

THEORY OF PENAL LIABILITY

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ABSTRACT

*Penal Liability Theory as summed up in the maxim *actus non facit reum nisi mens sit rea*—an act alone does not suffice to establish guilt; it must be accompanied by culpable mental intent—the theory of penal liability bases criminal responsibility on two fundamental requirements: *actus reus* (the guilty act) and *mens rea* (the guilty mind).*

A prohibited act or omission must be committed by the individual in order to meet the material (physical) criterion. It is impossible to impose criminal culpability without such an overt action. The act must be carried out with a guilty mentality in order to satisfy the formal (mental) criterion; this is usually manifested as intention, carelessness, or negligence. Wilful vs Careless Regardless of the likelihood of a particular event, intention involves a deliberate plan or anticipation of its effects. Negligence, on the other hand, results from apathy or reckless disregard. It could be unconscious, based on carelessness, or occur even when you know there is a risk but don't take action to avoid it. The person who does the act is usually held accountable. Nonetheless, in certain situations, such as when an employer is held accountable for an agent's activities while they are acting in the course of their job, legal systems acknowledge vicarious liability. Furthermore, in many jurisdictions—such as those pertaining to regulatory offenses—strict or absolute liability is applied without the need for mens rea. Liability in these cases stems only from the act itself, albeit depending on the jurisdiction, defences like due diligence may or may not be applicable. Establishing guilt is simply one aspect of penal liability; another is determining how it ought to be handled. Criminal law concentrates on the following, whilst civil wrongs are corrected by damages.

The goals of punishment include vengeance, prevention, deterrent, and reform. India. Certain groups of people are believed to lack voluntariness or intent and are therefore immune from criminal culpability.

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INTRODUCTION

Actus Reus and Mens Rea: A Definition of Penal Liability:

The Latin proverb "actus non facit reum nisi mens sit rea"—"the act is not culpable unless the mind is guilty"—lays the groundwork for penal (or criminal) culpability. This sums up two requirements for proving criminal responsibility:

A voluntary bodily act or omission is known as the external guilty act, or actus reus. An accompanying mental condition, such as intent, knowledge, recklessness, or negligence, is known as mens rea, or the internal guilty mentality.

Criminal liability is a legal concept that holds individuals responsible for their actions or omissions if they are found to have committed a criminal act. Criminal liability differs from civil liability, which is based on the breach of a contract or tort. To be considered criminally liable, an individual must have acted with intention or negligently and thus there must be both an actus reus and mens rea.

Criminal liability is a complex concept that can have far-reaching legal implications. This article will provide an in-depth look at the concept of criminal liability, its various forms, and the legal consequences that may result from it.

The legal maxim "actus non facit reum, nisi mens sit rea" is a cornerstone of penal liability, emphasizing that guilt cannot be established solely based on an action — it must be accompanied by a guilty state of mind, known as "mens rea."

Actus reus

Actus reus is a fundamental concept in criminal liability, often referred to as the "guilty act." This Latin term encapsulates the external or objective component of a criminal offense. Essentially, it pertains to the actions or omissions that constitute the physical aspects of a crime, as defined by statute.

Mens rea

In contrast, mens rea — another cornerstone principle in criminal liability — translates to the "guilty mind." This Latin expression signifies the mental element of an individual's intent to engage in criminal conduct. The mental state is a crucial component when assessing criminal behaviour.

Therefore, mens rea serves as the driving force behind the commission of a crime. It reflects an individual's cognitive state and their awareness of the wrongful nature of their actions.

The burden of proof in legal proceedings determines the standard required to establish a fact in court. In criminal cases, the prosecution must prove guilt beyond a reasonable doubt, while civil cases demand proof by a preponderance of the evidence.

This burden comprises two aspects — the burden of production such as presenting evidence, and the burden of persuasion like the convincing the fact-finder. Various standards exist, such as clear and convincing evidence, probable cause, reasonable suspicion, and more, each tailored to specific legal contexts.

These standards ensure fairness and accuracy in legal outcomes by aligning the burden of proof with the nature of the case and jurisdiction.

Exception

Criminal liability law acknowledges situations where a person, despite engaging in a criminal act, should not be held accountable for it. This includes individuals who, due to mental incapacity, lack the culpability required for criminal guilt.

