

THE UNIVERSAL PERIODIC REVIEW AND THE DEATH PENALTY: A CASE STUDY OF PAKISTAN

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ABSTRACT

Acclaimed as an innovative mechanism of the UN Human Rights Council, the Universal Periodic Review (UPR) was introduced by General Assembly Resolution 60/251 in 2006. It appraises the human rights record of each UN Member State, every four and a half years, in an attempt to further the global promotion and protection of human rights. The third cycle of the UPR has been underway since April 2017 and will conclude in November 2021. Using Pakistan's latest review, held in 2017, as a case study, this article assesses the mechanism's engagement with the question of the death penalty. In doing so, it evaluates each stage of the process and considers the extent to which this violation of the right to life is challenged and issues recommendations to strengthen the integrity of the UPR.

INTRODUCTION

Since April 2006, pursuant to subsection (d) of Resolution 60/251, the Human Rights Council (HRC) has been mandated with the responsibility of monitoring Member States' compliance with human rights obligations and commitments. This is to be implemented through the Universal Periodic Review (UPR), a peer-review mechanism based on:

objective and reliable information...in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an

interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs.²⁷⁷

Resolution 5/1, also known as the ‘Institution Building Package’ (IBP), provides an overview of the UPR’s modalities and further expands upon Resolution 60/251. According to the IBP, the following human rights commitments and obligations are to be relied upon to form the basis of a State’s review: the Charter of the United Nations, the Universal Declaration of Human Rights, human rights instruments to which a State is party to, and voluntary pledges and commitments made by States. The review criteria also include applicable international humanitarian law due to its complementary and mutually interrelated nature with international human rights law.²⁷⁸ The inclusion of legally binding and non-legally binding human rights instruments as the basis of the review indicates its comprehensiveness, allowing it to build upon the universality, indivisibility, and interrelatedness of human rights.

Each Member State is reviewed every four and a half years. The review itself begins with national consultations in the country concerned and concludes with implementation of recommendations and follow-up. Using Pakistan’s third UPR, held in 2017, as a case study, the question of the death penalty is assessed in each stage of the mechanism below. The article considers the extent to which this violation of the right to life is challenged and issues recommendations to strengthen the integrity of the UPR.

²⁷⁷ UNGA Res 60/251, ‘Human Rights Council’ (3 April 2006) UN Doc A/RES/60/251, para 5e.

²⁷⁸ UNHRC Res 5/1, ‘Institution Building of the United Nations Human Rights Council’ (18 June 2007) UN Doc A/HRC/RES/5/1, paras 1-2.

4. THE UNIVERSAL PERIODIC REVIEW

4.1. National Consultations

The first stage of the UPR involves a national consultation process. The State under Review is encouraged to prepare its national report “through a broad consultation process at a national level with all relevant stakeholders”.²⁷⁹ The consultations, which generally begin ten to twelve months before the actual review,²⁸⁰ allow relevant stakeholders to make significant contributions in increasing awareness and knowledge of the UPR mechanism. This, in turn, allows key human rights issues, such as the death penalty, to be brought to the forefront.

Stakeholders include NGOs, national human rights institutions, human rights defenders, academic and research institutions, regional organisations, and civil society representation.²⁸¹ Civil society engagement in the UPR helps provide a balance to the State’s performance by including independent and impartial perspectives. Moreover, it gives a voice to the marginalized and vulnerable groups which highlights the universality and indivisibility of human rights and, therefore, has an effective role to play when a State’s human rights record is being reviewed.

²⁷⁹ *ibid* para 15(a).

²⁸⁰ Lisbeth Arne Nordager Thonbo, ‘The Role of the State’ in Lis Dhundale and Lisbeth Arne Nordager Thonbo (eds), *Universal Periodic Review First Cycle: Reporting Methodologies from the Positions of the State, Civil Society and National Human Rights Institutions* (The Danish Institute for Human Rights 2011) 17.

²⁸¹ OHCHR, ‘Information and Guidelines for Relevant Stakeholders on the UPR Mechanism [as of July 2008]’ available at <www.ohchr.org/EN/HRBodies/UPR/Documents/TechnicalGuideEN.pdf>.

The concept of national consultations adheres to the principle that the UPR must, “ensure the participation of all relevant stakeholders, including nongovernmental organizations and national human rights institutions”.²⁸² No detailed instructions, however, are provided on the format that the consultative national process should take. As a result, only a small number of submissions have identified the specific nature of consultations such as the time, location, and/or number of participants.²⁸³ This was reflected in Pakistan’s second UPR where the State listed the date and location of its consultations with government departments and civil society organisations, but failed to disclose their identities or the number of organisations actually involved.²⁸⁴ Surprisingly, moving one step backward, its third UPR simply observed that “all stakeholders were involved”²⁸⁵ and consultative meetings were arranged “with the participation of the government officials and CSOs for seeking their input, and finalization of responses”.²⁸⁶ No further details were forthcoming. Consequently, the true level of cooperation and engagement with stakeholders cannot be determined and can include stifling effective interpretation on the death penalty.

²⁸² *ibid* para 3(m).

