dataset, all references made to the death penalty in the three reviews were collated and categorized. From this, three key issues were identified as the focus of this analysis: (1) the non-self-executing declaration lodged against the ICCPR by the USA; (2) the reservation lodged against Article 6 and juvenile executions; and (3) categorical exemptions to the death penalty. The discussions relating to these three themes have been exam-

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ined to assess the USA's engagement with the Committee and, ultimately, suggest ways in which the USA can better engage with the Committee in future reviews, which is particularly important as the USA's next Committee review is imminent.

Introduction

In the modern day, the USA has a fractious relationship with international human rights. Yet its initial engagement with international law was positive, as dating back to the drafting of the Constitution, the Supremacy Clause of Article VI, §2 provides that, "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land."[1] The American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States clarifies that this means international agreements have the same status as federal law and, as such, are the supreme law over U.S. state laws.[2] Furthermore, in cases as early as *The Paquete Habana* in 1900, the U.S. Supreme Court noted that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[3]

Moving towards the modern day, Eleanor Roosevelt played a pivotal role in the creation of the United Nations ("U.N.") and the Universal Declaration on Human Rights, After that, however, the U.S. relationship with the U.N. became more tumultuous, becoming more evident in recent times when the Trump Administration withdrew from the U.N. Human Rights Council ("UNHRC") in 2018, along with further withdrawals from pivotal international agreements.[4] Moving for-

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[1] U.S. CONST. art. VI,

[2] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §111 (1987) [hereinafter Restatement of Foreign Relations].

[3] The Paquete Habana, 175 U.S. 677, 700 (1900).

[4] The Trump Administration withdrew from UNESCO, the Paris Agreement, and the UNHRC. U.S. Dep't of State, *The United States Withdraws from UNESCO* (Oct. 12, 2017); Associated Press, *China and California Sign Deal to Work on Climate Change without Trump,* THE GUARDIAN (June 7, 2017), www.theguardian.com/us-

ward in time, the Biden Administration sought to repair those damaged relationships at the start of its term in the White House by getting the USA re-elected to be part of the U.N. Human Rights Council in October 2021.[5] However, having an uneasy relationship with international law is a bipartisan issue in the USA, and there is still much work to be done by the government.

In practice, the USA's engagement with international law is now more complex than the Framers of the U.S. Constitution could have envisaged, particularly due to the evolution of international law from its bilateral nature to multilateral application and protection of individual rights. Further complication is added by the federal system in the USA, with the federal government retaining some powers,[6] and the individual state governments retaining others,[7] alongside the extent to which international law can bind the states as well as the federal government is often disagreed upon. This causes a particular problem for international human rights permeating the USA's legal system and, as a consequence, protecting U.S. citizens. One way of examining the extent of this thorny relationship is through the USA's engagement with the U.N. Human Rights Council's Treaty Body system.

The U.N. treaty bodies monitor U.N. Member States' implementation of human rights treaties, which takes place through cyclical reviews. The treaty bodies are led by independent human rights experts, and, in recent years, civil society organizations have also been able to submit reports to the treaty bodies. In order to provide an example of how the USA interacts with international human rights, this article uses the case study of the USA's engagement with the Human Rights Committee ("the Committee") on the question of capital punishment. The Committee is the treaty body attached to the International Covenant on Civil and Political Rights ("ICCPR"), a seminal multilateral agreement that provides numerous protections relating to

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news/2017/jun/07/china-and-california-sign-deal-to-work-on-climate-change-without-trump; BBC News, *US Quits "Biased" U.N. Human Rights Council,* BBC NEWS (June 20, 2018), www.bbc.co.uk/news/44537372.

[5] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Election of the United States to the UN Human Rights Council (HRC) (Oct. 14, 2021), https://www.state.gov/election-of-the-united-states-to-the-un-human-rights-council-hrc/.

[6] U.S. CONST. art. I. §8.

[7] U.S. CONST. amend. X.

the death penalty. Since the death penalty was reinstated in 1976 by the Supreme Court,[8] it has provoked significant controversy both in the US criminal justice system and the international human rights system. Over 1,500 people have been executed since 1976 across the USA, and, as of 2022, 27 U.S. states retain the death penalty along with the federal government and the military.[9] Furthermore, the USA's retention and continued application of capital punishment is considered to be a prime example of the USA's exceptionalist approach to international human rights law.[10]

Providing another lens to view the USA's relationship with international human rights, this article will analyze the USA's engagement with the Committee on the question of capital punishment. The USA has been reviewed three times by the Committee, in 1995, 2006, and 2014. To collate a comprehensive dataset, all references made to the death penalty by all participants in the three reviews were collated and categorized. From this, three key issues were identified as the focus of this analysis: (1) the non-self-executing declaration lodged against the ICCPR by the USA, (2) the reservation lodged against Article 6 and juvenile executions, and (3) categorical exemptions to the death penalty. The discussions relating to these three themes have been examined to assess the USA's engagement with the Committee and, ultimately, suggest ways in which the USA can better engage with the Committee in future reviews. This is particularly important as the USA's next Committee review is imminent.[11]

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[8] Gregg v. Georgia, 428 U.S. 153 (1976).

[9] DEATH PENALTY INFO. CTR., *Number of Executions by State and Region Since 1976* (last visited Jan. 28, 2022), https://deathpenaltyinfo.org/number-executions-state-and-region-1976; DEATH PENALTY INFO. CTR., *Facts about the Death Penalty* (last updated May 12, 2022), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf.

[10] MICHAEL IGNATIEFF, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (2005).

[11] *See* U.N. Human Rights Treaty Bodies, U.N. Treaty Body Database – Reporting Status for United States of America (last visited February 4) 2022https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=US&Lang=EN [hereinafter UN Treaty Body Database]

I. The United Nations Treaty Body System

A. International Human Rights Treaties

There are nine core international human rights treaties,[12] which provide the framework for U.N. Member States' obligations. At the international level, once a multilateral treaty has been negotiated and agreed upon between States, States parties will then decide whether to become signatories, and then whether to ratify or later accede to each individual treaty. Each State has a sovereign right to ratify a treaty or not; it can take no action on a treaty, become a signatory only, or fully ratify it. However, once a State becomes a party to a treaty, the *pacta sunt servanda* principle applies, meaning that treaties are binding and States must perform them in good faith, a principle which the Vienna Convention on the Law of Treaties ("VCLT") enumerates.[13] The VCLT governs the general law of treaties, although the USA is a signatory only to it. Once a State becomes a party to a treaty, its engagement is monitored by its corresponding "treaty body." This article is focused on the International Covenant on Civil and Political Rights, and its treaty body, the Human Rights Committee.

B. The International Covenant on Civil and Political Rights (1966)

As one of the three treaties that makes up the "International Bill of Rights,"[14] the ICCPR seeks to protect a range of civil and political rights, including those relating to capital punishment. Particularly relevant is Article 6's right to life provision. When the ICCPR was adopted in 1966, Article 6 provided for the right to life, but with the exception of capital punishment for the "most serious crimes" in

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[12] U.N. OFF. OF THE HIGH COMMISSIONER OF HUM. RTS., *The Core International Human Rights Instruments and Their Monitoring Bodies* (last visited February 4, 2022), www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

[13] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. [hereinafter VCLT].

[14] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (The International Bill of Rights is made up of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights).

