

The Death Penalty in the OSCE Area

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THE DEATH PENALTY IN THE OSCE AREA



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This paper updates Background Paper 2005 of September 2005. It is intended to provide a comparative overview of the death penalty throughout the OSCE region and to promote constructive discussion. The content of this paper does not necessarily reflect the policy or position of the OSCE or the ODIHR.

Any comments or suggestions should be addressed to the ODIHR Human Rights Department.

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Foreword

The Organization for Security and Co-operation in Europe has 56 participating States, the large majority of which have abolished the death penalty for all crimes. The ODIHR has been tasked with providing up-to-date information on this issue at the annual Human Dimension Implementation Meeting.¹ Chapter 1 of this background paper lists the participating States and classifies them as abolitionist, partly abolitionist, *de facto* abolitionist, or retentionist.

The participating States that retain the death penalty have committed themselves to making information on its use available to the public. With a view to assisting participating States' compliance with this commitment, Chapters 2 and 4 provide a forum for the publication and dissemination of such information.

Chapter 2 includes five essays on different approaches to the death penalty. When considering these essays, readers should keep two points in mind: the first is that no attempt was made to provide an exhaustive overview of the different approaches to the death penalty taken by all 56 participating States; the second point is that the opinions expressed are those of the authors and do not necessarily reflect the views of their respective national governments, the OSCE at large, or the Office for Democratic Institutions and Human Rights.

In the first essay, Robert Badinter, a former minister of justice of France and a prominent advocate for abolition, discusses developments in the use of the death penalty in the context of the OSCE. The following four essays, written by contributors from Belarus, Poland, Tajikistan, and the United States, describe national processes, experiences, and arguments that led the authors' respective countries to their current position with regard to the death penalty.

While there is no OSCE document obliging participating States to abolish capital punishment, it is the ODIHR's intention to present a range of experiences of OSCE participating States with regard to capital punishment: states that have abolished it either *de jure* or *de facto* and states that continue to carry out executions.

¹ This paper updates Background Paper 2005. The reporting period covered by this paper is from 30 June 2005 to 30 June 2006. Information on developments that have occurred since 30 June 2006 will be indicated as such.

I would like to express my gratitude to those who contributed essays to this background paper. In addition to Mr. Badinter, these individuals are: Grigory A. Vasilevich, chairman of Belarus's Constitutional Court, and Elissa A. Sarkisova, a judge from Belarus's Constitutional Court; Aleksandra Gliszczyńska and Katarzyna Sękowska of the Poznan Human Rights Centre, and Professor Roman Wieruszewski, director of the Poznan Human Rights Centre and a member of the United Nations Human Rights Committee; Khalifabobo Khamidov, Tajikistan's justice minister; Margaret Griffey, chief of the Capital Case Unit of the US Department of Justice, and Laurence E. Rothenberg, senior counsel, Office of Legal Policy of the US Department of Justice.

While OSCE participating States are not required to abolish the death penalty, they have made a number of commitments regarding its use. In particular, participating States have committed themselves to impose the death penalty only in a manner that is not contrary to their international commitments. Chapter 3 thus provides an overview of the international standards on the death penalty that have been developed in the framework of the OSCE, the United Nations, the Council of Europe, and the European Union. Chapter 4 includes information on the legal framework, statistics on sentences and executions, and information on compliance with the international standards outlined in Chapter 3. This chapter is based primarily on information received from the participating States.

Finally, a copy of the questionnaire that was sent to the participating States requesting information on the use of the death penalty is attached as an annex together with full-text reproductions of the relevant OSCE commitments and other international standards and a ratifications table. Recommendations made at OSCE Human Dimension Implementation Meetings are also annexed.

I hope that this background paper will be useful to governments and civil society alike in their further debate on issues related to capital punishment and its possible abolition.

Ambassador Christian Strohal

Director of the Office for Democratic Institutions and Human Rights

1

The Status of the Death Penalty in the OSCE Area

For the purpose of this paper, each participating State has been classified as abolitionist, partly abolitionist, *de facto* abolitionist, or retentionist according to the status of the death penalty in the relevant state's law and practice.

Abolitionist: The death penalty has been abolished for all crimes.

Forty-seven OSCE participating States are abolitionist:

- Andorra
- Armenia
- Austria
- Azerbaijan
- Belgium
- Bosnia and Herzegovina
- Bulgaria
- Canada
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Georgia
- Germany
- Greece
- Holy See
- Hungary
- Iceland
- Ireland
- Italy
- Liechtenstein
- Lithuania
- Luxembourg
- Former Yugoslav Republic of Macedonia
- Malta
- Moldova
- Monaco
- Montenegro
- Netherlands
- Norway
- Poland
- Portugal
- Romania
- San Marino
- Serbia
- Slovak Republic
- Slovenia
- Spain
- Sweden
- Switzerland
- Turkey
- Turkmenistan
- Ukraine
- United Kingdom

Partly abolitionist: The death penalty has been abolished for crimes committed in peacetime but is retained for crimes committed in wartime.

Two participating States are partly abolitionist:

- Albania
- Latvia

***De facto* abolitionist: The death penalty is retained for crimes committed in peacetime, but executions are not carried out.**

Four participating States are *de facto* abolitionist:

- Kazakhstan
- Kyrgyzstan
- Russian Federation
- Tajikistan

Retentionist: The death penalty is retained for crimes committed in peacetime, and executions are carried out.

Three participating States are retentionist:

- Belarus
- United States of America
- Uzbekistan

2

Approaches to the Death Penalty
Essays

The OSCE and the Death Penalty

ROBERT BADINTER²

The OSCE is holding its position as humanity marches towards the universal abolition of the death penalty. Twenty-five states across the world had abolished the death penalty in 1975 when the Helsinki Final Act was adopted. Of the CSCE's 35 participants, 17 still retained it, in law or in fact. When the Charter of Paris was adopted in 1990, which institutionalized the Conference as a true international organization (the CSCE would become the OSCE in December 1994), seven of the 34 states (reunification between East and West Germany having occurred in the interim) had not abolished the death penalty. This figure rose considerably in 1992 with the arrival of 15 states from the former Soviet Union, none of which had abolished the death penalty, and some states from the former Yugoslavia. In 1992, 21 OSCE member states still retained the death penalty, the Czech Republic and Hungary having abolished it in the interim.

Since then, this figure has fallen substantially, as only nine of the 56 member states still retain this sanction in their legislation, and only three resort to it in practice: Belarus, the United States, and Uzbekistan.

This considerable progress is evidence of a general shift by the international community. In 2006, 125 of the 192 UN member states no longer resort to capital punishment. The Treaty of Rome, which established the International Criminal Court and which has been ratified by 40 of the 56 OSCE member states, rules out the death penalty even for the worst crimes against humanity. The abolitionist stance is now in the majority across the world; the expectation is that, one day, it will become universal, like human rights.

The principle of abolition is rooted within these very same human rights. The first human right is the right to life and represents the limit of a state's power, a limit that cannot be breached in a democracy. The justice system can take the freedom, fortune, and honour of a person who has broken the law, provided that it respects the safe-

² Robert Badinter is a former French minister of justice, former president of the French constitutional council, and president of the OSCE Court of Conciliation and Arbitration. During his term of office as minister of justice from 1981 to 1985, he was successful in promoting civil liberties in the French justice system, including the abolition of the death penalty, the abolition of the State Security Court and military courts in peacetime, as well as improving the rights of victims of crime.

guards of due process. But its power stops at the life of the person it is condemning because no power can legitimately deprive a man or woman of what makes them human: their very life. And this first requirement holds true for all humanity.

It appears therefore that the grounds for abolition are also linked to those for democracy. The death penalty has almost entirely disappeared in all democracies, admittedly with the notable exception of the United States. In Europe in particular, the death penalty has been banished, except in Belarus. What a moral victory that is, given the old continent's tragic past, which was marked by so much bloodshed, genocide, and crimes against humanity. Today, peace reigns across the European continent, guaranteed by international organizations, the European Union, the Council of Europe, and also the OSCE. In this vast geopolitical zone, which brings together 700 million people, abolition of the death penalty is an internationally recognized principle, a democratic value that is guaranteed in the international order and to which numerous international conventions forbidding recourse to the death penalty bear testimony.

The 1966 International Covenant on Civil and Political Rights did not prohibit the death penalty as such, but it did provide that it could only be applied for the most serious crimes, and it prohibited its use for juveniles under 18 and the execution of pregnant women. Again at the global level, the 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty abolished capital punishment while retaining the possibility to resort to it in times of war. The 1989 International Convention on the Rights of the Child also prohibited the death penalty for juveniles under 18.

At the regional level, the 1983 Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty both abolished this sanction but retained the exception in times of war. Only Protocol No. 13 to the ECHR prohibits the death penalty at all times and in all circumstances.

This general shift, this march towards abolition, is taking place because the death penalty is linked to an archaic justice system that kills and that has been revealed to be futile, unjust, and degrading on all occasions and in all places.

The death penalty is futile. This has been demonstrated in all the studies conducted, notably at the Council of Europe, on the evolution of violent crime following abolition. In no state has abolition led to an increase of violent crime. The same result was found in states that moved to establish a moratorium on the pronouncement of the death penalty for a probationary period. This included in particular the United King-

dom and Canada. In light of the results of this probationary period, the parliaments of these two states voted for definitive abolition. Can it really be seriously believed that, if the results had been otherwise and faced with an anxious population, the governments of abolitionist states would not have been forced to reinstall the death penalty? Obviously, its suppression does not lead to a reduction in criminality, but violent crime evolves for reasons other than the presence or not of the death penalty in a state's legislative armoury.

The death penalty is unjust. When practised legally, recourse to capital punishment brings with it all that is poisonous and unjust in society.

- First, social inequality: on death row, the largest proportion of detainees comes from the most disadvantaged social groups;
- Racial inequality: nothing can prevent the fact that, when faced with a terrible crime, a desire for vengeance and hatred forms among the public and some juries. Passions and racist prejudices, even if repressed until that point, emerge in these circumstances. Racism does not spare justice, it dishonours it. In this respect, again, analysis of the death-row prison population is significant: the proportion belonging to ethnic minorities or socially rejected racial majorities is far greater than their proportion in the population as a whole;
- Financial inequality: to fight an effective legal case against powerful state machinery that has all the resources of an organized police force at its disposal, a defendant needs a team of experienced lawyers who are familiar with the difficulties of criminal procedure and who are able to call upon competent experts. This kind of mobilization for the defence of the accused requires significant financial resources that only the wealthy or members of organized-crime groups can rely upon. Without this, a defence carried out by poorly paid state-appointed lawyers who have limited technical and scientific means available to them cannot benefit from the equality of arms that the legal process requires. Consequently, a large number of legal errors are made in the administration of capital punishment. This was particularly found to be the case in numerous studies carried out in the United States;
- Finally, the death penalty is degrading. It disregards society's first human right: the right to life. Yes, a killer does not respect this right, but the authorities should not adopt the code of criminals by killing them in turn in cold blood. Practising the death penalty has a negative effect on a society's sense of morality and, moreover, constitutes a negation of the democratic ideal founded on human rights.

Finally, given the times in which we are living, can the death penalty at least be of use in terms of the war on terrorism? In its organized form, terrorism is one of the main threats to world peace today. In a large number of states, emergency laws have been adopted, sometimes to the detriment of fundamental freedoms. This has a harmful effect on the rule of law, which is a necessary guarantee in a democracy.

Experience shows that, far from preventing or reducing terrorism, the death penalty simply makes it worse. How can it be believed that the threat of death would make a terrorist recoil when he is ready to perish with his victims in a hijacked plane he is going to fly into buildings or to set off bombs that will tear him to pieces alongside his victims? And why can it not be grasped that for a terrorist the court will always be a stage? By executing him, the justice system turns the terrorist into a hero who sacrificed his life for the cause he supported, if through extreme means. How many young people, inspired by his example, would lend their support to the very organizations the terrorist supported the day after his execution?

Finally, morally speaking, democracies make terrorists the object of the deadly violence they love by resorting to the death penalty. Democracies can fight terrorists in ways other than resorting to death, which is futile and degrading. It is worth noting in this respect that great democratic states such as the United Kingdom when faced with the IRA and Spain against ETA never wanted to reinstall the death penalty to fight terrorism.

In reality, no one is denying the threat posed by terrorism, but not only does the war against terrorism not require the death penalty, it must actually ensure that it does not resort to it. In the face of terrorism, abolition gives democracy an ethical dimension, essential in such a war. The terrorist kills innocent victims in the name of his ideology; democracy defends freedom and recognizes all lives as sacred, even that of the terrorist. This conflict is one of values in which, eventually, democracy always triumphs and even more so when it upholds, loud and clear, the principles on which it is founded. Faced with crime and cruelty, a democracy's justice system rejects vengeance and death. It punishes but it does not kill; it prevents the terrorist from harming others but respects his life; by refusing to give him death, democracy guarantees the humanity the terrorist denies through his crimes. Democracy comes out as the moral victor of the test inflicted on it by terrorism. That will not be the least of its victories in the eyes of generations to come.

Prospects for Abolition of the Death Penalty in the Republic of Belarus³

GRIGORY A. VASILEVICH⁴ AND ELISSA A. SARKISOVA⁵

Abolition of the death penalty is a problem that different countries resolve in different ways. Each country approaches the abolition of this form of punishment in its own way, and working out the solution often takes a very long time.

This process can also be reversed: A country may abolish the death penalty and then reinstate it. This was the case, for example, in the United States, where the death penalty was declared unconstitutional in 1972 but was afterwards reintroduced in 38 states. The death penalty was abolished, reinstated, and then abolished again in Italy. It was abolished and then reintroduced four times in Russia and then the Soviet Union.

There have recently been popular outbursts demanding the restoration of the death penalty in a number of countries that abolished it years ago. This frequently happens in the wake of a terrorist attack.

Today, however, the progress made by humanity in resolving this issue is very clear. The leaders in this have been the European states, the vast majority of which have not applied the death penalty for decades. The groundwork for this process was laid with the adoption, on 28 April 1983, of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty. But a number of countries had expressed their opposition to the death penalty for many years before the adoption of the Protocol and even the Convention, which was adopted on 4 November 1950, and had either banned it from being used in judicial practice or not envisioned it at all in their legislation.

An important step in the process of abolishing the death penalty was the signing by 36 states, on 3 May 2002, of Protocol No. 13 to the Convention, which forbids the application of this form of punishment under any circumstances, including in time of

³ Translated from the Russian by Peter Morley.

⁴ Grigory A. Vasilevich is chairman of the Constitutional Court of the Republic of Belarus.

⁵ Elissa A. Sarkisova is a judge of the Constitutional Court of the Republic of Belarus.

war or of imminent threat of war. This Protocol confirms the irreversible path of the democratic process towards the rejection by all European states of the death penalty as a form of punishment at all times and in all circumstances. Thus, juxtaposed against the numerous discussions, disputes, judgements, and assessments regarding the question of capital punishment is the actual practice of states, which expresses their firm opposition to this form of punishment. Article 1 of Protocol No. 6 to the Convention contains the imperative that: “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”

Some of the countries of the former Soviet Union – Azerbaijan, Armenia, Estonia, Georgia, Kazakhstan, Latvia, Lithuania, Moldova, Russia, and Ukraine – have also followed the European path in determining their own opposition to the death penalty. The experience of these countries in resolving the question of the death penalty is very significant for Belarus, which developed in much the same fashion as these states.

At the same time, many countries have still not assimilated the example of the European states. It is enough to note that the death penalty is still applied in the majority of states in the United States, as well as in many Asian and African countries. For example, China’s Criminal Code not only retains the death penalty but also envisions its application for an extraordinarily wide range – more than 70 – of crimes. Moreover, many crimes that carry a possible death penalty are not related to depriving someone of life or committing other violent acts against a person (e.g., smuggling, robbery, theft of state or private property, etc.).