Another group exempted from certain criminal liability is minors. The underlying rationale is that these individuals cannot form the necessary intent for it to be just to hold them responsible for the crime. In essence, they are responsible for their actions but not legally liable due to their incapacity to meet the required intent standard.

Force

Individuals can use force, even deadly force, to protect themselves from immediate physical injury, but the amount of force used must be proportionate to the threats they face. A reasonable defence applies when the force used was reasonable, while an imperfect defence may negate the intent by showing that the person had an unreasonable belief in the face of a deadly threat.

Necessity

This defence may be raised when an individual acts unlawfully in an emergency to prevent further serious harm. The threat is there, there are no alternatives, the damage caused by their actions should not be greater than it would have been and they also should not be held responsible for creating the dangerous situation.

Insanity

Different tests are used to determine if the defendant is not guilty by reason of insanity. These include the M'Naghten law (inability to distinguish between right and wrong), irresistible

emotional experimentation (loss of control due to mental illness), the Durham law (guilty by reason of dementia), and the Model Penal Code (incapacity and criminal conduct).

Intoxication

Alcohol may cause a defendant to prevent comprehending the consequences from hearing the nature of their actions or if their actions were inappropriate. However, this defence is limited in use and generally does not apply to conventional crimes.

Consent can be a defence in cases of physical injury, especially in physical contact sports. It generally does not apply when there is serious bodily injury, the injury must be reasonably anticipated given the nature of the activity to which the victim consented, and the injured party may also benefit some from communication to use to protect himself from the consent.

Coercion can be caused when another person pressures the defendant to commit a crime by threats or actual use of physical force. The defendant must face a credible threat of serious bodily harm, believe that the threat will be carried out, have no other recourse or other recourse is generally irrelevant in the case of murder.

Criminal liability varies depending on jurisdiction and the type of crime committed. For example, some states may consider certain acts as felonies while other states may not recognize them as such. It is therefore important to understand jurisdictional differences when it comes to criminal law.

Additionally, different types of crimes carry different levels of punishment – ranging from misdemeanours that may result in probation or community service to felonies that can lead to prison time or even death sentences in some jurisdictions.

TYPES OF CRIMINAL LIABILITY

Those accused of a crime should become aware of the various types of criminal liability that may be applicable in their case, as each carries its own implications.

Strict liability

The first type is strict liability, where someone can be held responsible for committing a crime without needing to prove any blameworthy conduct. An example would be laws governing sales of alcohol to minors. For instance, even if the seller was not aware of the customer's age, they could still face legal action.

Negligence

Negligence is another form which does not require intent but focuses on whether the accused should have been aware that their actions were illegal or posed risks to others. For instance, failing to secure hazardous materials can lead to criminal charges in certain cases even if there was no malicious intent behind it.

Intent requires proof that someone deliberately and knowingly violated the law with malicious intent or disregard for others' safety and wellbeing. This could include arson or murder where clear evidence exists that someone intended to cause harm through their actions.

Vicarious liability

Finally, vicarious criminal responsibility occurs when one person is held liable for another's actions in certain jurisdictions, often when an employer has failed in their duty to protect employees from breaking the law while carrying out job duties. Parental responsibility may also qualify as vicarious criminal liability depending on jurisdiction and circumstances involved in each case.

Educating oneself about these different forms of criminal liabilities can help individuals become more informed about their rights under the law and make better decisions within society while respecting boundaries set by authorities when necessary.

Criminal liability and mental health

When it comes to criminal liability, mental health greatly impacts the outcome of cases. The principle of insanity is often used as a defence in criminal cases — the idea that someone cannot be held criminally liable if they were unable to understand the wrongfulness of their actions due to mental illness or incapacity. This can be difficult to prove and may require expert psychiatric testimony in court.

Mental health issues can also increase the severity of sentences in some jurisdictions. For example, someone with an undiagnosed mental illness may not receive treatment for their condition while incarcerated, leading to further complications and potential harm for themselves and others. In some cases, a person's mental health condition may even lead to longer sentences than those without such conditions.

In response to this, many countries have begun implementing alternative sentencing programs for those with mental health issues who have committed crimes. These programs provide individuals with needed treatment and resources instead of incarceration, helping them get back on their feet while avoiding potentially detrimental long-term consequences associated with jail

time. Such programs can also help reduce recidivism rates among those suffering from mental illnesses by providing them with the support they need so they are less likely to reoffend in the future.