Article 6(2).[15] The *travaux préparatoires* of the ICCPR show that it took from 1947 until 1966 for the drafting to be completed, and the right to life provision, with its death penalty exception, took up most of the drafters' time.[16] This was due to the drafting States being at odds about whether to include the death penalty as an exception or not.[17] In particular, Uruguay and Colombia wanted Article 6 to expressly prohibit the death penalty, but this was disregarded even by other abolitionist States, on the basis that it may discourage ratification of the ICCPR by retentionist States.[18] Therefore, the right to life provision of the ICCPR was adopted with an exception for death sentences for the most serious crimes.[19] Despite this, two provisions of the ICCPR expressly reference "abolition," with Article 6(6) noting that "[n]othing in this [A]rticle shall be invoked to delay or to prevent the abolition of capital punishment."[20]

Other provisions of the ICCPR are also important for regulating States' application of capital punishment, including Article 7's prohibition of torture and cruel, inhuman and degrading treatment,[21] and Article 14, which sets out the basics required for a fair trial. The equality of arms principle includes the rights under Article 14(3), such as the right to a public trial without undue delay, the right to counsel and to have adequate time to prepare a defense, the right to cross-examination, and the right to an interpreter where necessary.[22] These rights provide vital protections for capital defendants.

The USA signed the ICCPR in 1977, but it was not until the George H. Bush Administration felt enough political pressure from the

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[15] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (16 December 1966) [hereinafter ICCPR].
[16] WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 45-47 (Cambridge U. Press 3d ed. 2002).
[17] *Id.*
[18] *Id.* at 64-5.
[19] ICCPR, *supra* note 15, at art. 6(2).
[20] *Id.* at art. 6(6).
[21] *Id.* at art. 7.
[22] *Id.* at art. 14.

international community in 1992 that the USA acceded to it.[23] However, attached to the ratification of the ICCPR were a list of reservations, understandings, and declarations ("RUDs").[24] According to the VCLT, a "reservation" is defined as "a unilateral statement … made by a State … whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State," and it can be lodged at any time between signature and ratification.[25] States have the sovereign right to place reservations against a treaty, although Article 19(c) VCLT provides that the reservation must not be "incompatible with the object and purpose of the treaty."[26] In proposing the list of RUDs to be attached, the Bush Administration's intention was to accede to the ICCPR while ensuring it would have little effect in the USA. In fact, "Bush assured the Senate that ratification would require no change in [U.S.] practice."[27]

In 1989, the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty ("Second Optional Protocol"), was adopted.[28] There are currently 89 parties to the Second Optional Protocol, while 108 countries have taken no action on it, including the USA.[29] All States Parties to the Second Optional Protocol agree not to execute any person within their jurisdiction,[30] and to take measures to abolish the death penalty.[31]

C. The Human Rights Committee

Each of the nine core international human rights treaties has its own treaty body attached to it. Each treaty body's composition and

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[23] *See* S. Rep. No 102-23 (1992) [hereinafter Senate Committee Report]; John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause,* 42 DePaul L. Rev. 1287, 1287 (1993).
[24] Senate Committee Report, *supra* note 23.
[25] VCLT, *supra* note 13.
[26] *Id.* at art. 19(c)*; See also* Restatement of Foreign Relations *supra* note 2 at §313.
[27] Quigley, *supra* note 23, at 1287.
[28] G.A. Res. 44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights (Dec.15, 1989) [hereinafter Second Optional Protocol].
[29] OHCHR, *Status of Ratification Interactive Dashboard*, Ohchr Dashboard, http://indicators.ohchr.org (last visited Feb. 4, 2022)
[30] Second Optional Protocol, *supra* note 28, at art. 1(1)
[31] *Id.* at art. 1(2).

role differs slightly, but they are generally made up of independent experts that are elected by the U.N. General Assembly to serve for a specified term. Composed of eighteen independent experts and meeting three times per year in Geneva, the Committee is tasked with monitoring State party implementation of the ICCPR.[32] Predominantly, this takes place through State reporting – each State party to the ICCPR must submit a report one year after accession to the treaty and thereafter upon request of the Committee, which is usually every four years.[33] The USA has taken part in this process three times to date, in 1995, 2006, and 2014, and so it can reasonably be concluded that the USA has not fully engaged in the review process, as it has only been reviewed three times in almost as many decades. However, scholars such as Melish believe that the USA engages well with the Committee. While conceding that the USA has "frequently been late in submitting its reports," Melish argues that the USA has "actively engaged with the supervising treaty bodies in the periodic reporting process … alongside the discussions in Geneva … and answering the Committee's questions."[34] On its face, this is true, but as Section 3 of this article identifies, there is a distinct lack of meaningful engagement and there is much to do in terms of ensuring that the USA is actively engaging with the Committee.

The Committee has other functions, including a quasi-judicial role of hearing interstate complaints[35] and individual complaints[36] that relate to an alleged breach of the ICCPR. However, the jurisdiction to hear individual complaints was granted to the Committee through the First Optional Protocol to the ICCPR, which the USA is not a party to. As such, the USA does not engage in this process. The Committee also provides regular General Comments, engaging in interpretation of the ICCPR's provisions, the most relevant here being General Comment

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[32] ICCPR, *supra* note 15.
[33] *Id.* at art. 40.
[34] Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L.389, 406-9 (2009).
[35] ICCPR, *supra* note 15, at art. 41.
[36] Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

36 on the right to life.[37] Taking all roles of the Committee into account, the reporting function of the Committee was identified as the clearest way of examining how the USA engages directly with the Committee.

II. The USA's Engagement with the Human Rights Committee

In order to provide an example of how the USA interacts with international human rights, this article uses the case study of the USA's engagement with the Committee on the question of capital punishment. To do this, all references made to the death penalty by all participants in the 1995, 2006, and 2014 reviews were collated into a spreadsheet and categorized. From this, three key issues were identified as the focus of this analysis, based upon two points: (1) the three issues that were raised frequently in at least one of the reviews, and (2) the three issues that continue to be pressing matters of concern for the USA's engagement with the Committee and implementation of the ICCPR in respect of capital punishment. The issues to be analyzed in this section are: (1) the non-self-executing declaration lodged against the ICCPR by the USA, (2) the reservation lodged against Article 6 and juvenile executions, and (3) categorical exemptions to the death penalty.

The 1995 and 2006 reviews involved the USA delegation and the Committee only. However, the 2014 review allowed submissions from civil society organizations ("CSOs"). While the Committee thanked CSOs for their engagement and involvement, the USA did not directly engage with any information provided by them and so the method utilized here did not include the issues discussed by CSOs, only the issues discussed by the Committee and USA delegation.[38] Furthermore, the USA's failure to acknowledge the expert opinions of these CSO submissions is telling in terms of its commitment to international human rights more generally. CSO involvement is to be celebrated, and the USA should make more of an effort in the next review to take note of CSO submissions, as this is a further way of improving

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[37] U.N. Hum. Rts. Comm., *General Comment 36, Article 6 (Right to Life),* Sep. 3, 2019, CCPR/C/GC/35 [hereinafter referred to as General Comment 36 2018].

[38] Although there is reference to the ACLU's submission to the 2014 review in section iii to identify a missing point.

its engagement with the Committee.

A. Non-Self-Executing Declaration

The "non-self-executing declaration" lodged against the entirety of the ICCPR is arguably the greatest obstacle preventing the USA from implementing the ICCPR. As examined below, this declaration has caused widespread confusion for both domestic and international communities, but, at its simplest, if the ICCPR has limited or no applicability in the USA, discussion of any other issues during Committee reviews is almost pointless. This must be resolved as a matter of urgency, yet, despite a great deal of discussion in the 1995 Committee review, this was not addressed again in 2006, and there was only one reference made by a CSO in 2014.[39] This section outlines the declaration and the confusion it has caused, reviewing how the USA has engaged with the Committee regarding this previously, and suggests how this engagement can be improved in future reviews.