²⁸³ Allehone Mulugeta Abebe, ‘Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council’ (2009) 9 *Human Rights Law Review* 4, 10.

²⁸⁴ UNHRC, ‘National Report Submitted in Accordance with Paragraph 5(a) of the Annex to Human Rights Council Resolution 16/21: Pakistan’ (6 August 2012) UN Doc A/HRC/WG.6/14/PAK/1, Annex 1.

²⁸⁵ UNHRC, ‘National Report Submitted in Accordance with Paragraph 5(a) of the Annex to Human Rights Council Resolution 16/21: Pakistan’ (4 September 2017) UN Doc A/HRC/WG.6/28/PAK/1, para 4.

²⁸⁶ *ibid*.

4.2. Submission of Reports

The next stage in the process involves the collation of reports. The review of a State is based upon three documents: 1) national report prepared by the State concerned; 2) summary of stakeholder reports, and; 3) compilation submitted by the Office of the High Commissioner for Human Rights (OHCHR) on relevant official United Nations documents [hereinafter UN report].²⁸⁷

4.2.1. National Report

The State under Review must submit a national report, the structure of which can follow the General Guidelines adopted by the Human Rights Council.²⁸⁸ The outcome should be an evaluative report that provides a detailed analysis of a country's human rights record, both the positive and the negative, paving the way for future compromises and assistance from other countries.²⁸⁹

²⁸⁷ UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 15.

²⁸⁸ 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>. Tentative deadlines are included in the calendar of the cycle as posted on the OHCHR website. For States considered at the early session of the year, the deadline for submission is usually set for October of the previous year. For States considered at the April-May session, the deadline is usually set for January-February of the same year. For States considered at the October-November session, deadline is usually set for July-August of the same year.

²⁸⁹ Juliana Vengoechea-Barrios, 'The Universal Periodic Review: A New Hope for International Human Rights Law or a Reformulation of Errors of the Past?' (2008) 12 *International Law: Revista Colombiana de Derecho Internacional* 109.

Pakistan's national report²⁹⁰ is devoid of any reference to the death penalty suggesting that its attitude to capital punishment is seen as a matter of State sovereignty as opposed to a question of human rights. This is 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 disassociation.²⁹¹ Pakistan has consistently voted against these resolutions,²⁹² including the most recent resolution in 2018, and endorsed the *note 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".²⁹³

The note 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"²⁹⁴ 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

²⁹⁰ See UNHRC, 'National Report Submitted in Accordance with Paragraph 5(a) of the Annex to Human Rights Council Resolution 16/21: Pakistan' (4 September 2017) UN Doc A/HRC/WG.6/28/PAK/1.

²⁹¹ 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 UN Doc A/62/658.

²⁹² UNGA Res 62/149 (26 February 2008) UN Doc A/RES/62/149; UNGA Res 63/168 (13 February 2009) UN Doc A/RES/63/168; UNGA Res 65/206 (28 March 2011) UN Doc A/RES/65/206; UNGA Res 67/176 (20 March 2013) UN Doc A/RES/67/176; UNGA Res 69/186 (4 February 2015) UN Doc A/RES/69/186; UNGA Res 71/187 (2 February 2017) UN Doc A/RES/71/187.

²⁹³ UN Docs A/62/658; A/63/716; A/65/779; A/67/841; A/69/993.

²⁹⁴ *ibid.*

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.²⁹⁵

Clear principles of sovereignty and criminal justice are reflected in the above statement and are being used to prevent scrutiny of States' practice of the death penalty. Moreover, to assert that all States are adhering to their right to life obligations is a bold claim to make, and the UPR process itself demonstrates that this is not accurate. The UN and stakeholder reports for Pakistan, 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 which Pakistan employs, 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.²⁹⁶

Whilst a lack of discussion on the right to life could be justified on the basis that the review is expected to focus on accepted recommendations from the previous cycle and Pakistan did not accept any death penalty recommendations in its second review, the report must still discuss any challenges the State under Review faces in its implementation of human rights. This includes safeguarding the right to life.

²⁹⁵ *ibid.*

²⁹⁶ For a comprehensive analysis of Islamic law and the death penalty, see Amna Nazir, *Islamic Member State and the Scrutiny of the Death Penalty within the Universal Periodic Review* (PhD thesis, Birmingham City University and University of Birmingham 2019).

4.2.2. Stakeholder Report

The second report is a summary of all stakeholder submissions to the UPR, presented in a summarized manner owing to word-limit constraints. Stakeholder submissions must be submitted six months before the State under Review's UPR and they can either be an independent individual report, not exceeding 2815 words, or a joint stakeholder report limited to 5630 words.²⁹⁷ All submissions are made available on the OHCHR's website which adds to the transparency of the whole process.²⁹⁸ A joint stakeholder submission increases the visibility of the submission and is afforded a greater sense of credibility as it implies that participating stakeholders were able to reach a consensus on particular issues and propose recommendations to ameliorate the human rights situation in the State under Review.²⁹⁹ Non-State contributions such as those by national stakeholders are accommodated as official documents in the review process which prevents any hierarchy among the different inputs.³⁰⁰ In the instance of Pakistan, a total of 20 joint submissions were recorded during its third review. An example of this was Joint Submission 4 (JS4), on the State's use of the death penalty, comprising of Reprieve, World Organisations Against Torture, Justice Project Pakistan and World Coalition Against the Death Penalty.