LEGAL CONSEQUENCES

Legal consequences of criminal liability can be severe and far-reaching. Depending on the type and severity of the crime, penalties can range from fines to jail time.

For cases that involve more serious crimes, harsher punishments may be imposed, such as life imprisonment or even the death penalty.

Aside from confinement, an individual who is convicted of a crime may also face professional consequences such as the revocation of their license or loss of their job.

Individuals convicted of a crime may have to forfeit property or assets acquired through illegal means. This includes money gained from criminal activities and any other tangible items used in the commission of a crime.

Furthermore, a conviction for a crime can result in the creation of a permanent criminal record which could negatively affect future employment opportunities and eligibility for certain government benefits.

LEX MENTE WHERE MINDS MEET LAW

DEATH PENALTY IN INDIA

Our initiation into the criminal justice system was through the death penalty in India. Despite being the harshest punishment in our legal system, there was very little empirical information on the administration of the death penalty, including uncertainty about the number of people India had executed or information about prisoners who are sentenced to death. An effort to fill that gap led to our foundational work - the Death Penalty India Report (May 2016). Between 2013-15, we interviewed all of India's death row prisoners and their families to document their socio-economic profile and map their interaction with the criminal justice system.

Information gathered during the fieldwork for the Death Penalty India Report demonstrated the urgent need to design interventions that would provide quality legal representation to individuals sentenced to death. Our litigation efforts over the years have constantly drawn lessons from this experience and many of the practices we have adopted are designed to fill the gaps observed. Challenging the conviction as well as the sentence is a core commitment of our litigation practice. We have also invested significantly in developing a mitigation investigation practice to aid and develop the sentencing practices in our criminal courts; an exercise mandated by the

death penalty sentencing framework in India. A central component of our work is maintaining regular communication with the prisoners we represent and their families, through letters and prison visits.

A measured and progressive expansion of the death penalty discourse in India demands that existing assumptions about capital punishment be challenged. Our research is, thus, grounded in an interdisciplinary approach and actively engages with penal philosophy, criminology, forensic science, psychiatry, and law. Our focus also lies in analysing contemporary and archival data in India to gauge the functioning of existing institutional stakeholders within the criminal justice system. Our efforts to understand the death penalty rests on in-depth research on various aspects of its administration in India. Sentencing practices at all levels of the judiciary, mental health of death row prisoners, and opinion studies have been particular areas of interest. Since 2016, through our Annual Statistics reports, we have also emerged as the most authoritative source for the number of death sentences imposed in India every year.

LEGAL REPRESENTATION

Our interdisciplinary team comprising practitioners of criminal law, forensic experts, legal researchers, social workers, psychologists and anthropologists is involved in representing prisoners on death row across India before the Supreme Court and various High Courts.

From victories involving significant commutations and acquittals in individual cases, we have also seen strategic success on issues of death warrant procedure, in limine dismissals without giving reasons and access to lawyers and mental health professionals towards effective legal representation of death row prisoners.

In addition to preparing the case on conviction, we also conduct robust mitigation investigations through interviews with prisoners and other witnesses of their lives to ensure individualized sentencing. To provide quality and effective legal representation on both conviction and sentencing we consult experts in forensics, psychiatry, anthropology, and psychology. Our litigation efforts have been made possible by the generous and dedicated support of a growing network of advocates from across the country, including Senior Advocates.

DEATH PENALTY INDIA REPORT

The Death Penalty India Report (2016) is the genesis of our death penalty work. Based on interviews with all (373) prisoners sentenced to death and their families, the report is a significant contribution to developing empirical research on the death penalty in India, the socio-

economic status of prisoners sentenced to death and its impact on their interaction with the criminal justice system. The report is divided into two volumes with a combination of quantitative and qualitative research that provides deep insights into the use and impact of the death penalty in India.

The report finds that an overwhelming majority of those on death row are economically vulnerable, and belong to backward classes and religious minorities. Through narratives of prisoners and their families, the report also documents the experience in custody, during trial and appeal, highlighting the infirmities within the criminal justice system.