In the Belarusian case, all of the successive measures that have been taken by the state indicate that it is following the European path, although at present it is the only European country to retain the death penalty in its legislation and to apply it – albeit in very rare cases – in practice.

In addition, Belarus has taken a number of steps towards signalling its own opposition to the death penalty.

First, we should survey the development of legislation in this area.

Whereas under the Criminal Code of the Belarusian Soviet Socialist Republic of 1928, the death penalty could be applied for 60 types of crimes, the 1960 Criminal Code greatly decreased this number, although it remained sufficiently high at more than 30, including war crimes and crimes that did not involve the intentional deprivation of human life.

An important point is that both Codes emphasized that the death penalty was only a temporary measure. In addition, even then practice was moving towards application of the death penalty only for premeditated murder with aggravating circumstances.

Beginning in the 1990s, lawmakers, following international trends, began to gradually reduce the scope of application of the death penalty, removing it in particular from the articles of the Criminal Code envisioning punishment for crimes not involving intentional infringement on a person's life. (In effect, the law was brought into line with contemporary practice.)

The reduction of the scope of application of the death penalty happened in parallel with an increase in the categories of people exempt from the application of the death penalty. In particular, under the Criminal Code of 1960 and until the adoption of the Law of 1 March 1994, this category included individuals under the age of 18 at the time the crime was committed and women who were pregnant either when the crime was committed or when the sentence was handed down or due to be carried out. Article 22 of the Code, as amended by the aforementioned Law, banned the use of the death penalty for women entirely.

Belarus's Criminal Code adopted on 9 July 1999, which entered into force on 1 January 2001, reduced the scope of possible application of the death penalty by more than half as much again. The death penalty can now be applied only in particularly serious cases of premeditated murder with aggravating circumstances. In addition, the categories of those exempt from this form of punishment were expanded to include males over the age of 65 at the time of sentencing.

In other words, the history of Belarusian criminal legislation regulating the application of the death penalty shows that there has been a trend towards limiting the use of this punishment, with the subsequent possibility of abolishing it.

Judicial practice also shows the same trend. First, the death penalty has for several decades now been applied only in cases of premeditated murder with aggravating circumstances. Second, whereas up to and including 1999 dozens of people were condemned to death annually – for 1995-1999 the figures were 37, 29, 46, 47, and 13, respectively – after 2000, the numbers drop to single digits – for 2000-2005, the figures are 4, 7, 4, 4, 2, and 2, respectively (as a percentage of the total number of convictions, this is a fraction of 1 per cent).

We should also note that the annual number of those convicted of murder with aggravating circumstances is 400-450; in 2005, for example, 439 people were convicted of this crime. Moreover, the majority of those were sentenced not to life imprisonment as an alternative to the death penalty but to prison terms of various lengths, including some of under 25 years. (Life imprisonment was introduced into the Criminal Code only at the end of 1997. In 1998-2005, the numbers of those sentenced to it were 3, 29, 18, 11, 15, 12, 12, and 8, respectively.)

Thus, judicial practice illustrates that there is a *de facto* moratorium on the death

penalty, while also using the exceptional punishment of life imprisonment on rare occasions.

The process of developing an approach to capital punishment in Belarus that is equivalent to the approaches of European countries shows that Belarus has developed its legislation and practices. It is sufficient to note that the issue of the death penalty was put to a nationwide referendum in November 1996, and the country periodically hosts international conferences and seminars on the topic, and constantly follows public opinion with the help of the mass media.

Parliamentary hearings held in May 2002 on the death penalty, organized by the House of Representatives of the National Assembly (the lower house of parliament), represented a serious step forward on the road to resolving this question and also produced a series of recommendations. We should stress that the very fact that these hearings were held has led to increased interest on the part both of lawyers and the public in this issue, which continues to be actively discussed in print and other media.

The consideration of the issue by Belarus's Constitutional Court played a significant role in determining approaches to resolving this question. The case was initiated by the House of Representatives, which asked the Constitutional Court to rule on the constitutionality of those provisions of the Criminal Code that envisioned the use of the death penalty as a form of punishment.

In its judgement of 11 March 2004, the Constitutional Court stressed the comparison of provisions of Belarus's Constitution, international legal acts ratified by Belarus, and the rules of the Criminal Code.

Article 24 of the Constitution, adopted on 15 March 1994, stipulates that: "Everyone shall have the right to life. The State shall protect the life of the individual against any illegal infringement. Until its abolition, the death penalty may be applied in accordance with the law as an exceptional form of punishment for very grave crimes and only according to a sentence of a court."

This rule of the Constitution enshrined, for the first time in Belarus, the non-derogable right to life of every human being and the obligation of the state to ensure protection of human life from any form of illegal infringement. With the aim of guaranteeing protection of the right to life, lawmakers permitted the application of the death penalty while at the same time indicating its exceptional and temporary nature.

Thus, the Constitution establishes the possibility of applying the death penalty. And national criminal legislation cannot contravene the Constitution. It also cannot contravene international legal acts signed and ratified by Belarus, which, following from Article 8 of the Constitution, recognizes the primacy of universally acknowledged

principles of international law and ensures that its legislation complies with them.

For example, Article 6 of the International Covenant on Civil and Political Rights states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” And further: “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime...” (Points 1 and 2). The Covenant establishes that the death penalty is an exceptional punishment and that its application is justified only for the most serious crimes and against limited categories of people. These principles regarding the use of capital punishment have been fully implemented in Belarus’s national legislation.

Belarus also takes into account that the Covenant considers states’ aspirations to abolish the death penalty as a positive trend and supports the development of their legislation in this direction. As mentioned above, this can be seen in the development of criminal legislation and practice, as well as in prominent attempts to contribute to discussion of the problem at the level of high-ranking state officials.

With regard to prospects for resolution of the issue, we should note first of all that, although Belarus is not a party to European agreements, it cannot ignore the trends and processes related to abolition of the death penalty in both the European and international communities or remain in the margins of these processes.

In its aforementioned judgement, the Constitutional Court paid particular attention to important documents of the Council of Europe, including the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and Protocols to the Convention (Protocol No. 6 of 28 April 1983 and Protocol No. 13 of 3 May 2002), which decided once and for all the “fate” of the death penalty in Europe. The Court also paid attention to the actual processes in European states that resulted in the complete rejection of the application of the death penalty.

At present, the vast majority of member states of the Council of Europe have abolished the death penalty. The trend towards abolition of this form of punishment or towards limiting its application is also characteristic of the international community as a whole: there are more than one hundred states and territories that do not apply capital punishment.

Seeing this as a positive trend, the Constitutional Court of Belarus studied legal ways to resolve the issue of the death penalty in Belarus. Specifically, it analysed the constitutionality of the issue and expressed a position on whether the country’s Constitution allowed a decision to be taken either on abolishing the death penalty or on declaring a moratorium without having to change Article 24 of the Constitution. To

provide an answer to this question, we must consider this article of the Constitution in the context of other constitutional rules.

The Constitution proclaims Belarus to be a democratic state governed by the rule of law. The Preamble states that the people of Belarus recognize themselves to be subjects, with full rights, of the world community and that they confirm their adherence to values that are common to all mankind, that they wish to ensure civil concord, which is the unshakable foundation of democracy and of a state ruled by law. The main provisions of Chapter 1 of the Constitution, “Principles of the Constitutional System”, are in effect rules that define the nature and essence of the state, the outlines of state policy, and the fundamental grounds for enshrining and developing all other principles and rules of the Constitution, including those directly relating to guarantees of human rights and fundamental freedoms, which are declared to be the highest value and goal of the state.

The Constitutional Court noted in its judgement of 11 March 2004 that human life is recognized as the highest good in civilized human society and that the right thereto is natural and inalienable and is a person’s right from the moment of birth. If a person is deprived of life, all other rights lose meaning. In light of this, the all-embracing nature of each person’s right to life – as universally recognized and enshrined in a number of international documents and rules of national legislation – is entirely obvious. This axiom is closely interconnected with the issue of the legality of depriving a person of his or her life, including by use of the death penalty as a form of criminal punishment.

The third part of Article 24 of the Constitution says that, until its abolition, the death penalty may be applied in accordance with the law as an exceptional punishment for grave crimes and only according to a sentence of a court.

On the one hand, this standard is a guarantee that a person’s life will be protected from any criminal infringement, which was to some extent based on the absence in legislation of the time of life imprisonment as a form of punishment. On the other hand, it is an expression of the state’s firm and consistent position vis-à-vis abolition of the death penalty.

On this basis, the Constitutional Court noted in its judgement that this part of Article 24 of the Constitution, which anticipates the abolition of the death penalty and establishes a kind of transitional condition in which it can be temporarily applied as an exceptional measure only for extremely serious crimes, assumes that the state will reject the death penalty at some point in the future. It appears that the position of the Constitutional Court will be decisive in determining legal paths to the abolition of the death penalty in Belarus.

The Constitutional Court based its judgement of 11 March 2004 not only on the contents of Article 24 of the Constitution, but it also took into account the dynamics of Belarusian criminality, which show no indication of any significant decrease of the murder rate, and primarily of murders committed with aggravating circumstances.

For example, the number of registered murders and attempted murders in 2002 was 23.7 per cent higher than in 1994, when 952 murders and attempted murders were registered, although no correlation could be traced between the application of the death penalty and the murder rate, nor was there any trace of the role of the death penalty as a deterrent. Neither practice nor scholarly research has proved a link between the number of murders committed and the degree to which the death penalty is used, nor could they determine its effect as a deterrent. This has also been confirmed in other states, which used it as a serious argument in favour of abolishing the death penalty. On the contrary, the number of murders committed with aggravating circumstances – which are grounds under law for the possibility of applying the death penalty – increased in years when the punishment was used on a significant number of occasions. In 1994-1998, the number of those sentenced to death increased (25, 37, 29, 46, and 47, respectively), while the number of those convicted of murder with aggravating circumstances also increased (278, 345, 411, 480, and 517, respectively). However, although only four people were sentenced to death in 2002, in 2003 the number of murders and attempted murders registered in Belarus dropped by 104 from the previous year. A significant drop – of 69 cases – was also registered in 2004. Unfortunately, in 2005 this rapid decline did not continue; rather, there was a slight increase, from 1,010 in 2004 to 1,032 murders and attempted murders in 2005. As noted above, the number of death sentences handed down in these years was very low. The higher number of murders in 2005 against 2004 – 22 more cases – did not affect the trend in judicial practice regarding use of the death penalty.

The Constitutional Court also took into account that Belarus has not yet ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, and that Belarus is not a full member of the Council of Europe, and thus has not signed or ratified the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto. These circumstances exempt Belarus from any obligations to adhere to the path of those states that make up the Council of Europe.

Public opinion also should not be ignored. Both the 1996 referendum and subsequent sociological studies show that more than 70 per cent of citizens still retain hope that the death penalty has a preventive effect. The conclusions of various government

departments indicated that a decision on abolishing the death penalty in 2004 would have been premature.

Just two years since the aforementioned judgement was delivered, the realistic prospect – as noted by the Constitutional Court and buttressed by judicial practice – of abolishing the death penalty is distinctly clear.

We maintain that Belarus will move towards abolition of the death penalty, and a possible first step could be declaring a moratorium on using it for any crime. The only exception, in our opinion, could be its application in cases of terrorism leading to mass deaths (although no such crime has been committed in Belarus).

There is no doubt that the introduction of a moratorium on the death penalty should be preceded by a series of preparatory measures, including, first of all, a study of public opinion. Adopting a resolution on a moratorium on the death penalty requires that the relevant bodies conduct a thorough multilateral assessment of the criminogenic situation, and primarily a study of the influence this has on criminality. The moratorium should be subject to repeal given even the slightest increase in the murder rate.

As noted above, based on parliamentary hearings on political and legal aspects of the death penalty in Belarus, on 13 July 2002, the House of Representatives adopted recommendations aimed at a number of ministries and government departments. In particular, it recommended that the Belarusian cabinet of ministers study the issue of the death penalty based on the possibility of gradually introducing a moratorium on its application for individual crimes, and later to declare a moratorium on courts handing down death sentences ahead of abolishing the death penalty altogether. This recommendation indicated the willingness of the Belarusian state legislature to adopt a positive decision on the problem. This is also evidenced by the parliament's request in 2003 that the Supreme Court examine the constitutionality of those standards of the Criminal Code that allow the use of the death penalty.

The aforementioned recommendations also noted the necessity of carrying out a number of preparatory measures ahead of implementing a practical solution to the problem. These measures deal with improvements to correctional institutions, better preventative work among young people, persistence in developing a legal culture among citizens and shaping the relevant public opinion, sociological research into the effectiveness of introducing a moratorium on the death penalty in Belarus, etc. Many of the measures recommended by the parliament had not been implemented by the time the Constitutional Court delivered its judgement, which was one circumstance indicating that the state was, on the whole, unprepared for adopting a final decision on the death penalty.

According to the wording of Article 24 of the Constitution, a specific decision on use of the death penalty in Belarus falls within the competence of the head of state and the parliament; the Constitutional Court noted this in its judgement.

On the whole, we can say that abolishing the death penalty by a resolution of the legislative body is more acceptable from the point of view of law. When this is done by constitutional courts, which suddenly explain the constitutional and legal meaning of constitutional norms, there immediately arise doubts as to the legitimacy of death sentences handed down in the past based on the Constitution and applicable legislation. Such a serious issue as the deprivation of a person's life requires a watertight legal foundation. And it is for this reason that Article 24 of the Constitution from the outset included two ideas: 1) that the death penalty may only be applied in accordance with the law and in accordance with the verdict of a court of law; 2) the temporary nature of the death penalty.

Based on what we have outlined here, we can say that Belarus is moving towards abolition of the death penalty.

The Abolition of the Death Penalty in Poland

ALEKSANDRA GLISZCZYŃSKA, KATARZYNA SĘKOWSKA, AND ROMAN WIERUSZEWSKI⁶

This article presents the most significant issues related to the abolition of the death penalty in Poland, focusing on the evolution of domestic legislation and international obligations undertaken in this matter. The final part of the article outlines current political and social attitudes towards the issue.

Regulations on the death penalty in Polish law – from past to present

The idea of eliminating the death penalty from Poland's penal law was first raised after World War I – when Poland regained independence and had to reorganize its legal system – though the road to abolition was neither short nor easy. Capital punishment was absent from a number of drafts of the Penal Code (written by Aleksander Mogilnicki, Emil Stanisław Rappaport, and Edmund Krzymuski), which received strong support within academic circles. Despite this, the Penal Code that was adopted in 1932 (the so-called Makarewicz Code) introduced the death penalty, which could be used as an alternative to life in prison and could be imposed following summary proceedings.

The 1932 Penal Code remained in force after World War II. The addition of 11 more laws providing for the death penalty meant that capital punishment could now be imposed for several dozen crimes, and a decree of 16 November 1945 also provided for capital punishment in the wake of summary proceedings. These regulations were aimed at punishing war criminals and provided a useful tool in the fight with the political opposition. Although there is no reliable data on the number of death sentences pronounced or the number of executions carried out between 1948 and 1954, there have been suggestions that around a thousand people were sentenced to death by common courts and perhaps a further two thousand by military courts. What is

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obvious from this period of Polish history is that capital punishment was seriously abused.

Work began on a new Penal Code in the early 1950s, which revived discussions on abolition of the death penalty. The movement for abolition gained even more strength after 1956, when the regime was eased (during the so-called thaw or Polish October).