1. Self-Executing vs. Non-Self-Executing Treaties

The USA attached four declarations to the ICCPR, and the most controversial of them is the declaration that Articles 1 to 27 of the ICCPR are non-self-executing.[40] The concept of self-executing treaties originated in the USA itself,[41] but has since been adopted by the global community and developed into an established component of international law.[42] In the context of treaties such as the ICCPR, a basic definition of this concept is, if the treaty is considered to be self-executing, once it has been ratified, it will automatically become law in the ratifying State. If the treaty is considered to be non-self-executing, as the USA declared the ICCPR to be, then it will not become law in the ratifying State and therefore cannot be relied upon by the courts

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[39] U.N. Hum. Rts. Comm., *Indigenous Peoples Consolidated Alternative Report,* 46 (Sep. 13, 2013).

[40] Senate Committee Report *supra* note 23, at 19.

[41] Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis,* 26 VA. J. INT'L L. 627, 627 (1986) (citing *Foster v. Neilson*, 27 U.S. 2, 253 (1829)).

[42] *See* Albert Bleckmann, *Self-Executing Treaty Provisions, in* 4 ENCYCLOPEDIA PUB. INT'L L. 374 (Rudolf Bernhardt ed., 2000).

until domestic legislation has been passed to implement it.[43] The federal (and often exceptional)[44] system in the USA makes executing treaties in practice quite challenging. From a domestic perspective, predominantly there are two constitutional schools of thought in terms of non-self-executing treaties: (1) The Foster Doctrine, which provides for "constitutional limits on the judiciary's power [of interpretation and enforcement of treaties]"[45] and (2) The Whitney Doctrine, which provides for "constitutional limits on the treaty makers' power to create primary domestic law by means of treaties."[46] While these Doctrines appear to be straightforward, in practice this is often complex and confusing, as demonstrated by the USA's ratification of the ICCPR.

When providing its advice and consent on the ICCPR prior to the Senate's vote on its ratification, the U.S. Senate Committee on Foreign Relations ("SFRC") explained in its report that "the intent [of the Declaration is] to clarify that the Covenant will not create a private cause of action in the [domestic] courts," and this was because the SFRC believed that "[U.S.] law generally complies with the [ICCPR]; hence, implementing legislation is not contemplated."[47] Despite the SFRC stating clearly that the intent of the declaration is to prevent a private cause of action, courts and scholars alike have been unable to agree upon what this means in practice.

The U.S. Court of Appeals for the Fifth Circuit declared that "[t]he self-execution question is perhaps one of the most confounding in treaty law."[48] Some courts have utilized the SFRC's definition of non-self-executing. For example, in an unreported case in the District of Colorado, the court substantiated its ruling that the non-self-executing declaration provides for no private cause of action by citing

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[43] *See* Iwasawa, *supra* note 41.
[44] *See* Ignatieff, *supra* note 10.
[45] David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 5 (2002).
[46] *Id.*
[47] Senate Committee Report, *supra* note 23, at 19.
[48] United States v. Postal, 589 F. 2d 862, 876 (5th Cir. 1979).

"[d]ozens of courts" that have agreed with this point.[49] However, the Southern District Court of Florida interpreted the non-self-executing declaration more narrowly, by stating that "[a]s a non-self-executing treaty, the ICCPR is not judicially enforceable, and therefore, does not provide [the defendant] with a defense."[50] Some scholars believe this ruling to be incorrect and in violation of international law. For example, Vasquez and Carpenter take the view of the SFRC – that it will simply not allow a private cause of action unless there is domestic legislation giving the ICCPR authority.[51] Vasquez also added that, "even without a 'private cause of action,' private individuals may enforce such treaties defensively if they are being sued or prosecuted under statutes that are inconsistent with treaty provisions."[52]

While most courts have taken a narrow view of the declaration, others have done the opposite. For instance, U.S. First Circuit Judge Lipez, in his concurring opinion in *Igartúa v. U.S.*, found that "[t]he Senate's declaration that the ICCPR is non-self-executing is *ultra vires* with respect to the ratification process and as such that declaration is not binding on the courts."[53] Quigley agrees with the First Circuit's view that the Senate was acting *ultra vires*.[54] In support of his argument, Quigley noted that U.S. courts often hold treaty provisions to be self-executing, and so there would be no reason why the USA could not do so in the case of the ICCPR, as Judge Lipez did in *Igartúa*.[55] However, Carpenter contends that the treaties Quigley considered in coming to this conclusion did not have express non-self-

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[49] Smith v. Bender, Civil Action No. 07-cv-01924-MSK-KMT, 2008 U.S. Dist. LEXIS 58395 (D. Colo. July 11, 2008) (citing *Hain v Gibson,* 287 F.3d 1224, 1243 (10th Cir. 2002): "Even if ... the above-quoted reservation were void...it is clear that the ICCPR is not binding on the federal courts").

[50] In re Extradition of Hurtado, 622 F. Supp. 2d 1354, 1357 (S.D. Fla. 2009).

[51] *See* Carlos Manuel Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995); Kristen D. A. Carpenter, *The International Covenant on Civil and Political Rights: A Toothless Tiger?,* 26 N.C. J. INT'L L. & COM. REG. 1 (2000).

[52] *Vasquez, supra* note 51, at 720.

[53] Igartúa v. U.S., 626 F.3d 592 (1st Cir. 2010).

[54] Carpenter, *supra* note 51, at 24 (citing John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213, 1230 (1996)).

[55] *Id.*

executing declarations lodged against them as the ICCPR does.[56] Moreover, the Restatement provides that "[c]ourts in the [USA] are bound to give effect to international law and to international agreements of the [USA], except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation,"[57] and there is currently no domestic legislation in place giving the ICCPR effect in the USA. Despite this, Quigley's argument, supported by the *Igartúa* case, demonstrates that the non-self-executing declaration lodged against the ICCPR is not simply accepted by all in the USA.

However, the U.S. Supreme Court has narrowly interpreted the notion of non-self-executing treaties. Its most recent view on the definition of self-executing was provided in *Medellín v. Texas*.[58] The majority opinion of the Court, delivered by Chief Justice Roberts, stated in a footnote:

> Even when treaties are self-executing in the sense that they create federal law, the background presumption is that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts."[59]

As Kolb has found, using this understanding of non-self-execution from *Medellin*, "[U.S.] states are under no obligation to respect or enforce even ratified treaty law until it is implemented through federal legislation."[60] Despite this, Kolb is confident that state courts may still be receptive to some kinds of arguments based upon international human rights treaties.[61]

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[56] *Id.* at 24.
[57] Restatement of Foreign Relations, *supra* note 3, at §111(3)
[58] Medellin v. Texas, 552 U.S. 491 (2008).
[59] *Id.* at n. 3 (citing Restatement of Foreign Relations, *supra* note 3, at §907).
[60] Johanna Kolb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism after Medellin*, 115 PENN. ST. L. REV. 1051, 1052 (2011).
[61] *Id.* at 1070-72.

2. Discussions in the Committee's Reviews

As discussions by the courts and the literature suggests above, this declaration has caused widespread confusion and was something that the Committee found to be a significant issue in 1995. In fact, it was the fifth most discussed issue in the 1995 review.

In the review, the USA's delegation sought to clarify what they called a "misunderstanding," stating that "the courts could refer to the Covenant and take guidance from it even though it was not self-executing." "What the Covenant could not do was provide a cause of action."[62] Yet the post-1995 cases identified above signify a widely inconsistent approach being taken by courts across the USA regarding what the non-self-executing declaration means in practice. Such a difference in interpretation was raised by the Committee when it provided comments on the initial USA report in 1995. The Committee found that "members of the Judiciary both at the federal, state and local levels have not been fully made aware of the obligations undertaken by the State party under the Covenant."[63] This is an ongoing issue as courts are essentially left to their own devices to interpret the declaration, leading to judicial fragmentation across the USA.