²⁹⁷ OHCHR, 'Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders' written submissions', para 11 available at <www.upr-info.org/sites/default/files/general-document/pdf/upr_technicalguidelines3rdcycle_submissions.pdf>.

²⁹⁸ NGO submissions can be located on each country's page on the OHCHR website dedicated to the UPR: www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx. After selecting the relevant country, click on the footnote at the end of the title 'Summary of stakeholders' information'.

²⁹⁹ UPR-Info, 'The Civil Society Compendium: A Comprehensive Guide for Civil Society Organisations Engaging in the Universal Periodic Review' (2017) 23.

³⁰⁰ Abebe (n 8) 11.

In order to improve the efficacy of written submissions, the OHCHR has introduced new guidelines for stakeholders for the third cycle onwards.³⁰¹ One such example being the introduction of “matrices of recommendations of countries to be reviewed during the third cycle of the UPR”.³⁰² The aim of the matrix is to record precise and specific information regarding the State under Review’s 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’.³⁰³

Stakeholders are advised to download their country matrix, complete the relevant section, and submit it as an annex to the main submission.³⁰⁴ Pakistan’s review had a total of 43 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”³⁰⁵ where recommendations have not been implemented and to ensure submissions remain relevant and specific.

³⁰¹ OHCHR, ‘Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders’ written submissions’, paras 5-6. The guidelines strongly encourage stakeholders to specifically tailor their submissions for the UPR and ensure that they contain reliable and credible information on the State under Review. They should identify issues of concern, possible recommendations and/or best practices, cover a maximum period of four years, and not contain abusive language.

³⁰² The table of matrices is available from the OHCHR website at <www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx>.

³⁰³ *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.

³⁰⁴ OHCHR, ‘Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders’ written submissions’, para 5e.

³⁰⁵ *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 JS4, Unrepresented Nations and Peoples Organization (UNPO), and Child Rights International Network (CRIN) in Pakistan's UPR.³⁰⁶

UNPO and JS4 drew attention to Pakistan's decision to lift a seven-year moratorium on the death penalty in December 2014 despite repeated recommendations from many States to the contrary. Furthermore, the stakeholders noted that the State under Review had extended resumption of executions to cover all 31 offences carrying the death penalty, such as kidnapping and drug-trafficking.³⁰⁷ JS4 also noted an absence of legislative provision to expressly protect people with psycho-social disabilities from the death penalty in Pakistan.³⁰⁸

According to CRIN, the juvenile death penalty had been imposed since the lifting of the moratorium in clear contravention to international human rights law. JS4 was also concerned about the lack of birth registration which continued as a major obstacle to juvenile justice. The police often recorded the age of the defendant based on a cursory visual assessment.³⁰⁹

³⁰⁶ UNHRC, 'Summary of Stakeholders' Submissions on Pakistan' (23 August 2017) UN Doc A/HRC/WG.6/28/PAK/3, paras 25-27.

³⁰⁷ *ibid* para 25.

³⁰⁸ *ibid* para 27.

³⁰⁹ Para 26; see also CRIN report p5

4.2.3. UN Report

The third report is compiled by the OHCHR on information contained in the reports of human rights treaty bodies, Special Procedures, and other relevant UN documents. This report is also restricted to ten pages.³¹⁰ In Pakistan's UN report, the High Commissioner for Human Rights voiced concern at the lifting of the 2008 moratorium on the death penalty and urged Pakistan to re-impose the moratorium. Whilst it had initially been lifted for terrorism-related crimes only, it was lifted generally in March 2015.³¹¹ A group of special rapporteurs also warned against the resumption of the death penalty for terrorist acts.³¹²

Three main themes were identified regarding the State's use of capital punishment: execution of juveniles, faith-based killings, and execution of persons with disabilities. The High Commissioner noted that approximately ten percent of individuals on death row had reportedly been juveniles at the time of the commission of the offence.³¹³ Moreover, the Committee on the Rights of the Child expressed alarm at reports that a number of individuals had been executed for offences committed when they were under the age of 18 years or when the age of the individual was contested.³¹⁴ The Special Representative of the Secretary-General on Violence against Children and a group of Special Rapporteurs also condemned the execution of juveniles.³¹⁵

³¹⁰ UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 15(b).

³¹¹ UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights: Pakistan' (4 September 2017) UN Doc A/HRC/WG.6/28/PAK/2, para 23-24.

³¹² *ibid.*

³¹³ *ibid* para 24.

³¹⁴ *ibid* para 25.