Abolition was supported by eminent legal experts and intellectuals, such as Stanisław Ehrlich, Władysław Wolter, and Maria Ossowska. In 1966, Marian Cieślak published an article called “The problem of the death penalty”,⁷ which gave rise to a lively discussion in Polish society. Despite this, the ruling party was far from abolishing the death penalty.

The Penal Code that was passed in 1969 preserved capital punishment but repealed the decree allowing the imposition of the death penalty after summary proceedings. Unlike other forms of punishment listed together in the Code, the death penalty was now described in a separate article that called it “an exceptional penalty” and provided regulations on its use. For example, the execution of pregnant women or persons under the age of 18 was now forbidden. In addition, an alternative of 25 years in prison was also provided. Though the Code underlined the “exceptional” character of this form of punishment, the death penalty could be imposed for a wide variety of crimes, including murder, espionage, sabotage, or even for serious cases of fraud. Some years, there were only a few executions, while others saw more than twenty.

Drafts of a new Penal Code were discussed at the beginning of the 1980s. The so-called public draft, prepared by specialists connected with the Solidarity movement, eliminated the death penalty for all crimes. A second, so-called governmental draft retained capital punishment but for a limited number of crimes.

These discussions were interrupted, however, by the introduction of martial law in 1981. The Decree on Martial Law introduced the death penalty for 86 crimes and allowed capital punishment to be imposed following summary proceedings. Some people were sentenced to death *in absentia*; fortunately, however, nobody was executed.

The Supreme Court played a vital role in limiting the number of executions in the last years of the Communist regime. As the last judicial instance that reviewed individual cases, the Supreme Court allowed death sentences to be carried out only when the accused posed an extreme threat to society and where the Court felt that there was no possibility of rehabilitation. A moratorium on executions was introduced in 1988, meaning that the Supreme Court replaced all death sentences with sentences of 25 years in prison; in some cases, a pardon was issued.

⁷ M. Cieślak, “Problem kary śmierci”, *Państwo i Prawo* 1966, No. 12.

Certain provisions of the Penal Code were changed by a 1995 law introducing a statutory moratorium, i.e., all executions were suspended for a five-year period. This transitional measure was widely criticized as a violation of human rights, since people sentenced to death were uncertain as to their future, which could constitute inhuman treatment and psychological torture.

Further legal changes were undertaken in 1997 that were crucial for the process of democratization in Poland, including the adoption of a new Penal Code that finally abolished the death penalty. Under current penal law, the harshest sentences available are life or 25 years in prison. In an explanatory report on the Penal Code, the legislator argues that “the death penalty cannot be reconciled with the principle of human dignity and contemporary values, and it also does not deter [people] from committing a crime”. Article 38 of Poland’s 1997 Constitution states that, “The Republic of Poland shall ensure the legal protection of the life of every human being.”

Poland’s obligations under international law

The elimination of the death penalty from the new Penal Code of 1997 is evidence of the evolution in Polish domestic law towards complete abolition of capital punishment. This change was a result not only of domestic legislation but also of the binding international standards on the death penalty. The right to life, the supreme value in the international hierarchy of human rights, is granted in the provisions of the standards legally binding for Poland at the universal and regional levels.

Participation in the international system of human rights protection implies that it is necessary to enforce relevant provisions and generally accepted international standards.

Polish obligations under international law can be divided into four groups, each of which relates to a different system or mechanism of human rights protection.

Council of Europe

The European Convention for the Protection of Human Rights and Fundamental Freedoms, a landmark document in the field of human rights protection, entered into force for Poland in 1993. This Convention guarantees the right to life, with an exception for the execution of the death penalty when imposed by a court for committing a crime for which this penalty is provided by law. Poland is also a state party to Protocol No. 6 to the Convention concerning the abolition of the death penalty. Under Protocol No. 6, ratified by Poland in 2000, the death penalty shall be abolished and no one shall be condemned to death or executed. It does not, however, provide maximum protection, as abolition is only required for peacetime. A state can still provide for the

death penalty for acts committed in time of war or of imminent threat of war. The abolition of the death penalty in all circumstances (during times of peace and war) is covered by Protocol No. 13 to the Convention, which, unfortunately, Poland has signed but not ratified.

United Nations

The International Covenant on Civil and Political Rights provides minimum universal standards for the protection of a number of human rights. As a state party to the Covenant, Poland has been bound by its provisions since 1977. Nevertheless, Poland is not party to the Second Optional Protocol, which limits the possible imposition of the death penalty to wartime for committing the most serious crimes of a military nature during wartime. Poland's Fifth Periodic Report with respect to abolition of the death penalty, covering the period between January 1995 and October 2003, says that, because of the related subject matter of the Second Optional Protocol to the Covenant and Protocol No. 13 to the European Convention, these two documents will be ratified at the same time, though no time frame for these ratifications was given. The Report further states that: "Extradition of a prosecuted person to a foreign State is inadmissible in the case when there are justified grounds to fear that in the State demanding the extradition, the extradited person may be sentenced to the death penalty or that [the] death penalty may be executed or that the extradited person may be subject to torture."

In its List of Issues of 16 August 2004, concerning Poland and its Fifth Periodic Report, the UN Human Rights Committee requested that Poland provide information about its decision on the issue of ratification of the Second Protocol. Poland has not responded to this request.

Poland is also bound by the Convention on the Rights of the Child (Article 37a) and the Economic and Social Council's "Safeguards guaranteeing protection of the rights of those facing the death penalty". Furthermore, Poland, like all UN member states, is one of the addressees of the Human Rights Committee's General Comment No. 6 on the right to life, of 30 April 1984, and of the UN Human Rights Commission's Resolution No. 2004/67 on the question of the death penalty, in which the Commission calls upon the states parties to consider ratifying or acceding to the Second Optional Protocol to the Covenant.

Organization for Security and Co-operation in Europe

As a member of the OSCE, Poland is bound by commitments on the death penalty that are formulated in a number of OSCE documents, e.g., the concluding docu-

ments of the 1989 Vienna Meeting, the 1992 Helsinki Summit, and the 1994 Budapest Summit. While OSCE participating States are not required to abolish the death penalty, they have committed themselves to impose the death penalty only in a manner that is not contrary to their international commitments. The annual OSCE Human Dimension Implementation Meeting provides a forum for peer review of the implementation of human dimension commitments by participating States, including in the area of capital punishment.

European Union

In the European Union, human rights protection is based on protection of the fundamental rights that are established in the general rules of Community law and protected by the European Court of Justice. It is the EU's belief that the abolition of capital punishment contributes to the enhancement of human dignity and development of human rights. As such, all countries seeking membership in the Union are required to first abolish the death penalty. This also applied to Poland, of course, as it, too, had to meet all of the EU's criteria, including those dealing with human rights, before its accession.

The EU has reaffirmed its objective of working towards complete abolition of the death penalty in numerous declarations and statements, including its "Guidelines to EU Policy towards Third Countries on the Death Penalty", EU presidency declarations on abolition of the death penalty, and the Declaration to the European Union Treaty on the abolition of the death penalty. Article II-2 of the Charter of Fundamental Rights of the European Union and the European Draft Constitutional Treaty also abolish the death penalty and the execution of death sentences.

Will the death penalty be reintroduced in Poland?

Poland's Law and Justice party, which won parliamentary elections in 2005, made the reintroduction of the death penalty one of the main elements of its election platform. In 2004, Law and Justice proposed reintroducing the death penalty for genocide and for murder committed with extreme cruelty and motives deserving special condemnation. According to the proposal, capital punishment would not be imposed on pregnant women or persons below the age of 18 at the time of the commission of the crime. On 22 October 2004, the lower house of the Polish Parliament rejected the proposal by a vote of 198-195, with 14 abstentions. Taking into account the very small difference between the number of votes for and against the proposal, conservative lawmakers have already announced plans to take further steps aimed at reintroducing the death penalty, including notifying the Council of Europe that Poland will

withdraw from the European Convention. Given these recent developments, it is worth considering the possibility of reintroducing the death penalty in Poland, as well as the possible consequences of doing so.

While the Protocols to the Covenant and to the Convention constitute international agreements, they are optional, and states, therefore, are not required to sign or ratify them. But since Poland has ratified Protocol No. 6 to the European Convention, it is obliged to fulfill its provisions, which provide the highest standard in terms of the protection of human life of all the international agreements that are binding for Poland. As Articles 1-5 of Protocol No. 6 are considered additional provisions of the European Convention (due to Article 6 of Protocol No. 6), reintroducing the death penalty in Poland would mean withdrawing not only from Protocol No. 6 but also from the European Convention. And that would have negative consequences for Poland's membership in the European Union.

The European Court of Justice has repeatedly confirmed the fundamental importance of the European Convention for all member states. Moreover, even without ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, the reintroduction of the death penalty would breach the provisions of the Covenant. The Human Rights Committee has interpreted para. 2 of Article 6 of the Covenant as a prohibition on reintroducing the death penalty "in countries which have abolished the death penalty". Accordingly, if the death penalty has been abolished, it may not be reintroduced.

Another issue that has come up during discussions about the possible reintroduction of the death penalty in Poland is the question of whether the Constitution would allow the restoration of capital punishment in the Polish legal system or whether it would be necessary to first amend the Constitution. Constitutional-law experts are divided on this matter, but the prevailing opinion is that Article 38 of the Constitution makes the reintroduction of the death penalty impossible since it guarantees protection of the life of every human being.

The issue of the death penalty has always provoked a lively public reaction. Emotions are particularly strong after the disclosure of a brutal murder. And this is also when supporters of the death penalty argue, contrary to the findings of criminological research, that capital punishment is the most efficient means of deterring people from committing crimes, and they suggest that the introduction of capital punishment would reduce the crime rate. The research conducted regularly by CBOS (Public Opinion Research Centre) shows that, in the last two decades, the majority of Polish society has supported the death penalty and that this number is growing. In 2004, 77 per cent of people polled declared that they were in favour of capital punishment.

This trend is alarming and even surprising when we take into account the fact that 95 per cent of Poles claim to be Catholic. Because of the stance of Pope John Paul II, the attitude of the Catholic Church towards the issue of capital punishment has greatly changed. In his encyclical *Evangelium vitae* of 1995, the Pope implicitly expressed his support for abolition by stating that the death penalty should be extremely limited or even abolished since there were other measures to protect society from offenders. In the following years, the Pope appealed for abolition and declared that capital punishment was contrary to human dignity.

The facts presented in this paper show that, although Polish legislation currently meets international standards, public attitudes and the aspirations of politicians indicate that the possibility of the reintroduction of the death penalty in Poland is realistic and should not be disregarded. Opponents of capital punishment have been making efforts to prevent this from happening. The draft law proposed by Law and Justice has drawn protests from a great number of NGOs, such as Amnesty International and the Helsinki Committee in Poland, which stated: "The death penalty ruins the faith in the absolute, inalienable value of human life. It's this faith that has to be propagated and upheld, because it is the basis for public morals. That is why we oppose the restitution of the death penalty in Poland, as well as the instrumental treatment of this problem by politicians."

The possible consequences of reestablishing the death penalty could reach far beyond those mentioned above. Today, when the majority of the member states of the Council of Europe, the European Union, and the OSCE are aiming, through the provisions of domestic law and related policy, to abolish the death penalty under all circumstances, Poland, by reintroducing the death penalty, would be taking a step backwards in the process of becoming a democratic, modern country that respects fundamental human rights and the universal and regional standards that uphold those rights. Irrevocable harm could also be done to Poland's reputation and international relations, which are based on mutual confidence and common goals.

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International Experience and Legal Regulation of the Application of the Death Penalty in Tajikistan⁸

KHALIFABOBO KHAMIDOV⁹

As a form of punishment under criminal law, the death penalty has its roots way back in history. It has been applied continuously since time immemorial. Moreover, the need for the death penalty was founded on the following passages from the Bible: “Whoever sheds man’s blood, by man his blood shall be shed”; “One who strikes a man so that he dies shall surely be put to death”; and “But if a man come presumptuously upon his neighbour, to slay him with guile; thou shalt take him from mine altar, that he may die.”¹⁰ The idea expressed by the ancient Chinese philosopher Han Fei that the execution of a robber is designed to improve others has united opponents of the death penalty in both the past and the present. He believed that severe punishment for a single evil deed would put a stop to all falsehood within the state and that this is how order is created.¹¹

Given the influence of this philosophy and the lack of development of individual rights in past times, the death penalty was widely used. The blood-feud legacy was lavished so generously by the state that there was a time when the death penalty was an entirely normal occurrence and was applied as punishment for any significant criminal act whatsoever. This picture was a common one, entirely in keeping with the state of legislation and practices in the 16th, 17th, and 18th centuries. The celebrated code of King Charles V, Carolina, prescribes the death penalty for 44 crimes. According to calculations made by Louis Pasteur, pre-revolutionary legislation in France

⁸ Translated from the Russian by Simon Clarke.

⁹ Minister of justice of Tajikistan.

¹⁰ See the Bible: Genesis 9:6, Exodus 21:12, Exodus 21:14; Navishtai Mukaddas, *Akhdi Kadim va Akhdi Chadid* (Stockholm, 1992), pp. 26, 124. A similar idea is contained in sura 2 ayat 177 of the Koran: “Oh you those who came to believe! Retribution is prescribed to you for the people that have been killed: a free man for a free man, a slave for a slave, a woman for a woman.” M.M. Sherbatov, *Razmyshleniya o smertnoi kazni*, from the works of Prince M.M. Sherbatov, Vol. 1, *Politicheskie sochineniya* (St. Petersburg, 1859); *Antologiya mirovoi pravovoi mysli*, Vol. IV, pp. 363-370 (this collection of works will hereinafter be referred to as “Anthology”); S.E. Desnitskii, *Slovo o prichinakh smertnykh kaznei po delam kriminalnym – Iuridicheskoe proizvedeniya progressivnykh russkikh myslitelei* (Moscow, 1959), in *Anthology*, Vol. IV, pp. 385-387.

¹¹ Han Fei, Treatise: “Han Feizi”, in *Anthology*, Vol. I, p. 505.

highlighted 115 crimes that were punishable by death. At the same time, a classic example of a country applying the death penalty is England, insofar as it occupies first place in this regard. Back in the 18th century, Sir William Blackstone counted 160 crimes that were punishable by death. There were also eras in history when this number rose to 240 in England.¹²

Despite all this, human thinking as a whole could not be indifferent to the fate of that being that is now called the supreme value, i.e., man. Back in his day, Jesus Christ maintained: “You have heard that it was said, an eye for an eye, and a tooth for a tooth. But I say to you, do not resist him who is evil.”¹³ It is possible that these and similar ideas formed the basis for thinkers and politicians in the Middle Ages when they cast doubt on the fairness of the death penalty as a form of punishment under criminal law. For example, in a legal document of King William the Conqueror (stating what he established with his aides after the conquest of England), it was prohibited for any man to be killed or hanged, whatever the crime. The King preferred the criminal to have his eyes poked out and be castrated. Likewise, the laws of King Henry I established pronouncement of a death sentence as being inadmissible on the basis of a single accusation without careful investigation and granting the possibility of vindication by means of “God’s trial”.¹⁴ However, these aspirations were nothing more than timid attempts amid an innumerable and endless stream of applications of the death penalty in a qualified form, such as breaking on the wheel, sewing people up in sacks and drowning them, cremation, quartering, burying people alive, interweaving bodies on the wheel, putting heads on stakes, burning corpses after cutting off the head, cutting the hands off corpses, and so on.

The new age of the 17th-19th centuries was characterized by outstanding success in the development of legal thinking. In overcoming a theological worldview, the dogmas of Middle Age scholastics collapsed, and issues regarding relations between individuals and their rights, laws and the state, and the role of the state and the law in public life were approached and resolved in a rational manner. Looking at the individual and his needs and social qualities as a starting point for studying law and the state brought about the pronounced axiological aspect of the legal doctrines of the new age. The indisputable status of an individual’s value and the subordination of the law to the worldly interests of individuals were brought to the fore.