The Committee member, Mrs. Evatt, asked further questions regarding the practical impact of the ICCPR in the USA, noting that because the USA's position is that "the rights recognized under the [ICCPR] were already guaranteed in domestic law, it would be interesting to know why the courts had been deprived of the opportunity to refer to the [ICCPR]."[64] Related to this, Mrs. Evatt also correctly identified that "it was unclear how [ICCPR] rights would actually be protected in cases where domestic law was not up to the standards set by that instrument."[65] Thereafter, the Committee recommended that, despite the USA attaching the non-self-executing declaration, it should

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[62] U.N. Hum. Rts. Comm., *Summary Record of the 1405th Meeting*, ¶ 8, U.N. Doc. CCPR/C/SR.1405 (Apr. 24, 1995) [hereinafter S.R. 1405th Meeting].
[63] U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee: United States of America*, ¶ 15, U.N. Doc. CCPR/C/79/Add.50 (Apr. 7, 1995).
[64] U.N. Hum. Rts. Comm., *Summary Record of the 1401st Meeting*, ¶ 34, U.N. Doc. CCPR/C/SR.1401 (Apr. 17, 1995) [hereinafter S.R. 1401st Meeting].
[65] *Id.*

"ensure that effective remedies are available for violations of the Covenant, including those that do not, at the same time, constitute violations of the domestic law of the [USA]."[66] However, according to the SFRC's report on the ICCPR, the USA takes the approach that while "[t]he overwhelming majority of the provisions in the Covenant are compatible with existing U.S. domestic law," if international law does not adhere to the U.S. Constitution, it will not prevail.[67] This also violates Article 31 of the VCLT that "[a] treaty shall be interpreted in good faith,"[68] and as M. Cherif Bassiouni asserted, "[t]his open-ended approach to treaties is incompatible with international law, much as it is incompatible with common sense and good judgment."[69]

More generally, Committee member Mr. El-Shafei asked the USA to "explain to the Committee the criteria for deciding whether any given treaty would be self-executing, and what criteria would be applied for conforming domestic laws to the provisions of the Covenant."[70] It does not appear that this has been clearly answered by the USA, and this is something that the Biden Administration should seek to clarify.

3. USA Engagement on this Issue

Until now, there has been very limited engagement from the USA on this issue. While it was mentioned frequently in the 1995 review, the USA provided no significant response, and it has not been discussed in any meaningful manner in the reviews since. Given that implementation of the entire treaty is unlikely with this declaration still in place, and the fact that there is widespread confusion in the USA about what non-self-execution actually means in practice, this is a key issue that needs to be addressed at the next Committee review

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[66] U.N. Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America*, ¶ 4, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) [hereinafter Concluding Observations 2014]

[67] Senate Committee Report *supra* note 23, at 4.

[68] VCLT, *supra* note 13, at art. 31.

[69] M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate,* 42 DEPAUL L. REV. 1169, 1180 (1993).

[70] S.R. 1401st Meeting, *supra* note 65, at 46.

of the USA. In particular, the USA must explain how the ICCPR is being implemented in practice, providing examples from across the federal and state systems.

The Committee could also appeal directly to the U.S. states, as opposed to just the federal government, in terms of incorporating the ICCPR in practice. The former UN Special Rapporteur and clinic professor of law, David Kaye, argues that "advocates should look to the states not only as a partial solution to non-implementation of the ICCPR but also as the principal institutions that can test state practice according to the standards of human rights law."[71] Certainly, this would take some work, but with civil society's input, they could act as the "go-between" from the Committee's concluding observations and state governments, urging them to comply with and incorporate the ICCPR.

B. The Reservation Lodged Against Article 6 and Juvenile Executions

The reservation lodged against Article 6 of the ICCPR, and the linked issue of the juvenile death penalty, regularly featured in the Committee's reviews of the USA. This section outlines this reservation, reviewing how the USA has engaged with the Committee, and suggests how this engagement can be improved in future reviews.

Article 6 of the ICCPR provides that "[e]very human being has the inherent right to life,"[72] while also stating that there is an exception to this right – capital punishment.[73] Article 6 sets out minimum standards for those States still administering the death penalty, including that the death penalty may only be administered for "the 'most serious crimes,'"[74] and that those who committed a crime while under the age of eighteen and pregnant women should not be executed.[75]

The reservation to Article 6 lodged by the USA states, "[t]he

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[71] David Kaye, *State Execution of the International Covenant on Civil and Political Rights,* 3 U.C. IRVINE L. REV. 95, 98 (2013).
[72] ICCPR, *supra* note 15, at art. 6(1).
[73] *Id.* at art. 6(2).
[74] *Id.*
[75] *Id.* at art. 6(5).

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."[76]

Predominantly, this reservation attracted the attention specifically relating to the execution of juveniles. While the Supreme Court ruled in *Thompson v. Oklahoma* that executing a "15-year-old offender" was unconstitutional[77] and increased this age limit to those who were sixteen and under at the time of the crime in *Stanford v. Kentucky*,[78] it remained constitutional to execute those under the age of eighteen until 2005.[79] However, Professor of Law John Quigley has argued that this reservation "clearly signifie[d] an effort on the part of the [USA] to protect and perpetuate current practice rather than to conform to the [ICCPR]."[80] The USA's view that its own Constitution is superior to international law – and, therefore, the ICCPR – was a common theme throughout the Committee's reviews of the USA.

1. Discussions in the Committee's Reviews

In 1995, almost all the discussions of the reservation to Article 6 focused on juvenile executions. In fact, the juvenile death penalty was the number one theme discussed across the entire 1995 review. This is unsurprising, given the fact that since 1990 only seven countries in the world, including the USA, have executed people who were under the age of eighteen at the time of their crimes.[81] Following the Supreme Court's decision in *Roper,* which ruled that juvenile executions were unconstitutional, discussion in the 2006 review decreased

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[76] Senate Committee Report, *supra* note 23, at 11.
[77] Thompson v. Oklahoma, 487 U.S. 815, 836-38 (1988).
[78] Stanford v. Kentucky, 492 U.S. 361 (1989).
[79] *See* Roper v. Simmons, 543 U.S. 551, 575-78 (2005).
[80] John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 74 (1993).
[81] DEATH PENALTY INFO. CTR., Executions of Juveniles Outside of the U.S. (Dec. 31 2018), https://deathpenaltyinfo.org/policy-issues/juveniles/execution-of-juveniles-outside-of-the-u-s.

dramatically, with plenty of praise being heaped upon the USA for removing capital punishment for those under eighteen. By the 2014 review, this did not feature in the top ten issues discussed.

Reviewing the discussions in all three reviews, there are two key issues that remain unresolved by the USA's ruling that the juvenile death penalty is unconstitutional: (1) the reservation remains lodged against the entirety of Article 6, and (2) the reservation to Article 6 goes against the object and purpose of the treaty.