³¹⁵ *ibid.*

The Special Rapporteurs on Freedom of Religion and Belief, Minority Issues, and Extrajudicial, Summary or Arbitrary Executions all called upon Pakistan to adopt urgent measures to end faith-based killings and protect the rights of its religious minorities such as the Ahmadiyya community. The Special Rapporteurs expressed concern that such violence was only exacerbated by existing blasphemy laws that targeted minorities.³¹⁶ The Human Rights Committee³¹⁷ noted severe penalties, including the mandatory death penalty, under the State's blasphemy laws which reportedly had a discriminatory effect particularly on Ahmadis.³¹⁸

Concerning persons with disabilities, a group of Special Rapporteurs³¹⁹ urged Pakistan to stop the executions of such individuals, noting that "persons with psychosocial disabilities frequently face the risk of being sentenced to death and executed in breach of international standards."³²⁰ The Human Rights Committee echoed these views and advised the State to establish an

³¹⁶ *ibid* para 43. See also "Stop faith-based killings" – UN rights experts urge Pakistan to protect Ahmadiyya Muslim minorities' (*OHCHR*, 2 June 2014) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14658&LangID=E>.

³¹⁷ A body of 18 experts that monitors implementation of the ICCPR by its States Parties. Under Article 40(4), the Committee has issued a number of 'General Comments' which help States Parties to fulfil their reporting obligations 'by sharing the experience gleaned from the many periodic reports already studied, drawing attention to insufficiencies, and suggesting improvements'.

³¹⁸ UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights: Pakistan' (4 September 2017) UN Doc A/HRC/WG.6/28/PAK/2, para 43. See also UN Docs CCPR/C/PAK/CO/1, para 33; CERD/C/PAK/CO/21-23, para 21; CRC/C/PAK/CO/5, paras 30-31.

³¹⁹ Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on the independence of judges and lawyers; and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

³²⁰ 'UN rights experts urge Pakistan authorities to halt execution of a person with disabilities' (*OHCHR*, 27 September 2016) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20593&LangID=E>.

independent mechanism to review all cases where there is credible evidence that death row prisoners have such disabilities and to review the mental health of death row inmates.³²¹

The Human Rights Committee further recommended that Pakistan reinstate the moratorium on the death penalty with a view to abolition. If the death penalty was to be maintained, Pakistan should ensure that it was reserved only for the ‘most serious crimes’ involving intentional killing, that it was never mandatory, that pardon or commutation of the sentence was always available, that it was never executed in contravention to the ICCPR and fair trial guarantees. Moreover, it should not be imposed by military courts, in particular respect to civilians, and that no person who was below the age of 18 years at the time of the commission of an offence was subjected to the punishment.³²²

What emerges is a polarisation of attitudes as demonstrated by the State in its national report and the Special Procedures in the UN report. This demonstrates a superficial engagement with the UPR process as the State is failing to acknowledge its limitations in protecting the right to life or the occurrence of unfair trials which are facilitating the application of the death penalty.

³²¹ UNHRC, ‘Report of the Office of the United Nations High Commissioner for Human Rights: Pakistan’ (4 September 2017) UN Doc A/HRC/WG.6/28/PAK/2, para 91; UN Doc CCPR/C/PAK/CO/1, para 18(c).

³²² UNHRC, ‘Report of the Office of the United Nations High Commissioner for Human Rights: Pakistan’ (4 September 2017) UN Doc A/HRC/WG.6/28/PAK/2, para 26; CCPR/C/PAK/CO/1, para 18.

4.3. Interactive Dialogue

Following the submission of the reports, the UPR takes the physical form of an interactive dialogue which is held in Geneva where the Universal Periodic Review Working Group conducts a three and a half hour review.³²³ The Working Group is composed of all Member and Observer States in the Human Rights Council and is chaired by the Council's President.³²⁴ Pakistan's third UPR was held on 13 November 2017. The delegation of Pakistan was headed by the Minister of Foreign Affairs, Khawaja Muhammad Asif.

An interesting aspect of the interactive dialogue is that it helps normalise the discussion of human rights at the international level thereby reducing any perceived sensitivities. Roland Chauville argues that it “challenges the notion that human rights are a matter of domestic policy and that the involvement of the international community is akin to interfering with the sovereignty of the State being reviewed”.³²⁵ Therefore, statements encouraging retentionist countries to “preserve the death penalty given their cultural, political and legal specificities”³²⁶ can be respectfully questioned at the UPR; challenging the ideology that capital punishment is underpinned by State sovereignty and criminal justice, and help solidify the argument that it is a question of human rights.

³²³ The time allocated for reviews was originally three hours but was later extended for a further half hour. Compare UNHRC Res 5/1 (18 June 2007), at para 22 and HRC Presidential Statement 8/1, (2008) UN Doc HRC/8/PRST/1 at para 7 with UNHRC Dec 17/119, at paras 3-4 and Annex II, and UNHRC Res 16/21, at para 11.

³²⁴ UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 18.

³²⁵ Roland Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014) 90.

³²⁶ A/HRC/28/16, para 165.

The dialogue is made accessible on the OHCHR website and webcasted live, keeping with the principles of transparency, non-selectivity, and equal treatment. Stakeholders with ECOSOC status are able to attend the session but are not provided with any speaking time and are therefore prevented from directly interacting in the review dialogue.³²⁷ Whilst this is a drawback to the Universal Periodic Review, it signifies the ideology that the review is a State-led process.³²⁸

The review is guided by the troika which is a group of three Member State Rapporteurs chosen by the drawing of lots.³²⁹ The State under Review can request that one of the three troika members is from its own region thereby allowing the State to have “a regional ally that understands its cultural sensitivities and/or issues relating to capacities for human rights protection and promotion”.³³⁰ Conversely, a State that is selected to be part of troika can recuse itself from the position. This occurred in 2008 where Pakistan declined to serve as a troika member for India’s review due to the history of political

³²⁷ UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, paras 18 and 21.