Taking into account the new tendency that has come about in the development of jurisprudence, entirely new ideas have been expressed regarding the nature of punish-

¹² See I.Ya. Foinitskii, *Uchenie o nakazanii v svyazi s tiur'movedeniem* (St. Petersburg, 1889), in *Anthology*, Vol. IV, p. 794.

¹³ The Bible, Matthew 5:38-42.

¹⁴ *Anthology*, Vol. II, p. 84.

ments in general, and the death penalty in particular. For instance, one of the greatest authorities on the new age and author of the celebrated work *The Spirit of the Laws*, Charles-Louis de Secondat, Baron de Montesquieu, wrote: “Experience shows that in countries remarkable for the lenity of their laws, the spirit of the inhabitants is as much affected by slight penalties as in other countries by severer punishments. If we inquire into the cause of all human corruptions, we shall find that they proceed from the impunity of criminals, and not from the moderation of punishments.”¹⁵

According to the assertions of outstanding and acknowledged specialists in the sphere of criminal law, the first work that decisively rejected the application of the death penalty was the famous work by Cesare Beccaria entitled *On Crimes and Punishments*, published in Tuscany in July 1764, at that time without revealing the place where it was printed or the author’s name. The appearance of this book was described by specialists as a bomb for 18th-century society that would blow a significant part of the criminal institutions of the day to smithereens.¹⁶ Beccaria affirmed that the “death penalty is not a right and cannot be such. It is a war of a whole nation against a citizen whose destruction they consider as necessary or useful. But if I can further demonstrate that it is neither necessary nor useful, I shall have gained the cause of humanity.”¹⁷ Since then, the issue of the death penalty has been investigated by the highest-calibre academics, specialists in crime detection, psychologists, philosophers, and novelists; has been debated repeatedly in legislative assemblies; and has been resolved with the aid of practical experience. Analysing the course taken by these debates and discussions, Professor N.S. Tagantsev wrote at the beginning of the 20th century that the voices of the advocates of the death penalty were fading away, that the amount of current literature on the subject was declining, which was a sign that the issue had lost significance, while opponents of the death penalty were not encountering serious scholarly opposition, so that the death penalty was now more reliant on tradition than conviction. A recent attempt by the Italian school of anthropology to come out in defence of the death penalty for “born criminals” was, Tagantsev wrote, the final outburst, lacking in practical significance.¹⁸

The second half of the 19th century and the 20th century were influenced by this innovation in criminal law. Thanks to the unprecedented efforts of thinkers and politicians in individual countries of the world, abolition of the death penalty began in

¹⁵ Charles-Louis de Montesquieu, *The Spirit of the Laws*, Book 6, Chapter XII, in *Anthology*, Vol. III, pp. 114-115.

¹⁶ See V.D. Spasovich, *Uchebnyk ugovolnogo prava*, Vol. 1 (1st edition) Parts 1-2 (St. Petersburg, 1863), in *Anthology*, Vol. IV, p. 685; A.F. Kistyakovskii, *Elementarnyi uchebnyk obshchego ugovolnogo prava s podrobnim izlozheniem nachal russkogo ugovolnogo zakonodatel'stva* (Kyiv, 1875), in *Anthology*, Vol. IV, pp. 710-713; N.S. Tagantsev, *Russkoe ugovolnoe pravo*, 1st general part, Vol. II (St. Petersburg, 1902) (Tula, 2001), pp. 241-242.

¹⁷ C. Beccaria, *O prestupleniyakh i nakazaniyakh* (Moscow, 1995), in *Anthology*, p. 162.

¹⁸ Tagantsev, *op.cit.*, note 16, p. 242.

the 1860s. The first country to ban the death penalty was Venezuela, which introduced this rule into its legislation in 1863. Similar regulations were introduced into the legislation of Romania in 1864, Portugal in 1867, the Netherlands in 1870, and Italy in 1890. Switzerland abolished the death penalty at the constitutional level in 1874.¹⁹

Two World Wars, which accounted for the deaths of millions, provided further impetus for a world movement concerned with guaranteeing human rights, which resulted in reinforcing the aspiration of the peoples of the world to abolish the death penalty.

By the middle of the 20th century, a number of universal international-law instruments had already been adopted, which, based on historical traditions,²⁰ proclaimed the individual's right to life, freedom, and personal inviolability.²¹ On 4 November 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted, which enshrines that, "Everyone's right to life shall be protected by law." While still allowing application of the death penalty, Article 2 of the Convention clearly defines the framework associated with implementation of a death sentence: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

A new phase in international co-operation on the death penalty was heralded by the adoption of the International Covenant on Civil and Political Rights of 1966. Although the Covenant does not include a provision envisioning abolition of the death penalty, it does stipulate in Article 2 that, "in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant..." Thus, two new obligations were established for states parties to the Covenant: "sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time the crime is perpetrated and not contrary to the provisions of the present Covenant."

The international instrument that abolished the death penalty once and for all is Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty of 28 April 1983. Article 1 of this Protocol 1 states: "The death penalty shall be abolished. No one

¹⁹ *Ibid.*, p. 243.

²⁰ What is meant here are those historical acts that consolidated an individual's right to life, in particular, the US Declaration of Independence of 4 July 1776.

²¹ *Vseobshchaya deklaratsiya prav cheloveka – Sbornik mezhdunarodnykh aktov po pravam cheloveka* (Dushanbe, 2001), p. 46.

shall be condemned to such penalty or executed.” The Protocol gives states the option of making provision in their laws for the death penalty in respect of acts committed in time of war or of imminent threat of war.²²

The idea of abolishing the death penalty at the level of a universal instrument under international law is further envisioned in the Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at the abolition of the death penalty (15 December 1989). With a view to strengthening human dignity and the progressive development of human rights, the first article of this Protocol establishes that “no one within the jurisdiction of a State Party to the present Protocol shall be executed.” In addition, the Protocol obliges each state party “to take all necessary measures to abolish the death penalty within its jurisdiction.” Unlike Protocol No. 6 to the European Convention, this instrument prohibits any reservations “to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.”

Based on the measures that have been adopted, the current global tendency is characterized by the fact that the number of countries that have abolished the death penalty far outweighs the number of countries that retain it in their legislation. In 2001, 109 countries worldwide had abolished the death penalty while 86 retained it. As far as the OSCE region is concerned, it should be noted that the tendency here is even more evident. As of 30 June 2005, only nine participating States had capital punishment in their legislation.

Throughout its entire history, as an autonomous republic of the Soviet Union, as well as a sovereign state, the Republic of Tajikistan has experienced all the tendencies regarding the development of legal thought and judicial practice in relation to the death penalty. If, during the Soviet era, Tajikistan, along with all of the other Union republics, carried out Moscow’s instructions on all issues, including with respect to the death penalty (and it is not by chance that Tajikistan’s criminal legislation went through a period when the death penalty was abolished and then restored), then as a sovereign state, this issue has been resolved consciously, taking into account specific historical conditions that the country has experienced during the initial years of its development as an independent state.

Since the break-up of the Soviet Union took place suddenly and the particular features associated with the Union republics acquiring independence were also dictated by these realities, the legislative base could not be updated overnight. Furthermore,

²² See V.A. Kartashkin, *Mezhdunarodnie mekhanizmy zashchity prav cheloveka. Kak podat' zhalobu v mezhdunarodnie organy* (Moscow, 2003), p. 89.

one by one, the former republics of the Soviet Union, living under conditions of an ideologically based socialist system, having renounced the old beliefs, proclaimed themselves democratic, lawful, secular, social states whose principles are especially founded on bases other than those of the “people’s state”. Under the resulting conditions, the only way out was to use old legal regulations created during the previous phase of historical development, on the one hand, and to search for ways of creating new legal institutes and corresponding values under new conditions, on the other. It was no accident that all the criminal codes in force, in the redactions of 1960-1961, envisioned the death penalty for more than 30 crimes. In 1992, “taking into account the genuine threat to sovereign security and the state’s territorial integrity, ... brutal acts of violence, ... an outburst of crime...”, a number of amendments and additions were introduced into Tajikistan’s Criminal Code, a portion of which envisioned the application of the death penalty “in order to avert a national disaster ... [and] eliminate terrorist groups and organized gangs”.²³ As a result, the number of crimes for which the death penalty could be applied increased to 47.

The gradual stabilization of society and Tajikistan’s undertaking of numerous obligations under international law required serious consideration and an alternative approach to criminal-law institutions as a whole and the institution of the death penalty in particular. In 1998, the current Criminal Code, which is based on the constitutional standards of the Republic of Tajikistan and generally recognized principles and standards of international law, reduced to 15 the number of articles envisioning the death penalty. Nowadays, the death penalty is applied to individuals who have committed particularly serious crimes: murder, attempted murder, rape, terrorism, hijacking, and others, including gangsterism, robbery with assault, and trafficking in illegal drugs.

In order to humanize criminal legislation further, at the initiative of Tajik President Emomali Rahmonov, the Law of the Republic of Tajikistan “On Amendments and Additions to the Criminal Code” was adopted, reducing to a minimum the number of crimes punishable by death. This law came into force on 1 August 2003, in accordance with which the death penalty could only be applied for five crimes: murder (Article 104), rape (Article 138), terrorism (Article 179), genocide (Article 398), and biocide (Article 399). This Law also established that, in future, the death penalty would not be applied to women.

Nine months later, President Rahmonov declared a moratorium on the use of the death penalty, which undoubtedly signals a new milestone in the humane develop-

²³ See the Law of the Republic of Tajikistan “On Measures Designed to Strengthen Criminal Liability for the Perpetration of Serious Crimes Against Citizens’ Life and Health, Property Rights, and Aimed at Undermining Tajikistan’s Economic and Political Foundations”, *Vedomosti Verkhovnogo Soveta Respubliki Tadjikistan* (Dushanbe, 1992), No. 24, pp. 76-78.

ment of criminal-law institutions in Tajikistan. This step by the head of state was, in the author's opinion, the most important news expressed by the country's president in his address to the parliament on 30 April 2004, which was a subject for discussion among the world community and was seen as evidence of the just and humane policy that the Tajik leadership has been consistently pursuing in recent years. The head of state based his political decision on natural law, affirming that man, his rights and freedoms are of the supreme value and are inviolable, among which a special place is held by the right to life. As a matter of fact, President Rahmonov said, the right to life is of supreme value and no one should deprive anyone else of this right.²⁴ In order to develop the relevant regulations and legal instruments, a working group was set up that presented the draft law to the parliament for examination, thereby providing a mechanism for implementing the president's political decision.

Under Law No. 45 of the Republic of Tajikistan of 15 July 2004 "On Suspension of the Death Penalty", application of the death penalty as a form of punishment, enforcement of the death penalty, and other regulations associated with capital punishment were suspended. During the period when application of the death penalty was suspended, prison terms were set at 25 years.

However, under Law No. 86 of the Republic of Tajikistan of 1 March 2005 "On Amendments and Additions to the Criminal Code", an additional form of punishment was introduced into the aforementioned Criminal Code: life imprisonment (Article 58(1)), where it was established that life imprisonment is only used as an alternative to the death penalty for the commission of especially grave crimes and, on the basis of an appeal, that the death penalty could be replaced by life imprisonment (Article 59). This law stipulates that life imprisonment will not be prescribed for women, persons who committed a crime while under the age of 18, and men who had turned 63 by the time of sentencing (Article 58(1)).

It is the author's opinion that the time when Tajikistan, like the majority of countries throughout the world, will outlaw the death penalty as a form of punishment once and for all is not far. In the words of Nikolai Tagantsev, senator, professor emeritus of the Imperial College for Jurisprudence, honorary member of the St. Petersburg and St. Vladimir Universities, and of the Moscow and St. Petersburg law societies, "you do not need to be a prophet to see that the time is nigh when the death penalty will disappear from criminal codes and, as far as our children are concerned, the debate itself regarding its expediency will seem as strange as the argument facing us

²⁴ Paraphrased from the president's address to the parliament on 30 April 2004. Officially published in Russian as "Poslanie Prezidenta Respubliki Tadjikistan Emomali Sharipovicha Rakhmonova ob osnovnykh napravleniyakh vnutrennei i vneshnei politiki Respubliki Tadjikistan Madzhlisi Oli Respubliki Tadjikistan ot 30 aprelya 2004 goda", *Narodnaya gazeta*, 12 May 2004.

today regarding the need to break criminals on the wheel or set them alight, and the fairness of doing so.”²⁵

Abolition of the death penalty raises the question of the form of punishment that should replace it. The experience of those countries that renounced the death penalty more than a century ago and those countries that did so only recently shows that an alternative to this form of punishment is life imprisonment. However, problems associated with this form of punishment are very complex and their resolution requires detailed, in-depth, scrupulous study. The very term *life imprisonment*, in the words of the British expert Peter Hodgkinson, entails a certain amount of confusion.²⁶ There are issues associated with the minimum and maximum prison term (in Austria, the average prison term is 22 years; in Croatia, between 20 and 40 years; in Denmark, the maximum term is 20 years; in Estonia, 30 years; in Finland, individuals serve, on average, 10 to 15 years and are released by a presidential decree; in Latvia, the minimum is not less than six months up to a maximum of 50 years; while in Poland, the minimum is 20 years; Sweden and Bulgaria have full life imprisonment); how prisoners are housed, i.e., separately or with other prisoners; the conditions of guarding them and providing security; parole; education; training of corresponding staff with backgrounds in law, psychology, and other areas that allows them to organize work for such prisoners; and a multitude of other issues that we not only need to study and assimilate but also, taking into account the realities, accept that system that largely meets our needs. In this matter, the vast experience acquired by highly developed countries across the globe, as well as their direct help and real financial support for the matter initiated, will be of enormous help to us.

Finally, there is one other important innovation in the sphere of our country's criminal-law policy, i.e., adoption of the Law “On Amendments and Additions to the Criminal Code”, which, in turn, is aimed at the further humane development of criminal legislation, as a result of which many prisoners have been released from serving further time in prison, while many others have had their sentences reviewed with a view to having them reduced.

To sum up, it should be acknowledged that the phased humanization of criminal legislation applicable in Tajikistan is the next step towards the optimal performance of those tasks that will bring us nearer to those states that have an enhanced legal structure, to becoming an open society, where the rule of law is indisputable.

²⁵ Tagantsev, *op.cit.*, note 16, p. 255.

²⁶ Peter Hodgkinson, *Pozbiznennoe lishenie svobody: mezhdunarodnye standarty i praktika: Materialy mezhdunarodnoi nauchno-prakticheskoi konferentsii* (Almaty, 2003), p. 25.

The Death Penalty in the United States

MARGARET GRIFFEY AND LAURENCE E. ROTHENBERG²⁷

The application of the death penalty in the United States – and continuing opposition to it – are the results of the robust American democratic process. The interaction between public opinion, elected representatives of the public in the federal and state legislatures, law enforcement and prosecutorial authorities, and the independent judiciary at both the state and federal level has created a system of capital practice and jurisprudence that implements the public's desire for just punishment of murderers while protecting the rights of the accused.

Public Support

The United States federal government and 37 of the 50 state governments allow juries the option of assessing a death sentence for offences that result in the victim's death.²⁸ The offender must have a high degree of culpability with respect to the victim's death, and other aggravating factors must also be present, such as multiple victims, a child victim, rape along with the murder, or particular cruelty in the commission of the killing.