2. The USA's Reservation Remains Lodged Against the Entirety of Article 6

In its 1993 State Party Report to the Committee, the USA explained that the reservation to Article 6 was made because "approximately half the states have adopted legislation permitting juveniles aged 16 and older to be prosecuted as adults when they commit the most egregious offenses, and because the Supreme Court has upheld the constitutionality of such laws."[82] However, Committee member Mr. Francis refuted this, noting that "27 states did not favour the application of the death penalty to juveniles under the age of 17 years, [and] that its application to those committing capital offences at ages 16 and 17 was the subject of continuing debate in the United States."[83] Mr. Francis suggested a "joint initiative by the states and the federal Government to establish 18 years as the minimum age at which the death penalty would be applicable."[84] The USA's delegation refused to concede on this, stating that while federal statutes do prohibit juvenile executions, these "statutory provisions exceeded the requirements of the Constitution,"[85] indicating that the Constitution is superior to the ICCPR.[86] The Committee also made numerous references to its disappointment in relation to the continued juvenile executions, asking

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[82] U.N. Hum. Rts. Comm., *United States of America - State Party's Report,* 4 U.N. Doc CCPR/C/81/Add 148 (Aug. 24 1994) [hereinafter State Party's Report 1994].
[83] S.R. 1401st Meeting, *supra* note 65, at 10.
[84] *Id.*
[85] S.R. 1405th Meeting, *supra* note 63, at 56.
[86] *Id.* at 13.

the USA to prohibit this punishment.[87]

In 2006, the USA used the Supreme Court's decision in *Roper* to counter calls for them removing the reservation against Article 6 (again, mistakenly noting that the reservation is against Article 6(5)),[88] and the Committee congratulated the prohibition of juvenile executions, recommending that the USA should "withdraw its reservation to [A]rticle 6(5) of the Covenant."[89] In fact, Mr Ahanhanzo stated during the session that he "could not understand … the reasons that prevented the United States from lifting the reservations made to article 6, paragraph 5."[90] However, this misses the wider point. While the execution of juveniles was of course a significant issue that needed to be dealt with under the ICCPR, the discussions missed a key point that was pertinent to ensuring that the USA engages with the ICCPR: the reservation against Article 6 is lodged against the whole of Article 6. All key actors made specific references to the "reservation against Article 6(5)," i.e. the juvenile death penalty clause, in 1995, completely overlooking the fact that the reservation is much broader in practice.[91] The reservation is lodged against the entirety of Article 6 and, as Schabas argues, "the reservation extends far beyond the question of juvenile executions and seeks to exclude the [USA] from virtually all international norms concerning the death penalty."[92]

The USA itself has even accepted that the reservation is lodged against the entirety of Article 6. For example, in the 2006 review, Mr. Harris of the USA delegation stated that the reservation "had not been withdrawn since only a small section of that reservation involved the juvenile death penalty. It could not therefore be withdrawn in its en-

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[87] U.N. Hum. Rts. Comm., *Concluding Observations*, 16, 31 U.N. Doc. CCPR/C/79/Add50 (Apr. 7, 1995) [herein Concluding Observations 1995].
[88] U.N. Hum. Rts. Comm., *United States of America - State Party's Report,* 448 U.N. Doc CCPR/C/USA/3(Nov. 28, 2005). [hereinafter State Party's Report 2005]
[89] U.N. Hum. Rts. Comm., *Concluding Observations*, 6 U.N. Doc. CCPR/C/USA/CO/3 (Sep. 15, 2006) [hereinafter Concluding Observations 2006].
[90] U.N. Hum. Rts. Comm., *Summary Record*, 44 U.N. Doc. CCPR/C/SR.2379 (Sep. 21, 2006) [hereinafter UNHRC Summary Record].
[91] Concluding Observations 1995, *supra* note 88, at 27.
[92] Schabas, *supra* note 16, at 80.

tirety. Moreover, it was difficult and highly unusual to withdraw reservations in United States practice."[93] Furthermore, the SFRC confirmed in its 1992 report on the ICCPR that the reservation was lodged due to "the sharply differing view taken by many of our future treaty parties on the issue of the death penalty (including what constitutes 'most serious crimes' under Article 6(2))."[94] This, coupled with the statement of Mr Harris in the 2006 Committee review, clearly indicates that the USA's reservation to Article 6 covers more than the juvenile death penalty.

In fact, if the reservation against Article 6 was removed, the USA would be in breach of Article 6(2)'s "most serious crimes" clause.[95] The ICCPR does not provide a definition of "most serious crimes," but in its General Comment 36, the Committee asserted that "[t]he term 'the most serious crimes' must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing."[96] However, the USA continues to execute those who have not actually committed murder. An example being Kelly Gissendaner, who was executed in Georgia in September 2015 for malice murder of her husband, despite her not carrying out the murder herself and not being present when the murder took place.[97] The Committee further noted in its General Comment 36 that "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."[98] As such, the USA would be in breach of Article 6(2) if it removed the reservation.

In fact, not only would the USA be in breach of Article 6 if the reservation were to be removed, it may already be in breach of Article 6 due to the reservation being invalid as it undermines the object and purpose of the ICCPR.

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[93] UNHRC Summary Record *supra* note 91, at 13.
[94] Senate Committee Report, *supra* note 23, at 11.
[95] ICCPR, *supra* note 15, at art. 6(2)
[96] General Comment 36 2018, *supra* note 37, at 35
[97] Gissendaner v. Georgia, 532 S.E. 2d 677, 681-84 (2000).
[98] General Comment 36 2018, *supra* note 37, at 35.

3. The Reservation Against Article 6 Undermines the Object and Purpose of the ICCPR

As Article 6 protects the non-derogable right to life, it can be questioned whether the reservation is valid on the grounds that it undermines the object and purpose of the ICCPR. The Restatement agrees that a reservation must not be "incompatible with the object and purpose of the agreement,"[99] but says that this brings with it "uncertainty and possible disagreement" and therefore "the standard is intended to be an objective one."[100] In fact, the Committee, in its 2018 General Comment on the right to life has expressly stated that "no reservation … to the strict limits provided in Article 6 with respect to the application of the death penalty is permitted."[101]

Bassiouni stated that lodging of the reservation against Article 6 constituted a "*de facto"* rewriting of the treaty.[102] If this reasoning is followed, it can be concluded that the USA is currently adhering to an alternate version of the ICCPR. This is consistent with Schabas' view that this reservation (along with the reservation lodged against Article 7) calls into question whether the USA is, in practice, a party to the ICCPR at all.[103] Schabas argued that either, the invalid reservations lodged by the USA can be severed or separated from the [USA's] accession to the treaty, meaning that the USA is actually bound by the entirety of the ICCPR, or "if the invalid reservations cannot be separated from [USA's] accession, then the [USA] is not a party to [the ICCPR]."[104] As Schabas further argued, "[i]t is not plausible to conclude that the [USA] should remain bound by the [ICCPR], with the exception of the death penalty provisions,"[105] nor is it plausible for the USA to be adhering to a different version of the ICCPR than the other states parties.

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[99] Restatement of Foreign Relations, *supra* note 2, at §313 comment (1)(c).
[100] *Id.*
[101] General Comment 36 2018, *supra* note 37, at 68.
[102] Bassiouni, *supra* note 70, at 1173.
[103] William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States still a Party?,* 21 BROOK. J. INT'L L. 277, 316-17 (1995) [hereinafter Schabas, *Invalid Reservations*].
[104] *Id.* at 278.
[105] *Id.* at 317.

Although the Committee has found that reservations lodged against non-derogable treaty provisions will not automatically be invalid.[106] It concluded in the 1995 review that the USA's reservation against Article 6 is invalid due to it being incompatible with the object and purpose of the ICCPR.[107] Furthermore, the reservation against Article 6 prompted eleven objections from other State parties to the ICCPR on the basis that such a reservation went against the object and purpose of the treaty.[108]

Schabas has asserted that the USA should have known that the reservation would be invalid as it was lodged against a non-derogable provision of the ICCPR,[109] in that it includes "rights so fundamental and so essential that they brook no exception, even in emergency situations."[110] As such, Schabas concluded the reservations can be severed from the USA's accession to the ICCPR, meaning that the USA is a party to the treaty, including Article 6.[111] This was also the position of the Committee in its General Comment 24(52) in 1994, wherein the Committee stated that "[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather … the Covenant will be operative for the reserving party without benefit of the reservation."[112]

Bradley and Goldsmith disagree that the USA's reservation against Article 6 contradicts the "object and purpose" of the ICCPR, relying on the fact that "approximately one-third of the parties to the

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[106] U.N. Hum. Rts. Comm., *General Comment 24 (52) on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, 12 U.N. Doc CCPR/C/21/Rev1/Add6 (1994) [hereinafter General Comment 24].
[107] Concluding Observations 1995, *supra* note 87, at 14.
[108] Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain and Sweden raised issues with the reservation. VCLT, *supra* note 12 (stating that Article 19(c) states that a reservation may not be lodged against a treaty if it is "incompatible with the object and purpose of the treaty.")
[109] Schabas, *Invalid Reservations*, *supra* note 103, at 323-25.
[110] Schabas, *supra* note 16, at 82.
[111] Schabas, *Invalid Reservations*, *supra* note 103, at 323-25. *See also* Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty*?, 32 U.S.F. L REV. 735, 754-6 (1998).
[112] General Comment 24, *supra* note 106.