³²⁸ Marianne Lilliebjerg, ‘The Universal Periodic Review of the UN Human Rights Council: An NGO Perspective on Opportunities and Shortcomings’ (2008) 26 NQHR 311, 313. See also Lawrence Moss, ‘Opportunities for Nongovernmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council’ (2010) 2 Journal of Human Rights Practice 122; Human Rights Council, ‘Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council: Compilation of State proposals’ (2010) UN Doc A/HRC/WG.8/1/CRP.1/Rev.1 at 3-5.

³²⁹ UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 18(d).

³³⁰ Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge 2013) 26.

tension between the two countries.³³¹ The troika selected to facilitate Pakistan's third review comprised of Egypt, Iraq and Latvia.³³²

The interactive dialogue has two main features: a presentation by the State under Review and a question and answer session with other Member States. The State under Review presents its national report regarding the country's human rights situation and responds to advance written questions submitted to it through the troika. Germany,³³³ Sweden,³³⁴ Czech Republic,³³⁵ Norway,³³⁶ and the United Kingdom³³⁷ all submitted questions to Pakistan on its use of the death penalty however these were not adequately answered, if at all. In its opening presentation, Pakistan simply acknowledged that:

One consequence of the counter-terrorism challenges Pakistan had been facing was the decision to implement the death penalty. Mounting public pressure in the wake of the Peshawar school attack had forced the Government to lift the moratorium on the

³³¹ Emma Hickey, 'The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground? A Critical Evaluation of the First Cycle and Recommendations for Reform' (2011) 7 ICL Journal 4; Elvira D Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7(3) Chinese Journal of International Law 721, 727.

³³² UNHRC, 'Report of the Working Group on the Universal Periodic Review: Pakistan' (29 December 2017) UN Doc A/HRC/37/13, para 2.

³³³ 'Considering the end of the moratorium on executions was presented as a measure against terrorism, while many inmates on death row were sentenced for crimes not related to terrorism: Has the Pakistan taken any steps to reduce the number of crimes for which the death penalty is imposed?'

³³⁴ 'What legal measures is the Government of Pakistan taking to restrict the use of the death penalty and ensure that it is applied in accordance with international law?'

³³⁵ 'Is the Government considering re-establishing a moratorium on the death penalty, which had been lifted in 2014?'

³³⁶ 'Which steps will Pakistan take to ensure due process in trials where the death penalty is an option, especially in the military courts?'

³³⁷ 'What steps is Pakistan taking to ensure that its application of the death penalty complies fully with international norms and obligations, including juveniles and persons with disabilities?'

death penalty. Pakistan imposed the death penalty in line with its Constitution and international norms for only the most serious crimes, with due process of law and fair trial standards followed diligently.³³⁸

The State under Review did not, for example, address steps it had taken to limit recourse to the death penalty, or what steps it had taken to ensure compliance with international human rights obligations when imposing the death penalty, and whether it would consider reinstating a moratorium. Furthermore, contrary to its statement above, the use of the death penalty in Pakistan is not an exceptional measure with as many as 31 offences carrying the punishment including non-lethal offences such as kidnapping, blasphemy, and narcotics offence. Some offences such as blasphemy and adultery carry a mandatory death sentence which is in contravention to the ‘most serious crimes’ principle. In fact, stakeholder JS4 detailed how Pakistan was acting in violation of ICCPR Articles 6(2), 6(4), 6(5), as well as Article 7 (freedom from torture or cruel, inhuman or degrading punishment) and Article 14 (right to a fair trial).³³⁹ This divergence of perspectives is a common pattern that seems to transpire in the UPR process.

³³⁸ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Pakistan’ (29 December 2017) UN Doc A/HRC/37/13, para 9.

³³⁹ JS4 UPR Submission available at ‘Universal Periodic Review Third Cycle - Pakistan - Reference Documents <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRPakistanStakeholdersInfoS28.aspx> accessed 05 January 2020.

4.3.1. The Issue of Recommendations

Following the State under Review's presentation, Member and Observer States are then provided the opportunity to take the floor and pose questions, present observations, or make recommendations. Member States are restricted to three minutes of speaking time whilst Observer States are given two minutes.³⁴⁰ A total of 111 States took the floor during Pakistan's review issuing a sum of 302 recommendations. The Working Group grouped similar recommendations together resulting in a total of 289 recommendations which is the official figure listed in its report. Of these 289 recommendations, 168 were supported and 121 noted.³⁴¹

The quality of recommendations received during a State's review can have varying effects on its human rights situation. This is supported by Edward McMahon's comprehensive study on the evaluation of recommendations in the UPR. McMahon has categorised recommendations on a scale of 1 to 5 depending on the verb that is used in each recommendation:³⁴²

- 1) Category 1: these recommendations require minimal action in comparison with other categories. They call upon the State under Review to seek international assistance or share best practices (verbs in this category would include 'call on', 'seek', and 'share').