Public support for the death penalty remains high. According to a Gallup poll released on 1 June 2006, 65 per cent of Americans favour the death penalty for a person convicted of murder. When asked whether the death penalty or a life sentence with "absolutely no possibility of parole" is a better penalty for murder, Americans are evenly divided. However, it should be noted that the Gallup poll questions solicited opinions with reference to murders generally, not the narrowed class of aggravated offences for which death is a potential punishment. As a consequence, the results of the poll may understate actual support for the death penalty for the worst offences. For example, contemporaneous polls indicated that 75 per cent of the American public

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²⁸ In addition, death is designated by federal statute for certain treason, espionage, and large-scale drug offences that do not result in death, although the death penalty has not been sought for an espionage or treason offence in more than five decades and has never been sought in connection with a large-scale drug offence unrelated to a homicide.

supported the execution of Timothy McVeigh, the bomber of the Murrah Federal Building in Oklahoma City, Oklahoma.

Rationales

The death penalty serves two principal social purposes: retribution and deterrence. Under retribution theory, a particular punishment is appropriate because the offender morally deserves it. Far from relying upon a crude notion of “vengeance” (as capital-punishment opponents often mischaracterize it), retribution is a sophisticated justification for capital punishment that accounts for an offender’s moral blameworthiness based on the severity of the wrong he has committed against the community. As the Supreme Court has explained: “[C]apital punishment is [considered] an expression of society’s moral outrage at particularly offensive conduct ... an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”²⁹

While deterrence is a less favoured rationale for the death penalty than retribution, recent academic studies applying multiple regression analysis to state and county capital-case data suggest that the murder rate is significantly reduced by both death sentences themselves and actual executions.³⁰ One of these studies suggests that 18 murders on the average are deterred by each execution.³¹ While these studies are not without their critics,³² they have led two prominent legal scholars to suggest that “[i]f the current evidence is even roughly correct ... then a refusal to impose capital punishment will effectively condemn numerous innocent people to death.”³³

Legal Framework

The current legal framework for imposition of the death penalty is the result of the Supreme Court’s 1972 opinion in *Furman v. Georgia*, 408 U.S. 238 (1972). In that case, the Supreme Court effectively invalidated all existing capital sentencing schemes. Although the *Furman* Court did not hold capital punishment to be unconstitutional

²⁹ *Gregg v. Georgia*, 428 U.S. 153, 183-84 (opinion of Stewart, Powell, and Stevens, JJ.)

³⁰ See Hashem Dezhbakhsh *et al.*, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344 (2003); H. Naci Mocan and R. Kay Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. Law & Econ. 453 (2003); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 Mich. L. Rev. 203 (2005); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Stud. 283, 308 (2004); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. Appl. Econ. 163 (2004).

³¹ Hashem Dezhbakhsh *et al.*, *ibid.*, p. 344.

³² See John J. Donohue and Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791 (2005).

³³ Cass R. Sunstein and Adrian Vermule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 705 (2005).

per se, it did hold that the death penalty “could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”³⁴ In the Court’s view, under the capital sentencing schemes invalidated in *Furman*, death sentences were imposed in an arbitrary and capricious manner because “there [was] no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not.”³⁵

Within four years of the *Furman* decision, 35 states and the federal government had enacted new statutes that provided for the death penalty for certain homicide offences. The states responded to the concerns expressed by the Court in *Furman* either by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence or by making the death penalty mandatory for specific crimes. As convictions obtained under the new procedures were reviewed by the Supreme Court, a body of Eighth Amendment death penalty jurisprudence evolved. In approving Georgia’s new capital sentencing scheme, the Court in *Gregg* concluded that, in order to minimize the risk of arbitrary and capricious imposition, discretion to impose a death sentence must be suitably directed and limited by standards that take into account the circumstances of the offence and the character and propensities of the offender.³⁶ The Court invalidated the mandatory death penalty statutes that were enacted in response to *Furman*, in part on the ground that they failed to allow for individualized consideration of the offence and the character and background of the offender.³⁷

In the thirty years following *Gregg*, the Eighth Amendment capital sentencing requirements that had their genesis in *Furman* have continued to be refined. It is now well-established that a valid capital sentencing scheme must have two components. First, under a valid capital sentencing scheme, not every homicide offender can be eligible for the death penalty.³⁸ The eligibility (or narrowing) component requires a jury to determine whether a defendant falls within a narrowed class of homicide offenders.³⁹ The narrowing may be accomplished by the jury’s finding of an aggravating factor in addition to guilt, or by narrowly defining those offences for which a sentence of death is available.⁴⁰

³⁴ *Gregg* at 169.

³⁵ *Furman*, 408 U.S. at 311 (White, J., concurring).

³⁶ *Id.* at 189, 206.

³⁷ See *Woodson v. North Carolina*, 428 U.S. 280, 303-305 (1976); *Stanislaus Roberts v. Louisiana*, 428 U.S. 325, 333-336 (1976); *Harry Roberts v. Louisiana*, 431 U.S. 633, 637 (1977); *Sumner v. Shuman*, 483 U.S. 66, 74-77, 85 (1987).

³⁸ See *Arave v. Creech*, 507 U.S. 463, 474 (1993).

³⁹ See *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988); *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

⁴⁰ See *Lowenfield v. Phelps*, 484 U.S. at 244-246.

Second, the selection (or individualized sentencing) component requires a jury's death penalty decision to be based on individualized consideration of the offence and the defendant's character and background.⁴¹ The jury cannot be foreclosed from considering and giving mitigating effect to any aspect of a defendant's character or background or circumstance of the offence that mitigates against imposition of a death sentence.⁴² Mitigating weight can be given to disadvantages such as parental neglect, abuse, or poverty; intellectual or mental disability; capacity to function non-violently in a structured setting such as prison; good conduct or deeds; and any provocation by the victim.

In addition, since *Furman*, the Supreme Court has applied an "evolving standards of decency" analysis, first articulated in *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958), to conclude that the Eighth Amendment prohibits the execution of individuals who are insane at the time of the scheduled execution,⁴³ mentally retarded,⁴⁴ or less than 18 years of age at the time of the offence.⁴⁵ Furthermore, the Supreme Court held that the death penalty for rape was unconstitutionally disproportionate to the crime.⁴⁶ Finally, capital punishment cannot be imposed for fortuitous killings in the course of other crimes. Rather, the defendant must have a high level of culpability with respect to the death of the victim.⁴⁷

Criticisms of the Application of the Death Penalty in the United States

Criticism of the application of the death penalty in the United States has focused on an array of features: execution of juveniles, execution of the mentally retarded, execution of the mentally ill, lethal-injection procedures, the so-called death-row phenomenon, alleged racial disparities, the prospect of innocent people being executed, and the quality of representation of capital defendants. As noted above, the first two of these – execution of juveniles and of the mentally retarded – have been prohibited by the Supreme Court in the last four years. Others are currently under litigation – execution of the mentally ill and lethal-injection protocols – including with regard to the federal government's policies and cannot therefore be discussed in this context. The following section addresses the remaining matters.

⁴¹ *Zant v. Stephens*, 462 U.S. at 879; *Woodson v. North Carolina*, 428 U.S. at 303-304.

⁴² *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Boyd v. California*, 494 U.S. 370, 378-380 (1990).

⁴³ *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁴⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁴⁵ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴⁶ *Coker v. Georgia*, 433 U.S. 584 (1977).

⁴⁷ See *Tison v. Arizona*, 481 U.S. 137 (1987).

Alleged Racial Disparities

The Equal Protection Clause of the Fourteenth Amendment to the Constitution guarantees all individuals in the United States equality before the law. To establish that a violation of this guarantee has occurred, a criminal defendant must show that his prosecution or conviction was the result of purposeful discrimination. The scope of this guarantee was one of the major post-*Furman* Constitutional challenges to the death penalty. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), a convicted murderer claimed that his death sentence should be overturned because the Georgia state capital system was racially biased in violation of the Equal Protection Clause, based on a statistical study purporting to show that murderers of white victims were more likely to be sentenced to death than murderers of black victims. (The *McCleskey* study, as virtually all studies subsequent to it, demonstrated no statistically significant evidence of discrimination based on the race of the defendant. The debate about racial disparities has therefore focused on the race of the victim.) The Supreme Court rejected McCleskey's claim, holding that a statistical study, even if true, could not prove intentional discrimination in his individual case. In addition, the Court held that the study, even if true, could not prove that the entire system had been adopted and maintained by the Georgia state legislature for racially discriminatory purposes and could not prove that the system was arbitrary and capricious as applied to his own case or resulted in a sentence disproportionate to his crime.

It is important to note that, although the Supreme Court, for purposes of argument, accepted the validity of the underlying statistical study at issue in the case,⁴⁸ the study was decisively rejected by the district court.⁴⁹ The district court found errors and missing information in the databases used in the study, unwarranted assumptions, unreliable statistical models, and flawed interpretations of the data. It concluded, "[T]here is no statistically significant evidence produced by a reasonably comprehensive model that prosecutors are seeking the death penalty or juries are imposing the death penalty because the defendant is black or the victim is white."⁵⁰

Indeed, the extent of racial disparities in capital cases in the United States has been vastly exaggerated. For example, a widely quoted General Accounting Office (GAO)

⁴⁸ *Id.* at 292, n7.

⁴⁹ See *McCleskey v. Zant*, 580 F. Supp. 338 (NDGA, 1984).

⁵⁰ *Id.* at 379-380; Opponents of capital punishment still claim, however, not only that the Baldus study was valid but that the Supreme Court's decision actually accepted its validity as a matter of fact. See Charles J. Ogletree Jr. and Austin Sarat (eds.), *From Lynch Mobs to the Killing State: Race and the Death Penalty in America* 2 (2006). This is in direct contrast to the Court's words that, "Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia." *McCleskey*, 481 U.S. at 292 at n7.

review of research published in 1990 purported to show a race-of-the-victim effect.⁵¹ As the Department of Justice pointed out, however, the GAO review was seriously flawed. Only 10 of the 23 studies reviewed by the GAO were, by the GAO's own terms, "high-quality".⁵² Furthermore, five of the seven of those high-quality studies that considered imposition of sentence actually showed no race-of-the-victim effect.⁵³ As the Department stated in testimony to Congress, "[T]he high-quality studies support the conclusion that legally relevant considerations overwhelmingly account for any apparent race-of-the-victim effect." Since that time, evidence is equivocal; some studies show no effect of the race of the victim when characteristics of the crime are controlled for, while some continue to show effects.⁵⁴ (Again, no studies show statistically significant effects based on race of the defendant.)

With regard to the federal system, figures released by the Department of Justice regarding federal death sentences in 2000 indicated that the proportion of minority defendants in federal capital cases exceeded the proportion of minority individuals in the general population. Subsequent analysis revealed that racial and ethnic bias was not the cause of this disparity. Rather, the cause was the focus of federal prosecutions on large-scale drug trafficking and associated lethal violence, which is disproportionately committed by gangs whose members are drawn from minority groups.⁵⁵ In the most recent study on the subject, released in July 2006, the RAND Corporation found that controlling for legitimate considerations, such as applicable aggravating and mitigating factors, eliminated the race effects and demonstrated that decisions to seek the

⁵¹ General Accounting Office, "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities", GAO-GGD-90-57 (February 1990).

⁵² Death Penalty Legislation and the Racial Justice Act: Hearings on H.R. 4618 Racial Justice Act of 1990 and H.R. 105, H.R. 380, H.R. 596, H.R. 1197, H.R. 1464, H.R. 1477, H.R. 2196, Title I of H.R. 2709, and Titles I and II of H.R. 3119 Establishing Procedures for a Federal Death Penalty Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong. 76-120 (1990) (statement of Edward S.G. Dennis, Jr., Assistant Attorney General, Criminal Division, US Department of Justice).

⁵³ *Id.* at 104-105, n.11.

⁵⁴ For no effect, see David S. Baime, Report to the New Jersey Supreme Court: Systematic Proportionality Review Project, 2001-2002 Term (1 June 2001), available at: <http://www.judiciary.state.nj.us/baime/baimereport.pdf>; David C. Baldus, George Woodworth, Gary L. Young, and Aaron M. Christ, "The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis", (25 July 2001), available at: <http://www.ncc.state.ne.us/documents/other/homicide.htm>; for effect, see Raymond Paternoster and Robert Brame, "An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction", (no date) available at <http://www.newsdesk.umd.edu/pdf/finalrep.pdf>. The general lack of racial effects has led opponents of capital punishment to cite so-called geographic disparity as undermining the legitimacy of the death penalty. This claim is difficult to credit, however; differences in charging by prosecutors and convictions and sentences by juries in different jurisdictions (not motivated by racial animus) mean only that public opinions on the death penalty vary from one location to another, an entirely reasonable and legitimate outcome in a democratic society.

⁵⁵ US Department of Justice, "The Federal Death Penalty System: Supplementary Data, Analysis, and Revised Protocols for Capital Case Review" (6 June 2001), available at <http://www.usdjo.gov/dag/pubdoc/deathpenaltystudy.htm>.

death penalty by federal prosecutors were motivated by the heinousness of the crimes rather than by the defendant's or victim's race.⁵⁶

Finally, it should also be noted that even if the claim of race of the victim were valid, it would prove only that some crimes against black victims are punished less severely than comparable crimes against white victims, not that black defendants are treated more harshly than white defendants. The solution to such a problem would not be to abolish the death penalty – resulting in greater leniency for murderers of both black and white victims, and eliminating retribution and deterrence for society as a whole – but rather to ensure that murderers of black victims are more consistently sentenced to death.

Innocence

Much of the ongoing debate in the United States about the death penalty centres on the possibility that an innocent person has been or will be executed. However, the purported risk of executing an innocent person is most often predicated on the reversals of murder convictions for trial error, which simply do not correlate with or reflect actual innocence. Second, despite protracted and determined effort, abolitionists have been unable to identify a single factually innocent person who has been executed post-*Furman*. Finally, while a segment of American society views any possibility, however slight, that even one innocent person may be executed to be an unacceptable risk, most Americans recognize that perfection in criminal justice matters cannot be absolutely guaranteed in relation to any sanction, and that any risk of error there may be relating to capital punishment is acceptable in light of the many protections that exist against such error and the deterrent and retributive value of the death penalty.

As an initial matter, the constitutional and statutory rights that protect an accused in the United States are without parallel in the modern world, including the presumption of innocence, requirement of proof of guilt beyond a reasonable doubt, the right to confront witnesses, the right to compulsory process to obtain the testimony of witnesses, the right to effective assistance of counsel, the right to a jury trial, the right to have the prosecution disclose exculpatory evidence, the right to a fair trial, and, in a capital case, the right to have the jury be given the option of convicting of a lesser included offence. The accuracy of conviction and sentence are further assured by two distinct tiers of post-conviction review: direct appeal and habeas (or collateral) review. In addition, if following the trial, appeal, and habeas review, there nonetheless exists doubt about guilt, a defendant can seek clemency from the executive branch.

⁵⁶ Stephen P. Klein, Richard A. Berk, Laura J. Hickman, "Race and the Decision to Seek the Death Penalty in Federal Cases" (July 2006), available at: http://www.rand.org/pubs/technical_reports/TR389/.