ICCPR made reservations to over a dozen substantive provisions,"[113] albeit the USA is the only party with a reservation lodged against Article 6. They further argue that "there is no basis in international law" for the conclusion that the USA's reservations are severable from the ICCPR due to their invalidity, relying upon the principle that "in treaty relations a state cannot be bound without its consent."[114] They conclude that either the reservations are valid or the USA is not a party to the ICCPR, but that they cannot be bound by the Articles they have placed reservations against.[115] Although it is correct that states have the sovereign right to choose whether to ratify and be bound by a treaty and to lodge RUDs, the issue is not that the USA has lodged reservations generally, but that this particular reservation is lodged against a non-derogable provision, which goes against the object and purpose of the ICCPR. As a result, it is very likely that the USA is actually a party to the treaty in its entirety, meaning that the USA is in breach of Article 6 ICCPR.

While the USA noted in the 1995 review that "[t]he theory that no reservation could be taken to a non-derogable right, while popular, was also an innovative view and did not reflect existing law,"[116] numerous Committee members suggested to the contrary.[117] Committee member Mr. Bhagwati asserted that he "remained unconvinced of the validity of the United States reservation to [A]rticle 6 of the Covenant and recalled that the Committee had stated in [G]eneral [C]omment 24 that reservations that offended peremptory norms were incompatible with the object and purpose of the Covenant."[118] Furthermore, making reference to the USA's purported role as a world leader, Mr Bhagwati said that it "should take the lead in educating the public regarding the importance of honoring the commitments assumed upon ratification

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[113] Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 433 (2000).
[114] *Id.* at 437, citing *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* 1951 I.C.J. 15, 21 (May 28, 1951).
[115] *Id.* at 438-39.
[116] S.R. 1405th Meeting, *supra* note 62, at 15.
[117] *See* S.R. 1401st Meeting, *supra* note 64, at 34-5,44,52.
[118] S.R. 1405th Meeting, *supra* note 62, at 39.

of the Covenant."[119] The Biden Administration must take this into account when engaging in the next Committee review.

4. USA Engagement on this Issue

On its face, it seemed as though the USA had engaged with the Committee following its 1995 review, as in 2005 the Supreme Court struck down juvenile executions. In fact, conservative Justice Anthony Kennedy not only gave the swing vote to the liberal side of the Court, but he also provided the majority opinion, which relied upon international law and norms.[120] Justice Kennedy directly cited ICCPR Article 6(5), despite the reservation lodged against it, noting the "stark reality that the [USA] is the only country in the world that continues to give official sanction to the juvenile death penalty."[121] However, this link is tenuous—while Justice Kennedy did cite Article 6(5), it was used to affirm the Supreme Court's finding that the juvenile death penalty is unconstitutional, as opposed to international human rights law influencing the constitution. Furthermore, the USA's response in 1995 was an emphatic "no" to any suggestion that it may remove the death penalty for those under the age of 18, and even when the Supreme Court did prohibit juvenile executions, the USA still refused to remove the reservation lodged against Article 6.

Schmidt suggests that this "exemplifies the limits of the Committee's capacity to influence a state's attitude" regarding the death penalty, based upon the political divisions in the USA. However, as Schmidt further notes, "the Committee's recommendations should not be dismissed" because, "if they are taken up by sizable segments of civil society and repeatedly placed before executive and legislative bodies for consideration, the long-term effect may be far from negligible."[122] In fact, a key point of action for both the Committee and civil society at the next review should be to engage with the point that the reservation the USA has lodged is against the entirety of Article 6,

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[119] *Id.*
[120] *Roper,* 543 U.S. 551, at 575-78.
[121] *Id.* at 575.
[122] Marcus G. Schmidt, *Universality of Human Rights and the Death Penalty: The Approach of the Human Rights Committee*, 3 ILSA J. INT'L & COMP. L. 477, 480 (1997).

not just Article 6(5), and should ask the USA to clarify what steps would be needed to firstly, bring the USA in line with Article 6 in its entirety, and secondly, remove the reservation that goes against the object and purpose of the ICCPR.

The USA's delegation must approach its next review with a more open view to international human rights law. It must take into account the fact that its reservation against Article 6 goes against the object and purpose of the treaty and, as such, that the death penalty in the USA is operating in contravention of international law. At the very least, the Biden Administration should bring the federal death penalty in line with the ICCPR, as this falls under federal powers, setting an example for the states.

C. Categorical Exemptions from the Death Penalty

The two sections above have engaged with procedural issues relating to how the USA engages with the Committee. This section explores how the USA has responded to discussions surrounding a substantive issue relating to the implementation of capital punishment: categorical exemptions. There are two types of categorical exemptions: first, punishment exemptions which prohibit executions for particular crimes,[123] and, second, person exemptions that prevent certain classes of people being sentenced to death.[124] The Committee reviews of the USA discussed categorical exemptions frequently, and there were three main sub-themes of discussion. The first was juvenile executions, which has already been addressed in the section above, and

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[123] *See* Coker v. Georgia, 433 U.S. 584 (1977), (holding that a death sentence for the crime of rape of an adult woman was cruel and unusual punishment). *See* also Enmund v. Florida, 458 U.S. 782 (1982) (striking down a punishment of death for a felony murder crime). *See also* Kennedy v. Louisiana, 554 U.S. 407 (2008), (extending the decision in *Coker* exempting the crime of the rape of a child from the death penalty.

[124] *See* Ford v. Wainwright, 477 U.S. 399 (1986), (exempting persons who are ""insane" from a death sentence. *See also* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded, or intellectually disabled as it is now termed by the American Psychiatric Association,is cruel and unusual punishment contrary to the Eighth Amendment). *See also Roper supra* note 79 (holding that executions of those who were under the age of eighteen at the time of the offense are unconstitutional, contrary to the Eighth Amendment).

so this section focuses on the two other key categories of discussion: (1) mental health and the death penalty (i.e., person exemptions), and (2) restricting the number of death eligible offences (i.e., punishment exemptions). This section reviews how the USA has engaged with the Human Rights Committee on these two points and suggests how this engagement can be improved in future reviews.

1. Discussions in the Committee's Reviews

a. Mental Health and the Death Penalty

At the time of the USA's first Committee review in 1995, the only categorical exemption in place that related to mental health was derived from *Ford v. Wainwright*, a 1986 Supreme Court case that exempted those who were "insane" from being executed.[125] This did not include those who were "mentally retarded" (as was the terminology at the time) or those suffering from severe mental illnesses. In 1995, the focus was predominantly on the issue of exempting those with a mental retardation, and the Committee stated its regret that "in some cases, there appears to have been lack of protection from the death penalty of those mentally retarded."[126] The USA's delegation sought to address the Committee's concern about this, stating that "federal statute prohibited the execution of persons who were mentally retarded or disabled to a degree which prevented them from understanding the nature of the proceedings against them."[127] While this was the case for the federal death penalty, in 1995 it certainly was not the case for the state death penalty, which is most frequently administered. The delegation went on to say that "[t]he Constitution also required that evidence of mental retardation or mental illness must always be considered if offered in mitigation, regardless of the degree of such condition."[128] Yet this was not the same as it being ruled as unconstitutional and did not prevent people with a mental retardation being executed in the USA.