³⁴⁰ UNHRC, Presidential Statement 8/1 (2008) UN Doc HRC/8/PRST/1, para 7.

³⁴¹ UNHRC, 'Report of the Human Rights Council on its Thirty-Seventh Session' (14 June 2018) UN Doc A/HRC/37/2, para 786.

³⁴² Edward McMahon, 'The Universal Periodic Review: A Work in Progress an Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council' (Friedrich Ebert Stiftung, September 2012) 14-15.

For example, Albania to Pakistan: “Strengthen its efforts to promote food security and eradicate all forms of malnutrition, and ensure quality education to all children through inclusive policies”.³⁴³

- 2) Category 2: these recommendations encourage continuity of actions and/or policies (‘continue’, ‘maintain’, ‘persevere’, ‘pursue’). These recommendations are fairly easy to implement as they do not demand any change however, they can be challenging when the State under Review is faced with political insecurity, economic cuts or conflict.

For example, Morocco to Pakistan: “Continue strengthening the operational efficiency of various human rights institutions”.³⁴⁴

- 3) Category 3: recommendations to consider change (‘analyse’, ‘consider’, ‘envisage’, ‘explore’, ‘reflect upon’, ‘review’). Such recommendations are generally issued when the subject matter is controversial and does not enjoy State support.

For example, Spain to Pakistan: “Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights in order to definitively abolish the death penalty”.³⁴⁵

- 4) Category 4: recommendations that contain a general element. As a result of being so broad, they can cause frustration to both the State

³⁴³ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Pakistan’ (29 December 2017) UN Doc A/HRC/37/13, recommendation 152.207.

³⁴⁴ *ibid* recommendation 152.47.

³⁴⁵ *ibid* recommendation 152.3.

under Review and relevant stakeholders as they lack clarity in regards to the method of implementation or measurable outcomes.

For example, Paraguay to Pakistan: “Pursue the efforts to remove all measures that could give rise to situations analogous to torture or cruel or inhuman treatment from its national legislation”.³⁴⁶

5) Category 5: these recommendations require specific actions and ‘demand certain tangible or measurable outcomes’. Recommendations on the death penalty predominantly fall within this category.

For example, United Kingdom to Pakistan: “Set a clear timeline for the review of legislation carrying the death penalty with the aim of limiting the scope of crimes to which it applies”.³⁴⁷

Pakistan received 35 death penalty recommendations and noted all of them. Angola, Spain, Uruguay, Cote d’Ivoire and Portugal all recommended Pakistan to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) Aiming at the Abolition of the Death Penalty.³⁴⁸ The vast majority of recommendations simply required the State to ‘abolish the death penalty’, ‘reinstate the moratorium on the death penalty’ or ‘establish a moratorium with a view to abolishing it’. These were issued by Iceland, Estonia, France, Czechia, Lithuania, Montenegro, Brazil, Greece, Norway, Switzerland, Cyprus, Luxembourg, Chile, Portugal, Slovakia, Italy,

³⁴⁶ *ibid* recommendation 152.135.

³⁴⁷ *ibid* recommendation 152.124.

³⁴⁸ *ibid* recommendations 152.2-152.5, 152.7.

Sweden, New Zealand, Austria, Moldova, Mexico, Germany and Namibia.³⁴⁹ Whilst it is commendable that these are category 5 recommendations demanding specific action, they lack a measurable outcome and fail to acknowledge the review criteria as laid down in 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. In Pakistan's case, the relevant review criteria would be Article 3 UDHR and Articles 6, 7 and 14 ICCPR.

Belgium was the only State to base its death penalty recommendation on the review criteria, recommending Pakistan to:

Immediately repeal legislation that provides the possibility to impose the death penalty for freedom of speech-related cases, in particular section 295-C of the Penal Code, in order to ensure compliance with Articles 6 and 19 of the International Covenant on Civil and Political Rights.³⁵⁰

Furthermore, the United Kingdom's recommendation also made good use of the S.M.A.R.T principle requesting Pakistan to "set a clear timeline for the

³⁴⁹ *ibid* recommendations 152.103-152.121; 152.123; 152.125; 152.126; and 152.129.

³⁵⁰ *ibid* recommendation 152.122.

review of legislation carrying the death penalty with the aim of limiting the scope of crimes to which it applies”.³⁵¹

In response to concerns raised by Member States such as Germany who noted the lifting of the moratorium on the death penalty followed by executions “as a significant retrograde step”,³⁵² Pakistan responded by citing the ICCPR which forms part of its review criteria (i.e. human rights instruments the State has ratified), an approach that the recommending States should have adopted. It asserted that “the application of death penalty was in full compliance with the ICCPR. It was applicable only for the most serious crimes. It could not be imposed on an individual under the age of 18”.³⁵³

Nonetheless, such an answer demonstrates that retentionist States like Pakistan seem to be disconnected from the evolving human rights jurisprudence on the right to life, particularly when considering the Secretary-General’s quinquennial reports,³⁵⁴ the Human Rights Committee’s General

³⁵¹ *ibid* recommendation 152.124.