MATTERS OF JUDGEMENT

Matters of Judgment is an opinion study on the death penalty and the criminal justice based on interviews with 60 former Indian Supreme Court judges. The study was an attempt to understand judicial thought and adjudicatory processes that govern the administration of the death penalty within India's criminal justice system. The report records an overwhelming acknowledgment among the former judges about the crisis in criminal justice system on account of the widespread use of torture, fabrication of evidence, abysmal quality of legal aid and wrongful convictions, without these concerns having any bearing on their views on the death penalty. The study reveals a wide variance in the understanding of the 'rarest of rare' doctrine based predominantly on the nature of crime. The nature of retentionist arguments provided by the former judge's points to the legal discourse on death penalty being driven by a retributive instinct in response to 'brutality' rather than any real commitment to principled sentencing.

Death Penalty Sentencing in Trial Courts: Delhi Madhya Pradesh and Maharashtra (2000-2015)

This report offers an insight into the interpretation and application of the 'rarest of rare' capital sentencing framework originally developed by the Constitution bench of the Indian Supreme Court in Bachan Singh v State of Punjab (1980), at the trial court level. It also offers a doctrinal critique of the Bachan Singh framework and its evolution thereafter which has contributed to the errors in the last four decades. The report is based on analysis of all (215) death sentences imposed on 322 persons by trial courts of Delhi, Madhya and Maharashtra over a 16-year period, between 2000 and 2015. The report exposes the superficial nature of capital sentencing hearings conducted by trial courts. It also demonstrates the normative and procedural gaps in the capital

sentencing framework in India that have been inherited from the Bachan Singh judgment and have been carried over in the subsequent Supreme Court decisions in the last 40 years.

MENTAL HEALTH AND THE DEATH PENALTY

This is the first of its kind empirical and descriptive study to take a psychosocial approach to the mental health of death row prisoners in India. The study was conceived out of the need to collect accurate data on death row prisoners, through an empirical and descriptive study, in order to broaden the current sphere of knowledge on the death penalty.

Through this study, we aim to examine the presence of mental illness and intellectual disability among death row prisoners. An important component of the project is bringing forth narratives, through an interpretive and phenomenological lens, on the lived experience of prisoners while on death row with a focus on mental health. The study also delves into the lifetime vulnerabilities of death row prisoners and adverse experiences that have marked their lives. We have interviewed over 90 death row prisoners and their families, across prisons in Delhi, Madhya Pradesh, Chhattisgarh, Kerala and Karnataka.

LANDMARK CASES ON DEATH PENALTY IN INDIA:

Delhi Gang Rape Case

The Vinay Sharma v. Union of India (2020) case, publicly known as the Nirbhaya gang rape case outraged the nation's conscience. A 23-year-old woman was viciously abused and gang raped by six persons in a moving bus in south Delhi on the dark chilly night of December 16, 2012. She was brutally abused & rapped which was totally inhuman in nature, one of the juvenile accused inserted an iron road into the private part of her body later they threw her naked half dead in the street of the moving bus. The brutality of this incident did not only shock India, it shocked the whole world also. She died as a result of all the emotional and physical suffering. One of the accused took his life in jail at the time when the matter was presented in front of the court, another was below 18 years old as a result he got spared from capital punishment. However, the court passed an order for the death penalty to the other 4 accused & they were executed by hanging at the Tihar Jail in Delhi in 2020. After examining the aggravating and mitigating considerations, this judgment was reached. Given the essential facts surrounding the crime and brutal in-human torture of the victim, which resulted in her death, the court issued capital punishment to the 4 accused.

The Ajmal Kasab Case (2008-2012)

Md. Ajmal Md. Amir Kasab @ Abu v. State of Maharashtra (2012), also called The Ajmal Kasab case was another shocking incident to India as well as the whole world. Ajmal Kasab was a Pakistani terrorist, he & 9 other gunmen travelled from Karachi to Mumbai by boat. The terrorists split into five groups upon arriving in Mumbai on November 26, 2008, and spread terror by attacking different locations in Mumbai. Almost 166 people, including 26 foreign nationals lost their lives in this incident. 238 persons also suffered significant injuries. Also, this attack demolished properties worth millions of dollars. Among the 10 terrorists only Ajmal Kasab was captured alive, the other 9 were shot and killed during the rescue operation conducted by NSG and police. The Bombay High Court upheld Kasab's execution order on Feb 21, 2011. On Aug 29, 2012, The Supreme Court of India upheld the decision. On November 21, 2012, Kasab was hanged and buried behind the walls of Pune's Yerwada Central Prison.