Nonetheless, opponents of the death penalty frequently cite cases in which the convictions of murder defendants have been reversed for trial error to support the proposition that an innocent person has necessarily been executed. While a failure to afford a defendant one of the myriad rights attendant to a criminal trial may lead to reversal of the resulting conviction, this does not mean that the person convicted was actually innocent. For example, a conviction could be reversed because highly reliable evidence of guilt was obtained pursuant to an unconstitutional search. Even a reversal of a conviction for insufficient evidence does not mean that the defendant was actually innocent but merely that the evidence was insufficient to establish guilt beyond a reasonable doubt. To call someone “innocent”, even though they owe the reversal of their conviction simply to one of the many procedural protections afforded to capital defendants, “cheapens the word and impeaches the moral authority of those who claim that a person has been ‘exonerated.’”⁵⁷

Nevertheless, abolitionists continue to assert, based on purported exonerations, that an innocent person must have been executed. They have not yet identified a single case in which that has in fact occurred. As Justice Scalia has discussed, post-conviction claims of innocence are often clearly spurious. In many instances, they are made in complete disregard for existing evidence of guilt or in reliance on a highly improbable and selective understanding of the evidence.⁵⁸ Most recently, DNA testing proved that Roger Coleman, executed in 1992, whose claims of innocence were featured on the cover of a national news magazine and who became a prominent test case for the abolitionist movement, was indeed guilty.⁵⁹

Adequate Representation

Debate regarding the death penalty has also focused on the quality of representation provided to indigent capital defendants by counsel. As interpreted by the Supreme Court, the Sixth Amendment to the Constitution guarantees defendants the right to effective assistance of counsel at trial and capital sentencing in order to ensure the proper functioning of the adversarial process in procuring a just result.⁶⁰ Indeed, claims of ineffective assistance of counsel are often made in federal habeas review of state convictions and sentences and may result in the overturning of a conviction or

⁵⁷ Joshua Marquis, *The Myth of Innocence*, 95 J. Crim. L. & Criminology 501, 508 (2005).

⁵⁸ See *Kansas v. Marsh*, ___ S.Ct. ___, 2006 WL 1725515, at pp. 16-19 (Scalia, J., concurring).

⁵⁹ Maria Glod and Michael D. Shear, “DNA Tests Confirm Guilt of Executed Man,” *Washington Post*, 13 January 2006, Page A01.

⁶⁰ *Strickland v. Washington*, 466 U.S. 668 (1984).

sentence if the federal court determines that the constitutional rights of the defendant were violated by inadequate representation.⁶¹

Practical measures are also in place to provide quality representation. In the federal system, upon indictment for a capital offence, an indigent defendant is entitled to the appointment of two counsel, one of whom must have expertise in the law applicable to capital cases. Federal law also sets minimum standards for the experience of such counsel. The overwhelming majority of states with capital punishment have also established standards or practices to ensure that competent counsel are assigned.

In addition, the federal Bureau of Justice Assistance, a component of the United States Department of Justice, is funding a Capital Case Litigation Project to provide training to defence counsel, state and local prosecutors, and state trial judges to improve the quality of representation and the reliability of verdicts in state capital cases. The training will focus on investigation techniques; pre-trial and trial procedures, including the use of expert testimony and forensic science evidence; advocacy in capital cases; and capital-case sentencing-phase procedures. National grantees include the National District Attorneys Association, the National Legal Aid and Defenders Association, and the National Judicial College. Eligible state grantees include criminal justice agencies, such as the court system or a public defender's office, and state bar associations.

'Death-Row Phenomenon'

The often lengthy time between imposition of a death sentence and actual execution has led to claims that convicts suffer from cruel and unusual punishment as a result of the delay. This argument has had no legal success in the United States. Although it has not ruled on the merits, the Supreme Court has denied review of appeals courts' decisions rejecting this claim at least four times.⁶² The delay is typically the result of the convict's own insistence on the myriad of legal protections and layers of court review described above to ensure that his conviction and sentence were constitutionally determined and imposed. As Justice Thomas has stated, "I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."⁶³

⁶¹ See, for example, *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Williams v. Taylor*, 529 U.S. 362 (2000), in which the Supreme Court held that, in various circumstances, failure to present mitigating evidence at sentencing constituted ineffective assistance of counsel warranting reversal of the death sentence.

⁶² *Lackey v. Texas*, 514 U.S. 1045 (1995); *Elledge v. Florida*, 525 U.S. 944 (1998); *Knight v. Florida*, 528 U.S. 990 (1999); *Foster v. Florida*, 537 U.S. 990 (2002).

⁶³ *Knight*, 528 U.S. at 990.

Conclusion

Despite criticism of its justness and accuracy, public support for the death penalty in the United States remains high. Proponents and supporters cite its retributive and deterrent values as both morally required and practically necessary to ensure a safe society. Its application is subject to constitutional constraints and has been tested many times in court, leading to a complex jurisprudence that serves to protect defendants' rights while also enforcing the desire of the American public for just criminal punishment.

3

International Standards on the Death Penalty

This chapter provides an overview of the international standards on the death penalty that have been developed by the OSCE, the Council of Europe, the United Nations, and the European Union. For the purposes of this overview, the international standards have been divided into two categories:

- International standards restricting the use of the death penalty; and
- International standards abolishing the death penalty.

3.1 International standards restricting the use of the death penalty

OSCE

OSCE commitments, which are of a politically binding nature, do not require the abolition of the death penalty. However, OSCE participating States have committed themselves to carry out the death penalty only for the **most serious crimes** and **in a manner not contrary to their international commitments**.⁶⁴

Council of Europe

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which is of a legally binding nature, does not require the abolition of the death penalty.⁶⁵ Article 2 of the ECHR, which enshrines the right to life, provides that: “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

The text of the ECHR itself places no explicit restrictions on the use of the death penalty, save that it can only be carried out following conviction by a court of a crime for which the death penalty is provided for by law. However, the European Court of

⁶⁴ Concluding Document of the 1989 Vienna Follow-up Meeting, “Questions relating to Security in Europe”, para. 24. OSCE commitments also place a number of positive obligations on participating States that choose to retain the death penalty. A full-text reproduction of the OSCE commitments on the death penalty can be found in Annex 1.

⁶⁵ ETS No. 005. Entered into force on 3 September 1953.

Human Rights has interpreted both Article 2 and Article 3 of the ECHR as placing certain limitations on the use of the death penalty.⁶⁶

United Nations

The International Covenant on Civil and Political Rights (ICCPR), which is of a legally binding nature, does not require the abolition of the death penalty.⁶⁷ Article 6 of the ICCPR provides for the right to life but recognizes the death penalty as a permissible exception to the right to life. The text of the ICCPR provides that no one shall be deprived of the right to life arbitrarily and lists a number of specific restrictions and limitations on the use of the death penalty. Article 6(2) provides that:

- A death sentence may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime;
- A death sentence may be imposed only in a manner not contrary to the provisions of the ICCPR, and the death penalty may be carried out only pursuant to a final judgement rendered by a competent court;
- Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence;
- The death penalty shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.

The limitations set out in Article 6(2) have been interpreted by the Human Rights Committee in its concluding observations on state party reports, in its General Comment No. 6, and in its jurisprudence on individual complaints.⁶⁸ In addition, the limitations set out in Article 6(2) have also been interpreted and expanded upon in documents produced by other UN bodies, in particular, in the ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty⁶⁹ and in the annual resolutions of the Commission on Human Rights on the question of the death penalty.⁷⁰ The following is a brief overview of the nature of the restrictions set out in Article 6(2) on the basis of the documentation produced by the above-mentioned bodies.⁷¹

⁶⁶ Article 3 of the ECHR prohibits torture and inhuman or degrading treatment or punishment.

⁶⁷ UN General Assembly Resolution 2200 A (XXI) of 16 December 1966. Entered into force on 23 March 1976.

⁶⁸ General Comment No. 6, adopted at the 16th session of the Human Rights Committee, 1982.

⁶⁹ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN Economic and Social Council Resolution 1984/50, adopted on 25 May 1984.

⁷⁰ The most recent resolution of the Commission on Human Rights on the question of the death penalty is Resolution 2005/59, 20 April 2005.

⁷¹ Unless otherwise indicated, the documents referred to in the following overview are not of a legally binding nature.

Most serious crimes

General Comment No. 6 states that the term *most serious crimes* must be read restrictively to mean that the death penalty should be an exceptional measure. The ECOSOC Safeguards specify that the scope of the crimes punishable by the death penalty should not go beyond intentional crimes with lethal or other extremely grave consequences. The Human Rights Committee has gone further than this, stating that the imposition of the death penalty for crimes that do not result in loss of life would be contrary to the ICCPR.⁷² Resolution 2005/59 of the Commission on Human Rights states that the death penalty should neither be imposed for non-violent acts – such as financial crimes, religious practice or expression of conscience, or sexual relations between consenting adults – nor as a mandatory sentence.⁷³

In a manner not contrary to the provisions of the ICCPR and pursuant to a final judgement rendered by a competent court

States parties are obliged to rigorously observe all the fair-trial guarantees set out in Article 14 of the ICCPR. The Human Rights Committee is of the opinion that a violation of the right to life would result from an execution following a trial that fails to ensure the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.⁷⁴ The ECOSOC Safeguards and Resolution 2005/59 of the Commission on Human Rights also state that all legal proceedings should comply with Article 14 of the ICCPR.⁷⁵

Right to seek pardon or commutation

The term *pardon* means the removal of a death sentence and release, while the term *commutation* means the substitution of a death sentence with a less severe sentence. The right to seek pardon or commutation has been reaffirmed by General Comment No. 6, the ECOSOC Safeguards, and Resolution 2005/59 of the Commission on Human Rights.

⁷² CCPR/C/79/Add. 25, 3 August 1993.

⁷³ Resolution of the UN Commission on Human Rights 2005/59, 20 April 2005, para. f.

⁷⁴ General Comment No. 6.

⁷⁵ The special rapporteur on extrajudicial, summary and arbitrary executions has stated that the process leading to the imposition of the death penalty must also comply with Articles 9 and 15 of the ICCPR.

Persons below the age of 18 and pregnant women

The prohibition on the death penalty for crimes committed by persons below the age of 18 is reiterated in the Convention on the Rights of the Child (CRC), which is of a legally binding nature.⁷⁶ This principle has been reaffirmed by the ECOSOC Safeguards and Resolution 2005/59 of the UN Commission on Human Rights. In addition, the Sub-Commission on the Promotion and Protection of Human Rights has stated that the imposition of the death penalty for crimes committed by persons below the age of 18 is contrary to customary international law.⁷⁷ The prohibition on the execution of pregnant women has been reaffirmed by a number of resolutions of the UN Commission on Human Rights and the ECOSOC Safeguards. The Human Rights Committee has expressed the opinion that the prohibition on the execution of children and pregnant women represents a norm of customary international law.⁷⁸

Although Article 6(2) prohibits the execution of only two specific categories of people, this list should not be considered exhaustive. Indeed, the ECOSOC Safeguards extend this restriction to the elderly, mothers with dependent infants, the insane, and the mentally disabled.

Finally, it should be noted that the use of the death penalty also raises issues under Article 7 of the ICCPR on the prohibition of torture and inhuman or degrading treatment. The Human Rights Committee has found violations of Article 7 in certain cases concerning detention on death row, the method of execution, and the issuance of execution warrants for mentally incapable persons.

European Union

The European Union takes an active stance against the death penalty in its relations with accession countries and third countries. First, the abolition of the death penalty is a prerequisite to accession to the EU.⁷⁹ Second, the EU has developed *Guidelines on European Union policy towards third countries on the death penalty*.⁸⁰ These *Guidelines*, which are reproduced in Annex 2, contain a list of minimum standards on the use of the death penalty.

⁷⁶ Article 37 of the Convention on the Rights of the Child, UN General Assembly Resolution 44/25 of 20 November 1989. Entered into force on 2 September 1990.

⁷⁷ Resolution 2000/17, 17 August 2000.

⁷⁸ On this basis, the Human Rights Committee has stated that states parties may not reserve the right to execute children or pregnant women. See General Comment No. 24, adopted at the 52nd session of the Human Rights Committee, 1994.

⁷⁹ The abolition of the death penalty for peacetime crimes is an element of the Copenhagen Criteria for accession countries to the European Union.

⁸⁰ General Affairs Council, Luxembourg, 29 June 1998.

3.2 International standards abolishing the death penalty

Council of Europe

Since the adoption of the ECHR, steps have been taken to develop legally binding instruments that abolish the death penalty.

The Council of Europe has adopted Protocol No. 6 to the ECHR,⁸¹ which abolishes the death penalty during peacetime. All new member states of the Council of Europe are required to ratify Protocol No. 6 within a certain time limit.⁸² In addition, the Council of Europe has also adopted Protocol No. 13 to the ECHR,⁸³ which is the first legally binding instrument that abolishes the death penalty in all circumstances, including in time of war.

- Forty-five⁸⁴ OSCE participating States have ratified Protocol No. 6.⁸⁵ In the period from 30 June 2005 to 30 June 2006, one participating State, Monaco, ratified Protocol No. 6.
- Thirty-six⁸⁶ OSCE participating States have ratified Protocol No. 13. In the period from 30 June 2005 to 30 June 2006, six participating States ratified Protocol No. 13: Luxembourg, Monaco, the Netherlands, Norway, Slovakia and Turkey. One participating State, Armenia, signed Protocol No. 13.

United Nations

Since the adoption of the ICCPR, steps have been taken to develop a legally binding instrument that requires the abolition of the death penalty. Accordingly, the UN has adopted the Second Optional Protocol to the ICCPR,⁸⁷ which abolishes the death penalty during peacetime.

Forty-one OSCE participating States⁸⁸ have ratified the Second Optional Protocol.

⁸¹ ETS No. 114. Entered into force on 1 March 1985. Article 2 of Protocol No. 6 provides that a state may make provision in its law for the death penalty in respect of acts committed in times of war or of imminent threat of war.

⁸² Resolution 1044 (1994) of the Parliamentary Assembly of the Council of Europe on the Abolition of Capital Punishment, 4 October 1994.

⁸³ ETS No. 187. Entered into force on 1 July 2003.

⁸⁴ Including the State Union of Serbia and Montenegro.

⁸⁵ Of the 56 OSCE participating States, 46 are member states of the Council of Europe.

⁸⁶ Including the State Union of Serbia and Montenegro.

⁸⁷ UN General Assembly Resolution 44/128 of 15 December 1989. Entered into force on 11 July 1991. Article 2 of the Second Optional Protocol provides that no reservation is admissible except for reservations made at the time of ratification or accession that provide for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

⁸⁸ Including the State Union of Serbia and Montenegro.

Resolution 2005/59 of the Commission on Human Rights called upon all states that still retain the death penalty to abolish it completely and, in the meantime, to establish a moratorium on executions.⁸⁹ It also stated that abolition of the death penalty is essential for the protection of the right to life.

European Union

Article 2 of the Charter of Fundamental Rights of the European Union,⁹⁰ which is politically binding on EU member states, provides that no one shall be condemned to death or executed.

⁸⁹ Resolution of the UN Commission on Human Rights 2005/59, 20 April 2005, para. a.

⁹⁰ The presidents of the European Parliament, European Council, and European Commission signed and proclaimed the Charter on behalf of their institutions on 7 December 2000 in Nice, France.

4

The Death Penalty in the OSCE Area

The participating States that retain the death penalty in some form have committed to ensuring transparency by making information about its use available to the public.⁹¹ This publication facilitates compliance with this commitment by providing a forum for participating States to make such information available on an annual basis. This chapter is comprised of country entries on the nine participating States that retain the death penalty in some form. The Constitution of Moldova was amended in July 2006, thus completing the legislative abolition of the death penalty.

Each country entry contains information on relevant international instruments, the country's legal framework, statistics, and compliance with international safeguards. First, the section on "relevant international instruments" lists the legally binding instruments the state has ratified. Second, the section on the "legal framework" outlines those crimes for which a death sentence can be imposed. It is in this section that trends towards reduction in scope or abolition are presented. Third, the section on "statistics" indicates the number of death sentences that have been imposed and executed during the reporting period. Fourth, the section on "international safeguards" provides information on compliance with the international standards that were outlined in Chapter 3.