³⁵² *ibid* para 77.

³⁵³ *ibid* para 123.

³⁵⁴ ECOSOC, by its Resolution 1745 (LIV) of 16 May 1973, invited the Secretary-General to submit to it, at five-year intervals starting from 1975, periodic updated and analytical reports on capital punishment. Under Resolution 1995/57 of 28 July 1995, it recommended that the quinquennial reports of the Secretary-General should continue to cover also the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. There have been nine quinquennial reports to date. See UN Docs E/5616 (covering period 1969-1973); E/1980/9 (covering period 1974-1979); E/1985/43 (covering period 1979-1983); E/1990/38/Rev.1 (covering period 1984-1989); E/1995/78 (covering period 1989-1993); E/2000/3 (covering period 1994-1998); E/2005/3 (covering period 1999-2003); E/2010/10 (covering period 2004-2008); E/2015/49 (covering period 2009-2013).

Comment No. 36,³⁵⁵ and its concluding observations on the implementation of the ICCPR.³⁵⁶

The Human Rights Committee has addressed the meaning of ‘most serious crimes’ in the most recent Draft General Comment No. 36 stating that the term must be read restrictively and relate to crimes of extreme gravity, such as premeditated murder or genocidal killings. It States in length that:

Crimes not resulting directly and intentionally in death, such as drug offences, attempted murder, corruption, armed robbery, piracy, abduction, repeated evasion of compulsory military service and sexual offences, although serious in nature, do not manifest the extraordinary high levels of violence, utter disregard for human life, blatant anti-social attitude and irreversible consequences that could conceivably justify the imposition of the death penalty as a form of legal retribution.³⁵⁷

Therefore, States Parties that retain the death penalty for these offences are in violation of their obligations under Article 6 ICCPR. This also means that States, such as Pakistan, which criminalise apostasy, blasphemy and adultery as capital offences are not adhering to international law standards. Another

³⁵⁵ This General Comment replaces earlier General Comments No. 6 (16th session) and No. 14 (23rd session) adopted by the Committee in 1982 and 1984, respectively.

³⁵⁶ See eg, ‘Concluding observations on the initial report of Pakistan’ (27 July 2017) UN Doc CCPR/C/PAK/CO/1.

³⁵⁷ Human Rights Committee, ‘Draft General Comment No. 36 on Article 6: Right to life, Draft prepared by Yuval Shany and Nigel Rodley, Rapporteurs’ (2 September 2015) UN Doc CCPR/C/GC/R.36/Rev.2, paras 37-38.

restriction of the death penalty under Article 6 is found in paragraph 5 which excludes pregnant women and persons below 18 years of age.³⁵⁸

4.4. Adoption of Universal Periodic Review Outcomes

4.4.1. Adoption by the Working Group

Following the interactive dialogue, the troika prepares a report of the Working Group which includes a summary of the proceedings, the issues raised in the interactive dialogue, the recommendations submitted by participating Member States, and voluntary commitments made by the State under Review.³⁵⁹ There is a forty-eight hour time frame between the interactive dialogue and the adoption of the outcome report.³⁶⁰ The Working Group adopted the report on Pakistan at its 17th meeting held on 16 November 2017.

The outcome report details both accepted and noted recommendations by the State under Review. Attribution of recommendations was another challenge faced by the Human Rights Council. Egypt contended that “it is a violation of the sovereign rights of States”³⁶¹ to suggest that all Working Group members have agreed upon a recommendation which in fact has only been proposed by one State. The notion of ascribing a recommendation only to the State which proposed it gained favour in the international

³⁵⁸ The paragraph reads: [s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

³⁵⁹ UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/5/1, at para 26; UNHRC, Presidential Statement 8/1 (2008) UN Doc HRC/8/PRST/1 at paras 8-11; and UNHRC Presidential Statement 9/2 (2008) UN Doc HRC/9/PRST/2.

³⁶⁰ Redondo (n 46) 732.

³⁶¹ Abebe (n 8) 16.

community.³⁶² This is particularly useful for States who may not agree with recommendations such as those which may conflict with their own cultural or religious norms. Hence Angola's recommendation to Pakistan to "Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty"³⁶³ would not be endorsed by States such as Saudi Arabia, Iran, Afghanistan, or Sudan who are death penalty retentionists.

Recommendations are therefore viewed as "bilateral recommendations made through the multilateral forum of the Universal Periodic Review".³⁶⁴ This approach is reflected in the wording articulated 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".³⁶⁵

4.4.2. Adoption by the Human Rights Council

Three to five months after the Working Group session, the Human Rights Council will conduct a plenary session to adopt the Working Group's outcome report. This stage provides the State under Review to respond to any issues that were not adequately addressed during the interactive dialogue.

³⁶² *ibid.*

³⁶³ UNHRC, 'Report of the Working Group on the Universal Periodic Review: Pakistan' (29 December 2017) UN Doc A/HRC/37/13, recommendation 152.2.

³⁶⁴ 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.

³⁶⁵ 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.