State Vs Mohd. Afzal

In State v. Mohd. Afzal And Ors case or the Parliament attack case, Afzal Guru, a Kashmiri man, was charged with planning the 2001 attack on the Indian Parliament. He was detained in December 2001 and accused of planning the attack with the five other extremists. Eight security guards and a gardener lost their lives in the attack and all five terrorists were also eliminated. The case went to trial in the special court in 2002, upon hearing the case the special court issued capital punishment to Afzal Guru and 3 other men who were also found guilty in the case. Guru's sentencing was not carried out immediately, his case went through numerous appeals and reviews. Guru's defence team claimed that he was not a direct participant in the attack and he was also denied a fair trial. They further asserted that he was subjected to torture while he was being held captive and his confession was coerced. In spite of various objections, The Supreme Court of India upheld Guru's execution order in 2005. In 2011 the Indian President likewise denied his request for mercy and in Feb 2013, he was eventually hanged to death.

1993 Mumbai Blast Case

In the Yakub Abdul Razak Memon v. State of Maharashtra and Anr case, Yakub Memon, a chartered accountant of India was found guilty of taking part in the 1993 Bombay bombings, one of the deadliest terrorist assaults in Indian history. A squad of terrorists connected to the Pakistani extremist organization Lashkar-e-Taiba planned the explosion across Bombay. Memon was charged with giving the terrorists financial support, who carried out the explosions, which claimed 257 innocent lives and injured over 700 others. He was detained in 1994 and accused of

a number of crimes, including murder, terrorism, and conspiracy. He was also found guilty of illegally transporting and possessing weapons and ammunition with the intent to harm his life. Memon was found guilty and given capital punishment in 2007 after a protracted trial. Yet after a series of appeals in his case, the Supreme Court of India upheld his execution order. Memon's mercy petition was denied despite pleas for mercy from a variety of human rights organizations and public figures, including some who said that he had cooperated with authorities and provided crucial information about the bombs. He was executed by hanging in July 2015. In India, this case is still a contentious one, while some claim that Memon was unfairly singled out while others maintain that his penalty was appropriate considering the seriousness of the offenses for which he was found guilty.

Shabnam Case (2015)

In Shabnam v. Union of India, the case refers to the brutal murder of seven members of a family in the Amroha district of Uttar Pradesh in 2008. Shabnam, a teacher plotted to murder her parents, two brothers, sister-in-law, cousin, and 10-month-old nephew with the help of Salim, her lover. The family members were drugged before being strangled to death by Shabnam and Salim. After that, they dismembered the bodies and dumped them in a neighbouring field. The driving force behind such murder was Shabnam's family's objection to her relationship with Salim. The pair was detained shortly after the incident, and the case received extensive media coverage. They were given capital punishment by the district court in 2010. Both the High Court and the Supreme Court rejected their petitions against the death penalty. This is the first time the court issued capital punishment to a woman in the Indian criminal justice system.

DEATH PENALTY IN CHINA

The People's Republic of China continues to carry out more judicial executions than the rest of the world combined. In addition, despite having the largest population in the world, China possibly executes a higher proportion of its population than any other country, except for Singapore, which has one of the smallest populations. Law unto itself Behind these facts lies a criminal justice system which cannot and does not guarantee a fair trial under international law to defendants. Often defendants are denied their right to legal representation until after they have been interrogated, and even then, access in practice is strictly limited. The period of pre-arrest or pre-trial detention is often arbitrary, lasting in one extreme case for 28 years. Torture by police in China is rife, but there is no provision under Chinese law to exclude from court 'confessions or