Methodology

It is the ODIHR's intention that the content of each country entry should be based primarily on information provided by the participating States themselves. Accordingly, a questionnaire on the use of the death penalty was sent to each of the relevant states in the first half of July 2006. The questionnaire, which is reproduced in Annex 4, requested detailed information on each state's legal framework, statistics on sentences and executions, and information on compliance with the international standards outlined in Chapter 3. Of the nine participating States that retain the death penalty, five responded to the questionnaire: Belarus, Kazakhstan, Kyrgyzstan, Latvia, and the United States of America.

⁹¹ Copenhagen Document 1990, para. 17.8.

In some instances, where the information received from the participating States was not complete, it has been supplemented by information received from other sources, including OSCE field presences, intergovernmental organizations, non-governmental organizations, and media reports.

4.1 ALBANIA

Relevant International Instruments

International Instruments	Ratification Status ⁹²
ICCPR	R
Second Optional Protocol to the ICCPR	-
CRC	R
ECHR	R
Protocol No. 6 to the ECHR	R
Protocol No. 13 to the ECHR	S

Status: partly abolitionist

Legal Framework

The death penalty has been abolished for all peacetime crimes but is retained for serious crimes committed in wartime or during a state of emergency.⁹³ The Military Criminal Code envisages the death penalty for a number of crimes if committed during a state of emergency or during wartime.⁹⁴ Women and individuals who were below the age of 18 at the time of the crime cannot be sentenced to death.

The UN Human Rights Committee commended Albania for having abolished the death penalty in 2000, and encouraged it to ratify the Second Optional Protocol to the ICCPR.⁹⁵

⁹² R = ratified, S = signed, a dash (-) indicates that the participating State has neither signed nor ratified the relevant instrument.

⁹³ Article 8(a) of the Military Criminal Code, Law No. 8003, 1955. Amended by Law No. 8991, 4 July 2002.

⁹⁴ Articles 25, 26, 28, 34, 47, 50, and 77 of the Military Criminal Code.

⁹⁵ Concluding observations of the Human Rights Committee: Albania, CCPR/CO/82/ALB, 2 December 2004, para. 7.

4.2 BELARUS

Relevant International Instruments

International Instruments	Ratification Status ⁹⁶
ICCPR	R
Second Optional Protocol to the ICCPR	-
CRC	R

Status: retentionist

Legal Framework

The Constitution of the Republic of Belarus provides that, until the abolition of the death penalty, it may be applied in accordance with the law as an exceptional penalty for particularly serious crimes and only in accordance with the verdict of a court of law.⁹⁷ The Criminal Code provides that the death penalty may be imposed for severe crimes connected with the deliberate deprivation of life with aggravating circumstances.⁹⁸

The death penalty is envisaged for 14 crimes: acts of aggression, murder of a representative of a foreign state or international organization with the intention of provoking international tension or war, international terrorism, genocide, crimes against the security of humanity, use of weapons of mass destruction, violations of the laws and customs of war, murder with aggravating circumstances, terrorism, terrorist acts, treason that results in loss of life, conspiracy to seize power, sabotage, and murder of a police officer.⁹⁹

Moratorium

On 11 March 2004, the Constitutional Court concluded its assessment of the compliance of the death-penalty provisions in the Criminal Code with the Constitution, following a request from the House of Representatives of the National Assembly. The Court found a number of provisions of the Criminal Code to be inconsistent with the

⁹⁶ R = ratified, S = signed, a dash (-) indicates that the participating State has neither signed nor ratified the relevant instrument.

⁹⁷ Article 24 of the Constitution of the Republic of Belarus, 27 November 1996.

⁹⁸ Article 59(1) of the Criminal Code, 9 July 1999.

⁹⁹ Articles 122(2), 124(2), 126, 127, 128, 134, 135(3), 139(2), 289(3), 359, 356(2), 367(3), 360(2), and 362 of the Criminal Code.

Constitution,¹⁰⁰ thus providing for the possibility of either the abolition of the death penalty or the imposition of a moratorium on executions as the first step towards full abolition. The Court recalled that such measures may be enacted by the head of state and the National Assembly.

On 24 June 2005, the president of Belarus submitted a draft law to the parliament that, *inter alia*, supplements the Criminal Code with a reference to the temporary character of the death penalty, which, until its abolition, may be applied as an exceptional measure for cases of premeditated murder with aggravating circumstances. On 23 June 2006, the law was adopted by the Chamber of Representatives of the National Assembly of Belarus.

Method of execution

Shooting¹⁰¹

Statistics

Death sentences

According to official statistics provided by the Supreme Court, during the period from 30 June 2005 to 30 June 2006, seven individuals were sentenced to death for murder with aggravating circumstances: Alexei M. Serdukov (11 October), Sergei M. Pugachev (28 June), Nikolai A. Lubich (8 December), Viktor I. Tikhikh (29 November), Petr P. Korablev (27 December), Oleg A. Potapenko (27 December), and Vyacheslav V. Knyazkov (27 December). All convictions are final, i.e., all appeals stages have been exhausted.

Executions

Official statistics indicate that five individuals were executed during the period from 30 June 2005 to 30 June 2006 (irrespective of the date of sentencing). No information was provided with respect to the identities of the executed individuals.

International Safeguards

Pregnant women and minors

Women and individuals who were below the age of 18 at the time of the crime cannot be sentenced to death.¹⁰²

¹⁰⁰ Articles 48 (Part 1, para. 11) and 59 have been found to be inconsistent with the Constitution due to the lack of reference, in those articles, to the temporary character of the death penalty.

¹⁰¹ Article 59 (1), Criminal Code.

¹⁰² Article 59 (2)(1), Criminal Code. In addition, Article 59 (2)(3) also stipulates that men who are over the age of 65 at the time when the sentence is pronounced are exempt from the death penalty.

Fair-trial guarantees

In 2001, the UN special rapporteur on the independence of judges and lawyers reported that: “the administration of justice, together with all its institutions, namely the judiciary, the prosecutorial service and the legal profession, are undermined and not perceived as separate and independent. The rule of law is therefore thwarted.”¹⁰³

In November 2004, after a visit to Belarus, the UN Working Group on Arbitrary Detention noted a clear willingness and openness to change law and practice and to introduce positive changes; however, it noted with concern the excessive power given to prosecutors and investigators during the period of pre-trial detention, and that investigations are carried out without effective oversight by a judge. The Working Group also expressed concern regarding the procedure used for appointing and dismissing judges, which does not guarantee their independence from the executive branch, and also regarding the lack of independence of lawyers and of the National Bar Association.¹⁰⁴ In January 2006, the UN special rapporteur on the situation of human rights in Belarus expressed his concern about the imbalance between the powers of the prosecution and the rights of the defence, which could lead to judicial errors, stating that this was of extreme concern since Belarus still applied the death penalty.¹⁰⁵

Pardon or commutation

The Constitution gives the president authority to grant clemency, and the death penalty may be commuted to life imprisonment.¹⁰⁶ Appeals are initially considered by the Clemency Commission. The cases of all individuals sentenced to death are automatically considered regardless of whether the sentenced person has submitted an appeal for clemency.¹⁰⁷

Relatives

Relatives are not informed in advance of the date of execution. The administration of the institution where the execution is carried out is obliged to notify a close relative about the execution. The body is not returned, and the place of burial is not disclosed.¹⁰⁸ The UN Human Rights Committee has found the treatment of the rela-

¹⁰³ Report on the mission to Belarus, E/CN.4/2001/65/Add.1, 8 February 2001.

¹⁰⁴ Report of the Working Group on Arbitrary Detention, mission to Belarus, E/CN.4/2005/6/Add.3, 25 November 2004.

¹⁰⁵ Report of the Special Rapporteur on the Situation of Human Rights in Belarus, Adrian Severin, E/CN.4/2006/36, 16 January 2006, Paragraph 20.

¹⁰⁶ Article 84 (19) of the Constitution.

¹⁰⁷ Presidential Decree No. 250 “On the introduction of the regulation of provisions for pardoning procedure in the Republic of Belarus”, 3 December 1994.

¹⁰⁸ Article 175, Criminal Executive Code.

tives of individuals sentenced to death in Belarus to amount to inhuman treatment in violation of Article 7 of the ICCPR.¹⁰⁹

The Human Rights Committee stated that the complete secrecy surrounding the date of execution, the place of burial, and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress.

In addition, the UN Committee against Torture has also expressed concern about the reported refusal to return the bodies of those executed to their relatives.¹¹⁰

¹⁰⁹ CCPR/C/77/D/887/1999, 24 April 2003, and CCPR/C/77/D/886/1999, 28 April 2003.

¹¹⁰ Concluding observations of the Committee against Torture, 20 November 2000.

4.3 KAZAKHSTAN

Relevant International Instruments

International Instruments	Ratification Status ¹¹¹
ICCPR	R
Second Optional Protocol to the ICCPR	-
CRC	R

Status: *de facto* abolitionist

Legal Framework

The Constitution of the Republic of Kazakhstan envisages the death penalty, as an exception to the right to life, for 10 especially grave crimes:¹¹² murder with aggravating circumstances; terrorism; attempt on the life of a person administering justice or preliminary investigations; attempt on the life of the president; state treason; sabotage; planning, preparation, or conduct of aggressive war; use of prohibited means and methods of conducting war; genocide; and mercenary participation in armed conflict. The death penalty is also envisaged for eight military crimes if committed in time of war.¹¹³

Moratorium

A presidential decree placing a moratorium on executions was introduced in December 2003.¹¹⁴ The moratorium is not limited to a particular time frame but is in place until the question of the full abolition of the death penalty is resolved. In addition, the presidential decree also provided for the introduction of life imprisonment as an alternative to the death penalty from 1 January 2004.

Subsequent amendments to the Criminal Code provide for the suspension of all executions while the moratorium is in place and set out the status of those individuals

¹¹¹ R = ratified, S = signed, a dash (-) indicates that the participating State has neither signed nor ratified the relevant instrument.

¹¹² Article 15 of the Constitution of the Republic of Kazakhstan, 30 August 1995. Also see Article 49 (1) of the Criminal Code, 1 January 1998.

¹¹³ Articles 96 (2), 156 (2), 159 (2), 160, 162 (4), 165, 167, 171, 233, 340, 367 (2), 368 (3), 369 (3), 373 (3), 374 (3), 375 (3), 380 (3), 383 of the Criminal Code of the Republic of Kazakhstan.

¹¹⁴ Presidential Decree No. 1251 "On the introduction of a moratorium on the death penalty in the Republic of Kazakhstan", 17 December 2003.

who are subject to the moratorium.¹¹⁵ In the event of the cancellation of the moratorium, the Criminal Code provides that all death sentences should be executed within one year. Everyone subject to the moratorium would have the right to appeal to the Clemency Commission for commutation of their sentences.¹¹⁶

Method of execution

Shooting¹¹⁷

Statistics

Executions

None

International Safeguards

Pregnant women and minors

Women and individuals who were below the age of 18 at the time of the crime cannot be sentenced to death.¹¹⁸

Pardon or commutation

All individuals sentenced to death have the right to appeal for commutation of the sentence to life imprisonment or 25 years' imprisonment.¹¹⁹ Appeals are initially considered by the Clemency Commission. The cases of all individuals sentenced to death are considered regardless of whether the convicted individual submits an appeal for clemency.¹²⁰

Relatives

Relatives are not informed in advance of the date of execution, the body is not returned, and the location of the place of burial is not disclosed to the relatives until at least two years after the burial has taken place.¹²¹

¹¹⁵ Law of the Republic of Kazakhstan No. 514-II "On the introduction of amendments and additions to legislative acts of the Republic of Kazakhstan on the introduction of life imprisonment", 31 December 2003; Law of the Republic of Kazakhstan No. 529-II "On the introduction of amendments and additions to the Criminal Code and Criminal Procedure Code of the Republic of Kazakhstan in connection with the introduction of a moratorium on the execution of death penalty", 10 March 2004.

¹¹⁶ Article 49 of the Criminal Code of the Republic of Kazakhstan; Article 166 (1) of the Criminal Procedure Code of the Republic of Kazakhstan.

¹¹⁷ Article 49 of the Criminal Code; Article 167 of the Criminal Executive Code, 13 December 1997. The death penalty cannot be executed until one year after all appeals have been exhausted.

¹¹⁸ Article 49 (2) of the Criminal Code. This article also stipulates that the death penalty cannot be applied to men who are over the age of 65 at the time the sentence is pronounced.

¹¹⁹ Article 49 (3) of the Criminal Code, Article 31 (2) of the Criminal Procedure Code, and Article 166 (1) of the Criminal Executive Code.

¹²⁰ Presidential Decree No. 2975 "On provisions for pardoning procedure by the president of the Republic of Kazakhstan", 7 May 1996.

¹²¹ Article 167, Criminal Executive Code.

4.4 KYRGYZSTAN

Relevant International Instruments

International Instruments	Ratification Status ¹²²
ICCPR	R
Second Optional Protocol to the ICCPR	-
CRC	R

Status: *de facto* abolitionist

Legal Framework

The Constitution provides that the death penalty may be used only in exceptional cases.¹²³ The death penalty is currently retained for three crimes: murder, rape of a female minor, and genocide.¹²⁴

The Ministry of Justice has developed a draft law “On introducing amendments to certain legislative acts of the Kyrgyz Republic” that envisages abolition of the death penalty. The draft law, which was approved by the government on 7 October 2005,¹²⁵ was forwarded for parliamentary review. The Ministry of Justice has also developed a draft law on accession to the Second Optional Protocol of the ICCPR. On 17 April 2006, the president submitted the draft law to the parliament for consideration. Both laws were reviewed and subsequently rejected by the parliament.¹²⁶

Three current drafts of the Constitution of the Kyrgyz Republic contain provisions on abolition of the death penalty.

Moratorium

An official moratorium on executions is in place. A moratorium was initially introduced by a presidential decree that entered into force on 8 December 1998. The moratorium has subsequently been extended on an annual basis. On 29 December 2005, the presidential decree extended the moratorium indefinitely, from 1 January

¹²² R = ratified, S = signed, a dash (-) indicates that the participating State has neither signed nor ratified the relevant instrument.

¹²³ Article 18 of the Constitution of the Kyrgyz Republic, 5 May 1993.

¹²⁴ Articles 97 (2), 129 (4), and 373 of the Criminal Code, 1 October 1997.

¹²⁵ Decree No. 473 of the Government of the Kyrgyz Republic, 7 October 2005.

¹²⁶ In accordance with the Law of the Kyrgyz Republic “On Regulations of the Parliament of the Kyrgyz Republic”, Article 105, the rejected draft law can be considered by the parliament six months after its rejection.

2006 until its final abolition.¹²⁷ The government was instructed to prepare draft legislation with the objective of the ratification of the Second Optional Protocol to the ICCPR, abolition of the death penalty and its replacement by life imprisonment or a lengthy term of imprisonment, including for persons covered by the moratorium. The Decree also tasks the government to take measures to improve prison conditions for those sentenced to death.

The government treats information on the number and identity of individuals subject to the moratorium as confidential.

Method of execution

Shooting¹²⁸

Statistics

Death sentences

According to official statistics provided by the Ministry of Justice, six individuals were sentenced to death during the period from 30 June 2005 to 30 June 2006. No information on their identities was provided. All convictions are final, i.e., all appeals stages have been exhausted. All individuals were sentenced for murder.

Executions

None

International Safeguards

Pregnant women and minors

Women and individuals who were below the age of 18 at the time of the crime cannot be sentenced to death.¹²⁹

Fair-trial guarantees

On 30 December 2005, after his visit to Kyrgyzstan, the special rapporteur on the independence of judges and lawyers welcomed reforms related to the administration of the justice sector in Kyrgyzstan, but expressed concerns in a number of areas. In particular, he noted that the prosecutor played a dominant, including a supervisory, role in the administration of justice and exerted a disproportionate amount of influence

¹²⁷ Presidential Decree No. 667 “On prolongation of the term of the moratorium on execution of the death penalty in the Kyrgyz Republic”, 29 December 2005.