This is generally preceded by an addendum to the outcome document which details whether any additional recommendations have enjoyed State support between the time of the review and the adoption of the outcome report.³⁶⁶

The discussion of the Working Group documents is approximately one hour. The time is equally distributed (20 minutes each) between the State under Review, Member and Observer States, and stakeholders to express their views. It provides the opportunity for relevant stakeholders to comment on the outcome report and those States whose recommendations were noted can restate their proposals, after which the plenary adopts the outcome report.³⁶⁷ During the adoption of Pakistan's report, Greece reiterated its recommendation to the State to abolish the death penalty as did the stakeholders, British Humanist Association and International Federation for Human Rights Leagues.³⁶⁸

Whilst this stage has been described by Alex Conte as "little more than a formality and ... somewhat of a rubber-stamping exercise"³⁶⁹, it holds more weight than this. This is the only stage where stakeholders are offered a platform to speak and it is essential their voices are given prominence, going beyond writings on paper, in order to make violations of the right to life more transparent.

³⁶⁶ UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/5/1, at paras 29-32 and UNHRC Res 16/21, at para 12, HRC Presidential Statement 9/2, at para 13. The provision of a written communication is called for in UNHRC Res 16/21, at para 16.

³⁶⁷ Abebe (n 8) 17.

³⁶⁸ UNHRC, 'Report of the Human Rights Council on its Thirty-Seventh Session' (14 June 2018) UN Doc A/HRC/37/2, paras 789 (Greece); 802 (British Humanist Association); 806 (International Federation for Human Rights Leagues).

³⁶⁹ Conte (n 74) 198.

4.5. 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.³⁷⁰ 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. 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.³⁷¹ In his letter to Pakistan, the High Commissioner encouraged the State to submit a midterm report by 2020 and highlighted areas in need of particular attention, such as safeguarding the right to life by encouraging the State to, “[r]e-impose the moratorium on the death penalty and consider abolishing it. Should it be maintained, it may be applied only to the ‘most serious crimes’”.³⁷²

³⁷⁰ 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.

³⁷¹ UPR: Overview of the Voluntary Fund for Implementation, 5.

³⁷² 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>.

Implementation is one of the fundamental challenges facing the Universal Periodic Review. The UPR needs to promote human rights on the ground level and ameliorate violations by “translating the recommendations and commitments made...into measurable improvements”.³⁷³ Recommendations on the death penalty, therefore, need to be S.M.A.R.T.³⁷⁴ 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.³⁷⁵

Unfortunately, tracking implementation is not a straightforward task as there is no formal guidance or official mechanism in place. This hinders the ability to engage with the extent to which the State under Review, such as Pakistan, has implemented recommendations relating to its use of capital punishment. One way to counter 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.³⁷⁶ Whether Pakistan submits a midterm report remains to be seen; however, based on its failure to produce one for its previous two UPRs, this seems unlikely.

³⁷³ Conte (n 74) 201.

³⁷⁴ Specific, Measurable, Achievable, Relevant, Time-bound.

³⁷⁵ See Amna Nazir, ‘The Universal Periodic Review and Muslim States’ Engagement’ (2019) 15 *Journal of International Law and Islamic Law* 1, 24.

³⁷⁶ 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.

5. CONCLUSION

The UPR provides a constructive and transparent platform for the international community to engage in human rights issues such as those pertaining to the right to life. This article analysed the question of the death penalty in Pakistan's third UPR by considering each stage of the mechanism and the extent to which this human rights issue is effectively challenged in the process.

During its review, Pakistan remained, for the most part, silent on the issue of the death penalty. This is reflective of States presenting a sanitized version of their human rights record in the international community. The state narrative justified the imposition of the punishment as part of its counterterrorism strategy, however, the application of the death penalty has broadened to cover a range of offences including those which are non-lethal.

It responded to Member State recommendations to abolish the punishment by arguing that its application was consistent with the ICCPR and reserved for the most serious crimes. This demonstrates the State's dissonance with the evolving human rights jurisprudence on the death penalty such as the Secretary-General's quinquennial reports and the Human Rights Committee's General Comment no. 36. Furthermore, the State needs to engage with the midterm reporting process to illustrate its progress on the implementation of recommendations and its commitment to the UPR mechanism as a whole.

Stakeholder engagement provides a more balanced perspective, and this was highlighted in Pakistan's UPR where civil society made right to life violations more transparent. Pakistan's adherence to its international human rights

obligations such as Articles 6, 7, and 14 of the ICCPR was challenged as was the State's execution of persons with psychosocial disabilities. Whilst civil society contribution increases awareness and exerts more pressure on the State under Review to address its human rights shortcomings, they also need to make effective use of tools at their disposal such as the matrices developed by the OCHR to ensure stakeholder submissions, such as those concerning the death penalty, remain relevant and specific.

As the UPR is a State-led process, recommending States should issue specific and measurable recommendations to the State under Review, and desist from issuing vague and generic comments that risk undermining the process and detract from the main issues at hand. In Pakistan's case, reliance on relevant articles of the ICCPR and CRC would strengthen recommendations on removing the sovereign State's right to apply the death penalty.