other ‘evidence’ extorted through torture. In practice, there is no presumption of innocence. “What evidence do you have that you didn’t commit the murder?” A high court judge in Heilongjiang Province before passing a death sentence despite inadequate evidence. Beijing Youth Daily, 28 April 2002. Political pressure and interference Trials and the process of appeal are often summary. Furthermore, there is no independence of the judiciary in China. The ruling Chinese Communist Party influences the judicial process at every level of proceedings with courts in particular being monitored and run by Party bodies. Political pressure on the judicial process is particularly acute during officially designated “strike hard” campaigns, where police, prosecutors and judges are under pressure to demonstrate speed and resolve at the expense of rigour and justice. “Judges must effectively enhance the Party’s leadership in people’s court work.” Luo Gan, Director of the Central Committee for the Management of Public Security, Xinhua, 17 December 2003. Death sentence is passed against a woman who was immediately executed with three other people on drugs charges. www.sina.com.cn 26 June 2003 (world anti-drugs day). © [sina.com.cn](http://www.sina.com.cn) Death is cheap Despite these obvious variances with international law and standards, China continues to execute huge numbers of people. Indeed, a recent decision to promote lethal injection as a means of execution nationwide was reported in some quarters in China as a “cost-effective” and more efficient alternative to execution by bullet, possibly facilitating even higher rates of execution. Mobile execution chambers are also being used extensively throughout China – converted buses in which convicts can be executed by lethal injection “immediately after sentence is passed”. [Quote] “All those present thought that drug injection is a very civilised and scientific method for carrying out death sentences.” www.people.com.cn 18 September 2001. [Unquote] Lethal injection does not overcome fundamental objections to the death penalty. A convicted prisoner – whether innocent or guilty as charged – still faces the impending threat of death at the hands of the State while being held in extremely harsh conditions. Promoting a “humane” way for the State to kill people is hardly the sign of a “civilized” society.

DEATH PENALTY IN SAUDI ARABIA

Saudi Arabia is one of the few countries in the world that still actively enforces the death penalty. The kingdom’s justice system, rooted in Islamic Sharia law, mandates capital punishment for a range of offenses, including murder, terrorism, drug trafficking, apostasy, and sorcery.

Although in 2022 the Crown Prince Mohammed bin Salman has proposed changes to modernize laws, including reducing the use of the death penalty for non-violent offenses and forbidding the execution of individuals who committed crimes as minors, overall use of the death penalty remains high. In 2024, Saudi authorities carried out at least 338 executions, the highest number of executions recorded in the country since 1990. This event highlighted the ongoing tension between the kingdom's reformist image and its adherence to strict legal punishments.

Individuals convicted of terrorism-related activities are frequently executed, with Saudi authorities asserting that harsh penalties serve as a deterrent. Yet, this charge is often used against those who have participated in anti-government protests. For instance, in April 2024 Saudi Arabia's court of appeal approved death sentences for two Saudi men, Yousif al-Manasif and Ali al-Mabyook, for protest-related crimes allegedly committed when they were between the ages of 14 and 17.

Moreover, the country is planning to execute six Shia citizens, including five who were minors during the 2011-2012 pro-democracy protests and one businessman. The UN Working Group on Arbitrary Detention found their imprisonment violated multiple human rights categories, including lack of legal basis, unfair trials, and discrimination against the Shia minority. Some were prosecuted under Saudi Arabia's controversial counter-terrorism law.

Many executions are mainly related to alleged drug smuggling with Saudi Arabia maintaining a strict zero-tolerance policy on drug trafficking and smuggling. In 2024, Saudi authorities executed around 50 individuals solely for drug-related offences compared to two executions for the same crime were documented in the country in 2023.

Moreover, this practice disproportionately affects the disadvantaged and the victims of discrimination such as foreign workers and women. Indeed, an increase in the executions of foreign nationals and women has been reported. Most of the women were foreign, including four Nigerians, all of whom were executed for drug-related offences. Executions of foreign nationals also rose, with 138 killed, up from 38 in 2023.

Sentences are often handed down by judges who have broad discretionary powers, leading to concerns over the consistency and fairness of rulings. Also, many capital offenses do now follow clear defining guidelines.

At the same time, Saudi authorities are spending billions to transform the country's reputation and present a more modern, progressive image to the world. As part of these efforts, the kingdom

has hosted major sporting events, music festivals, and cultural exhibitions, attracting global celebrities and investors to distract the international community from ongoing human rights violations such as the mass executions.

ADHRB denounces the persistence of the death penalty, especially when the individuals were minors at the time of the crime. Also, the executions reflect systemic discrimination, particularly against the Shia minority, who are disproportionately targeted under vague anti-terrorism laws. Finally, ADHRB calls on Saudi authorities to immediately halt executions, implement judicial reforms ensuring fair trials, and comply with international conventions prohibiting capital punishment for minors. It also urges the global community to hold Saudi Arabia accountable for these human rights violations.