A momentous decision was handed down by the Supreme

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[125] *Ford supra* note 12, at 417-18.
[126] Concluding Observations 1995, *supra* note 87, at 281.
[127] S.R. 1405th Meeting, *supra* note 62, at 56.
[128] *Id.*

Court between the 1995 and 2006 reviews. In 2002, *Atkins v. Virginia* became the landmark ruling on intellectual disabilities (previously termed "mental retardation") and the death penalty.[129] The Supreme Court held that executing those with an intellectual disability is a cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments of the US Constitution.[130]

In the 2006 review, the USA was rightly congratulated by the Committee for its decision in *Atkins*.[131] However, it also "encourage[d] the State party to ensure that persons suffering from severe forms of mental illness not amounting to mental retardation are equally protected."[132] In particular, during the discussions, Committee member Ms. Palm queried the fact that "there continued to be numerous executions of prisoners suffering from schizophrenia, bipolar disorder and other incapacitating mental illnesses," noting that this "could raise issues under article 7 [ICCPR]," and she questioned the delegation as to whether the USA "intended to take measures to ensure that severely mentally-ill persons were not subject to death penalty."[133] The USA's only response to the category it termed "mental defect" was that "[t]he U.S. Supreme Court has restricted the death penalty, finding that it is a disproportionate punishment where the defendant is mentally retarded."[134] This clearly did not answer the Committee's questions relating to exempting serious mental illnesses, instead the delegation seemed to evade its question by pointing to the *Atkins* case. Furthermore, in the *Atkins* case, the Supreme Court left the application of its decision to each of the U.S. states. This has led to further confusion and capricious decision making.[135]

Even more concerning is that evidence has been found that the

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[129] Atkins, *supra* note 125.
[130] *Id.* at 321. *Atkins* abrogated the previous decision of the U.S. Supreme Court in *Penry* , wherein the Court had held that "[t]he Eighth Amendment does not categorically prohibit the execution of mentally retarded capital murderers." *See* Penry v. Lynaugh, 492 U.S. 302, 305 (1989).
[131] Concluding Observations 2006, *supra* note 89, at 7.
[132] *Id.*
[133] UNHRC Summary Record, *supra* note 90, at 86.
[134] State Party's Report 2005, *supra* note 88, at 109.
[135] *See* Hall v. Florida, 134 S.Ct. 1986 (2014); Moore v. Texas, 137 S.Ct. 1039 (2017).

USA continues to execute people suffering an intellectual disability. For example, in its civil society submission to the Committee's 2014 review, the American Civil Liberties Union provided evidence that the states of Texas, Florida, Alabama, and Georgia had executed people with an intellectual disability,[136] in contravention of *Atkins*. This should have been a line of inquiry that the Committee prioritized, but it was not discussed anywhere in the 2014 review other than in the ACLU's submission. This is concerning in and of itself, but it also suggests that the civil society engagement with the reviews is not being taken seriously enough to have any impact.

Alongside clarifying the disturbing information above regarding the execution of those with intellectual disabilities, the focus should have shifted to exempting people suffering from a severe mental illness. In its 2018 General Comment 36 on the right to life, the Committee found that people with "serious psycho-social" disabilities or "persons that have limited moral culpability" should not face the death penalty.[137] Yet in its 2014 concluding observations, the Committee went further, stating that the USA should abolish the death penalty for "prisoners with serious mental illness[es]."[138] Yet the USA used the same response as it had done regarding intellectual disabilities, stating that "[i]f convicted of a capital offense, defendants are also permitted to present evidence of any mental illness or incapacity to mitigate their culpability for a capital or other sentence."[139] This is further evidence of the USA merely paying lip service to these reviews, and will only make changes if and when the federal and state governments in the USA decide to, not based upon discussions and recommendations made by the Committee. There was no other engagement on this point and the Committee discussions seem to have

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[136] Am. Civ. Lib. Union, *Statement regarding recent developments in the U.S. administration of the death penalty to contribute to the 2014 United Nations Secretary General's report to the Human Rights Council on the death penalty* (Mar. 12, 2014), https://www.aclu.org/sites/default/files/field_document/5_12_14_death_penalty_statement-final.pdf.

[137] General Comment 36 2018, *supra* note 37, at 49.

[138] Concluding Observations 2014, *supra* note 66, at 20.

[139] U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant,* 651, U.N. Doc. CCPR/C/USA/4 (22 May 2012) [hereinafter Consideration of Reports 2012].

run out of steam when it comes to the issue of exempting those with serious mental health issues from capital punishment in the USA.

b. Restricting the Number of Death-Eligible Offenses

In 1995, the Committee noted its concern "about the excessive number of offences punishable by the death penalty in a number of states" and that it "deplore[d] the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain states."[140] This was referring to the Violent Crime Control and Law Enforcement Act of 1994, which established sixty new death-eligible offenses.[141] In response, the USA's delegation noted that, "[a]t present, the statutes of 37 States provide the death penalty for murder and, in a few of these States, for other offences, almost all for offences resulting in death."[142] The delegation also attempted to defend its stance by stating that "[t]he majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes … [and] federal law provides for capital punishment for certain very serious federal crimes."[143] Yet it has already been established above that the USA does not meet the Article 6(2) definition of "most serious crimes." This was further substantiated by Mr Di Gregory, USA delegate, who stated that "[s]even states had extended the death penalty to certain serious non-homicidal crimes which involved grave risk of death to others or to society. Those crimes included treason, train-wrecking, aircraft hijacking, aggravated kidnapping and forcible rape of a child."[144]

The USA also relied upon the case of *Tison v. Arizona*[145] to excuse the range of death-eligible crimes, stating that, "restrictions on imposition of the death penalty are tied to a constitutional requirement that the punishment not be disproportionate to the personal culpability of the wrongdoer."[146] In reality, this was not the big win that the USA

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[140]Concluding Observations 1995, *supra* note 87, at 16.
[141] S.R. 1405th Meeting, *supra* note 62, at 48.
[142] State Party's Report 1994, *supra* note 82, at 136.
[143] *Id.* at 139.
[144] S.R. 1405th Meeting *supra* note 62, at 45.
[145] Tison v Arizona, 481 U.S. 137, 149 (1987).
[146] State Party's Report 1994, *supra* note 82, at 140.

portrayed it to be. The case is related to felony murder, which is an offense wherein during the commission of a felony, a person is killed. This is a capital crime in some U.S. states, even though the accused does not need to have engaged in the killing at all. While the Supreme Court in *Tison* did set out a test to ascertain whether a person's participation in a felony was proportionate to resulting in a death sentence, the Court also found that it was not unconstitutional for a person in certain circumstances to be executed for the crime of felony murder.[147] As such, this still means that a death sentence for felony murder contravenes Article 6(2) and its "most serious" crime clause. The USA's statement regarding *Tison* further indicates that the delegation was again paying lip service to the overarching issue of the high number of death-eligible offenses, instead of engaging in the specifics. For instance, here the USA should have had a conversation about the complex and controversial nature of felony murder.

Despite the USA's meager attempt to justify the number of offenses available for capital punishment, the Committee recommended that it should "revise the federal and state legislation with a view to restricting the number of [offenses] carrying the death penalty strictly to the most serious crimes, in conformity with [A]rticle 6 of the Covenant and with a view eventually to abolishing it."[148] When responding to this in the 2006 review, the USA stated that, "[w]hile, consistent with reservation (2) of the United States to the Covenant, the Covenant imposes no constraint on the crimes for which the United States may impose capital punishment, under the United States Constitution the use of the death penalty is restricted to particularly serious offenses."[149] This is simply incorrect and is a misinterpretation of Article 6(2)'s most serious crime clause. In fact, Committee member Mr. Amor asked the USA to "indicate what constituted the 'most serious crimes' and whether the [USA] intended to limit that category of crimes."[150] To some extent, the USA did do this, as it pointed to the

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[147] *See* Tison, *supra* note 145.
[148] Concluding Observations 1995, *supra* note 87, at 31.
[149] State Party's Report 2005, *supra* note 88, at 459.
[150] UNHRC Summary Record, *supra* note 90, at 90.

2008 Supreme Court decision in *Kennedy v. Louisiana*,[151] which "invalidated imposition of the death penalty for the rape of a minor where the crime did not result, and was not intended to result, in the minor's death."[152] While this is a positive move towards restricting the number of death-eligible offenses, the impact of the Committee is limited at best and non-existent at worst, as the *Kennedy* judgment made no reference to international law's influence on the decision.[153]

Moreover, in 2014, the delegation's predominant response was to provide an update on the latest figures regarding the death penalty:

> As of 2011, capital punishment is available as a penalty that may be imposed by the federal government, including in the military justice system, and 34 states for crimes such as murder or felony murder generally only when aggravating circumstances were present in the commission of the crime, such as multiple victims, rape of the victim, or murder-for-hire.[154]

Although it provided up-to-date figures, this is just lip service once again, as it does not get to the crux of the issue, which is the fact that there are death-eligible crimes that fall outside of the "most serious crimes" restriction.

c. USA Engagement on this Issue

The USA's engagement with a substantive death penalty issue, categorical exemptions, was just as disappointing as its engagement with the two procedural issues discussed above. There is a perennial problem of the USA paying lip service to international human rights, particularly when relating to the death penalty.

In terms of mental health, the USA did not engage in any meaningful way with the Committee reviews. Although in a footnote

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[151] *See* Kennedy, *supra* note 123.
[152] Consideration of Reports 2012, *supra* note 139, at 651.
[153] Kennedy, *supra* note 123.
[154] Consideration of Reports 2012, *supra* note 139, at 150.

in the majority opinion in *Atkins*, Justice Stevens referred to an amicus curiae brief submitted by the European Union which stated that the "world community" overwhelmingly disapproves of executing "mentally retarded" persons.[155] In reality, the Committee discussions in and of themselves did little to nothing to move the USA to prohibit the execution of those with an intellectual disability. Furthermore, the USA has yet to exclude those with a serious mental illness from execution and, as identified above, the Committee discussions seem to have run out of steam regarding mental health exemptions from the death penalty. As there are currently numerous bills being decided upon regarding a categorical exemption for the mentally ill in state legislatures across the USA,[156] this is a very relevant concern to be addressed.

Two key points must be addressed in the next review in this respect: (1) an examination into whether the USA continues to execute people with intellectual disabilities; (2) a detailed exploration into exempting people with serious mental health issues from the death penalty. The USA's delegation must be willing to engage in the details of these issues, avoiding its previous practice of sticking to surface-level discussions, even if just from the federal government's perspective. The findings also raise the question of whether civil society engagement is an effective tool here and how it can be strengthened, as an alarming observation was made regarding the execution of people with intellectual disabilities by the ACLU that was not picked up elsewhere.

In terms of the restriction of death-eligible offenses, again the USA would not be drawn into the details of death-eligible offenses, particularly on the question of whether some of those offenses contravene Article 6(2)'s most serious crimes clause, such as felony murder or murder-for-hire, where the person receiving a death sentence has not committed the killing. This point is directly linked to the reservation against Article 6, as noted in the section above, as it adds more fuel to the fire of the USA's reservation being invalid. The USA must attend the next review ready and willing to discuss these uncomforta-

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[155] Atkins*, supra* note 124, at n.21.
[156] *See* Fla. S.B. 1156 (2021).

ble truths about the capital system, not just regarding categorical exemptions, but all substantive death penalty issues including racial discrimination, method of execution, etc. Currently, the Committee's reviews cannot have any real impact on the USA's capital punishment protocol, as the USA does not engage in any depth. This is something that must be addressed in the next review by the Biden Administration.

Conclusion

Perhaps unsurprisingly, this research has found that the USA does not engage in a meaningful way with international human rights on the question of capital punishment, and in particular, the overarching finding is that the USA pays lip service to the Committee's reviews. More optimistically, this article has identified ways in which the USA can better engage with the Committee regarding the death penalty, particularly considering the three main issues: (1) the non-self-executing declaration lodged against the ICCPR by the USA; (2) the reservation lodged against Article 6 and juvenile executions; and (3) categorical exemptions to the death penalty. This is an important point of concern currently, as it appears that the fourth review of the USA's implementation of the ICCPR by the Committee is imminent, as CSO submissions have been available on the Treaty Body repository since 2019[157] and the Committee's review calendar predicted the USA's fourth review would take place in 2021.[158]

In terms of the non-self-executing declaration, there are two points of action suggested to the Biden Administration. First, the delegation should explain how a treaty would be considered self-executing, as well as how the ICCPR could be implemented in practice through federal law. This should take into account the issues of politics, partisanship, and federalism, and this should be provided in a section of the State Party Report. To date, the USA has provided no real response to questions on this point, so by providing an honest account, it would not only demonstrate a commitment to truly engaging with

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[157] UN Treaty Body Database, *supra* note 11.
[158] U.N. Human Rights Committee, *Predictable Review Calendar* (May 29, 2020), https://www.ohchr.org/Documents/HRBodies/CCPR/ListOfCountries.pdf.

the Committee's reviews but would also allow the international community to understand the complexities of the USA's federal system of governments. Second, also in the State Party Report, the USA should explain exactly *how* the ICCPR is being implemented in practice, across the States and federal government, with clear examples. This would allow the Committee to understand the broader picture, and to specifically identify areas where implementation is most resisted or welcomed.

Regarding the reservation lodged against Article 6, the first and most basic action is for the Biden Administration to expressly confirm that the reservation is lodged against the entirety of Article 6 and not just Article 6(5). This should be expressed both in the State Party Report and throughout the review itself. From there, the delegation should explain what action would be needed to bring the USA's capital system in line with Article 6 and the Biden Administration should take clear steps to put this into practice at the federal level, as an example to the States. Further, the delegation should explain to the Committee how the USA would practically withdraw a reservation from a treaty such as removing the Article 6 reservation. In 2006, Mr. Harris stated that "it [is] difficult and highly unusual to withdraw reservations in United States practice,"[159] so to allow key actors to understand the process, the delegation should explain it fully instead of relying upon the excuse of the process being difficult and unusual.

When considering categorical exemptions to the death penalty, there are two points of action for the USA. First, the delegation must engage in an examination of the claims that the USA is still executing people with intellectual disabilities. The government should investigate this and provide evidence relating to this in the State Party Report. Second, the USA must engage in a thorough review of all of the death-eligible offenses and whether they violate the "most serious crimes" clause of the ICCPR. This should also be listed in the State Party Report. Furthermore, this links to the wider point of this article, that the Biden Administration must take the opportunity at the next review to break the habit of paying lip service to the Committee's reviews and have a frank discussion about the USA's capital system.

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[159] UNHRC Summary Record, *supra* note 90, at 7.

Finally, CSO involvement in the Committee reviews is to be celebrated, and the USA should make more effort in the next review to take note of CSO submissions. Although it is important that this engagement does not duplicate the work of other human rights mechanisms, such as the Universal Periodic Review. CSOs can appeal to the U.S. states to implement the ICCPR, translating the views and recommendations of the Committee directly to the states, as an alternative way of implementing the ICCPR, particularly when considering that the death penalty is most widely administered by the states as opposed to the federal government.

Overall, the USA has a long way to go in terms of adhering to international human rights on the question of the death penalty. One way of achieving this is through engagement with the Committee. While there is much work to be done, the Biden Administration has been more receptive to the international system and, with the suggestions made in this article, the next review of the USA could be the Committee's most influential yet.