¹²⁸ Article 155 (2) of the Criminal Executive Code, 13 December 1999. This article also provides that executions should not be carried out in public.

¹²⁹ Article 50 (2) of the Criminal Code.

over the pre-trial and trial stages of judicial proceedings. He noted that higher-level prosecutors had the executive power to instigate a supervisory review once a case had been closed. He concluded that the procedures related to the appointment, length of tenure, and dismissal of judges prevent the judiciary from operating in a fully independent manner. He also noted the failure to implement the principle of equality of arms. Widespread corruption among the judiciary was also pointed out.¹³⁰

Pardon or commutation

The Constitution gives the president the authority to grant clemency and provides that all individuals sentenced to death have the right to seek clemency.¹³¹ The cases of all individuals sentenced to death are automatically considered by the Presidential Clemency Commission regardless of whether the sentenced person has submitted an appeal for clemency.¹³² Official statistics indicate that, during the period from 30 June 2005 to 30 June 2006, the death sentences of seven individuals were commuted to prison terms.

Relatives

Relatives are not informed of the execution in advance. The administration of the institution where the execution is carried out is obliged to notify a close relative, although the date of the execution is not disclosed. The body is not returned, and the place of burial is not disclosed.¹³³

¹³⁰ Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, Addendum, Mission to Kyrgyzstan, E/CN.4/2006/52/Add.3, 30 December 2005.

¹³¹ Article 18 (4) and Article 46 of the Constitution.

¹³² The clemency procedure is governed by the Law "On general principles of amnesty and clemency" and Presidential Decree No. 100 on "Regulations on the procedure for providing pardon in the Kyrgyz Republic", 13 April 1995.

¹³³ Article 155 (5) of the Criminal Executive Code.

4.5 LATVIA

Relevant International Instruments

International Instruments	Ratification Status ¹³⁴
ICCPR	R
Second Optional Protocol to the ICCPR	-
CRC	R
ECHR	R
Protocol No. 6 to the ECHR	R
Protocol No. 13 to the ECHR	S

Status: partly abolitionist

Legal Framework

The death penalty has been abolished for crimes committed in peacetime. However, the Criminal Code envisages the death penalty for murder with aggravating circumstances if committed during wartime.¹³⁵ Draft laws on ratification of the Second Optional Protocol to the ICCPR and Protocol No. 13 to the ECHR were submitted to parliament on 21 February 2002 and 17 October 2002, respectively.

¹³⁴ R = ratified, S = signed, a dash (-) indicates that the participating State has neither signed nor ratified the relevant instrument.

¹³⁵ Article 37 of the Criminal Code, 15 October 1998, with amendments of 18 May 2000. This article also provides that the death penalty may not be applied to individuals below the age of 18 at the time of crime, or to women.

4.6 THE RUSSIAN FEDERATION

Relevant International Instruments

International Instruments	Ratification Status ¹³⁶
ICCPR	R
Second Optional Protocol to the ICCPR	-
CRC	R
ECHR	R
Protocol No. 6 to the ECHR	S
Protocol No. 13 to the ECHR	-

Status: *de facto* abolitionist

Legal Framework

The Constitution of the Russian Federation provides for the death penalty, until its abolition, as an exceptional punishment for especially grave crimes against life.¹³⁷ The Criminal Code of the Russian Federation envisages the death penalty for five crimes: murder with aggravating circumstances, assassination attempt against a state or public figure, attempt on the life of a person administering justice or preliminary investigations, attempt on the life of a law-enforcement officer, and genocide.¹³⁸

Upon accession to the Council of Europe on 28 February 1996, the Russian Federation committed itself to introducing a moratorium on executions and to ratifying Protocol No. 6 to the ECHR within three years. A presidential decree was issued on 16 May 1996 that requested the government to draft legislation on ratification of Protocol No. 6.¹³⁹ A draft law was submitted to the parliament (the State Duma) on 6 August 1999. As of 30 June 2006, the Russian Federation had still not ratified Protocol No. 6.

The Parliamentary Assembly of the Council of Europe has continuously urged the Russian Federation to abolish the death penalty and to conclude its ratification of

¹³⁶ R = ratified, S = signed, a dash (-) indicates that the participating State has neither signed nor ratified the relevant instrument.

¹³⁷ Article 20 (2) of the Constitution of the Russian Federation, 25 December 1993.

¹³⁸ Articles 105 (2), 277, 295, 317, and 357 of the Criminal Code, 13 June 1996.

¹³⁹ Presidential Decree No. 724 "On the gradual decrease of the application of the death penalty in connection with accession to the Council of Europe".

Protocol No. 6 to the ECHR.¹⁴⁰ The commissioner for human rights of the Council of Europe has called on the Russian Federation to ratify Protocol No. 6 to the ECHR as soon as possible.¹⁴¹

The Russian Federation confirms that the legislative abolition of the death penalty is one of the goals of the juridical and legal reforms currently under way in the Russian Federation and that government departments are currently engaged in intensive preparations for the State Duma's ratification of Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the introduction of the relevant amendments and additions to the Criminal Code, the Code of Criminal Procedure, and the Criminal Executive Code of the Russian Federation.¹⁴²

Moratorium

A presidential decree instituted a moratorium on executions in 1996.¹⁴³ Furthermore, a ruling of the Constitutional Court placed a temporary prohibition on the passage of death sentences on 2 February 1999.

The Russian Constitution guarantees the right to trial by jury in cases where the death penalty is a potential sentence.¹⁴⁴ Accordingly, the Constitutional Court adopted a resolution prohibiting the passage of death sentences until such time as jury trials are introduced throughout the Russian Federation. At the time of the decision, jury trials were available in only nine of the 89 constituent entities of the Federation. It is envisaged that jury trials will have been introduced throughout the Russian Federation by 1 January 2007. The introduction of jury trials will remove the bar that the Constitutional Court has placed upon the passage of death sentences. The UN Human Rights Committee expressed its concern that the current moratorium would automatically end once the jury system has been introduced and called upon the Russian Federation to abolish the death penalty *de jure* before the expiration of the moratorium and to accede to the Second Optional Protocol to the ICCPR.¹⁴⁵

¹⁴⁰ Resolution 1277, 23 April 2002; Parliamentary Assembly session: 24 to 30 June 2006, 29 June 2006.

¹⁴¹ Report by Alvaro Gil-Robles on his visits to the Russian Federation on 15-30 July 2004, 19-29 September 2004, and 20 April 2005.

¹⁴² Comments by the Government of the Russian Federation to the concluding observations of the Human Rights Committee, CCPR/CO/79/RUS/Add.1, 2 February 2005, Paragraph 11.

¹⁴³ Presidential Decree No. 724 "On the gradual decrease of the application of the death penalty in connection with accession to the Council of Europe", 16 May 1996.

¹⁴⁴ Article 20 (2) of the Constitution.

¹⁴⁵ Concluding observations of the Human Rights Committee: Russian Federation, 6 November 2003; CCPR/CO/79/RUS, 6 November 2003, Paragraph 11.

On 3 June 1999, a presidential decree commuted the sentences of all individuals on death row to either life or 25 years' imprisonment.

Method of execution

Shooting¹⁴⁶

Statistics

Death sentences

None

Executions

None

International Safeguards

Pregnant women and minors

Women and individuals who were below the age of 18 at the time of the crime cannot be sentenced to death.¹⁴⁷

Pardon or commutation

The Constitution gives the president authority to grant clemency.¹⁴⁸ The death penalty can be commuted to life imprisonment or deprivation of liberty for 25 years.¹⁴⁹ Clemency commissions in each of the constituent entities consider appeals for clemency and make recommendations to the president.¹⁵⁰ All cases concerning individuals sentenced to death are automatically considered regardless of whether the sentenced person has submitted an appeal for clemency. Sentences are not executed until a decision on clemency has been issued.¹⁵¹

Relatives

Relatives are not informed in advance of the date of execution. The body is not returned, and the place of burial is not disclosed.¹⁵²

¹⁴⁶ Article 186 of the Criminal Executive Code, 8 January 1997.

¹⁴⁷ Article 59 (2) of the Criminal Code. This article also stipulates that the death penalty cannot be applied to men who are over the age of 65 at the time when the sentence is pronounced.

¹⁴⁸ Article 89 (c) of the Constitution.

¹⁴⁹ Articles 59 (3) of the Criminal Code.

¹⁵⁰ A single Presidential Pardon Commission was replaced by regional commissions in each of the constituent entities by Presidential Decree No. 1500 "On the procedure for consideration of clemency appeals in the Russian Federation", 28 December 2001.

¹⁵¹ Article 184 of the Criminal Executive Code.

¹⁵² Article 186(4) of the Criminal Executive Code.

4.7 TAJIKISTAN

Relevant International Instruments

International Instruments	Ratification Status ¹⁵³
ICCPR	R
Second Optional Protocol to the ICCPR	-
CRC	R

Status: *de facto* abolitionist

Legal Framework

The Constitution provides that: “Everyone has the right to life. No one shall be deprived of life except by order of the court for exceptionally grave crimes.”¹⁵⁴ In August 2003, the president signed legislation abolishing the death penalty for 10 crimes.¹⁵⁵ The death penalty was retained for five crimes: murder with aggravating circumstances, rape with aggravating circumstances, terrorism, biocide, and genocide.¹⁵⁶ On 30 November 2004, the lower chamber of parliament adopted amendments to the Criminal Code that provide for life imprisonment for these five crimes.¹⁵⁷ These amendments were endorsed by the upper chamber of parliament on 11 February 2005 and signed by the president on 1 March 2005. The Criminal Executive Code has also been amended.¹⁵⁸ The amendments introduce life imprisonment as an alternative to the death penalty for men between 18 and 63 years of age.

Moratorium

On 30 April 2004, the president of Tajikistan announced the introduction of a moratorium on executions and signed a subsequent law to that effect on 15 July 2004. The moratorium, which was applicable from the day of its announcement, is not limited to a specific time frame but has been put in place indefinitely.

¹⁵³ R = ratified, S = signed, a dash (-) indicates that the participating State has neither signed nor ratified the relevant instrument.

¹⁵⁴ Article 18 of the Constitution of the Republic of Tajikistan, 6 November 1994.

¹⁵⁵ Law No. 45 “On amendments to the Criminal Code”, 1 August 2003.

¹⁵⁶ Articles 104 (2), 138 (3), 179 (4), 399, and 398 of the Criminal Code, 21 May 1998, with amendments of 1 August 2003.

¹⁵⁷ Law “On the introduction of amendments to the Criminal Code”, 30 November 2004.

¹⁵⁸ Law No. 86 “On amendments to the Criminal Code” and Law No. 87 “On amendments to the Criminal Executive Code”, 1 March 2005.

The moratorium applies to those who were sentenced to death prior to 30 April 2004 and to those convicted of crimes for which the death penalty is envisaged after 30 April 2004. In the former case, death sentences were to be commuted to 25 years' imprisonment; in the latter case, a sentence of 25 years' imprisonment was to be passed as opposed to the death penalty. As indicated above, however, life imprisonment was also introduced on 1 March 2005 as an alternative to the death penalty.

Official statistics on persons currently subjected to the moratorium were not provided.

Method of execution

Shooting¹⁵⁹

Statistics¹⁶⁰

Official statistics on sentences and executions are not made public.¹⁶¹

Death sentences

None

Executions

None

International Safeguards

Pregnant women and minors

Women and individuals who were below the age of 18 at the time of the crime cannot be sentenced to death.¹⁶²

Fair-trial guarantees

By the end of the current reporting period, the UN Human Rights Committee had adopted decisions on six communications from individuals in Tajikistan on issues relating to the death penalty. The Committee found a number of violations of the ICCPR, including Article 6 (right to life), Article 7 (prohibition against torture or other ill-treatment), Article 9 (prohibition against arbitrary detention), Article 10 (1) (right of persons in detention to be treated with humanity), and Article 14 (right to a fair trial).¹⁶³

¹⁵⁹ Article 219 (2) of the Criminal Executive Code, 6 August 2001. This article also provides that executions shall not be carried out in public.

¹⁶⁰ No official statistics were provided.

¹⁶¹ Article 9 (22) of the Law "On the enumeration of information constituting a state secret", 10 May 2002.

¹⁶² Article 59 (2) of the Criminal Code, and Law No. 45 "On amendments to the Criminal Code", 1 August 2003.

¹⁶³ CCPR/C/79/D/1096/2002, 6 November 2003, para. 7; CCPR/C/81/D/964/2001, 20 August 2004, para. 7; CCPR/C/81/D/1117/2002, 25 August 2004, para. 7; CCPR/C/83/D/973/2001, 13 April 2005, para. 8; CCPR/C/86/D/1044/2002, 26 April 2006, para. 9; CCPR/C/85/D985/2001, 16 November 2005, para. 6.7 and 7.

In all of these cases, the Committee recalled that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of Article 6 of the ICCPR (right to life) and held that the sentences of death were passed in violation of the right to a fair trial as set out in Article 14 of the Covenant, and therefore also in violation of Article 6 of the ICCPR.¹⁶⁴

In its concluding observations on the initial report submitted by Tajikistan, the UN Human Rights Committee expressed its concern about a number of relevant areas, including the widespread use of ill-treatment and torture by investigative and other officials to obtain information; testimony or self-incriminating evidence from suspects, witnesses or arrested persons; the absence of any provision prohibiting the use of unlawfully obtained evidence in Tajikistan's criminal procedure law; widespread reports of the obstruction of detainees' access to a lawyer; the lack of equality of arms between the suspect/accused or defence counsel and the prosecution both during a criminal investigation and in court, in particular that a prosecutor, rather than a judge, remained responsible for authorizing arrests; the lack of independence of the judiciary, as reflected in the process of appointment and dismissal of judges, as well as in their economic status; the military courts having jurisdiction to try criminal cases concerning both military personnel and civilians; and reports of several convictions *in absentia*, notwithstanding the prohibition by law of trials *in absentia*.¹⁶⁵

On 30 December 2005, after his visit to Tajikistan, the special rapporteur on the independence of judges and lawyers welcomed a number of significant and far-reaching reforms affecting the judiciary that had been introduced in Tajikistan. However, he expressed his concerns about the dominant role of the prosecutor in the judicial process. He also noted that the executive branch remained very influential in the selection and appointment procedures for judges, the vulnerable position of lawyers, and the lack of appropriate training on international standards governing the independence of the judiciary for all legal professions.¹⁶⁶

Individual complaints to the UN Human Rights Committee

Tajikistan has ratified the First Optional Protocol to the ICCPR and thereby recognizes the competence of the UN Human Rights Committee to consider complaints

¹⁶⁴ CCPR/C/79/D/1096/2002, 6 November 2003, para. 7; CCPR/C/81/D/964/2001, 20 August 2004, para. 6.9; CCPR/C/81/D/1117/2002, 25 August 2004, para. 6.6; CCPR/C/83/D/973/2001, 13 April 2005, para. 7.6.

¹⁶⁵ Concluding observations of the Human Rights Committee, Tajikistan, CCPR/CO/84/TJK, 18 July 2005, para. 10, 11, 12, 15, 16, 17, 18 and 19.

¹⁶⁶ Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, Addendum, Mission to Tajikistan, E/CN.4/2006/52/Add.4, 30 December 2005, para. 85, 86, and 87.

from individuals claiming that their rights under the ICCPR have been violated.¹⁶⁷ In cases concerning the death penalty, the UN Human Rights Committee can issue urgent requests to suspend the execution of a death sentence while the case is pending before the Committee.

On 18 July 2005, the UN Human Rights Committee recalled that in at least two cases Tajikistan had executed prisoners under sentence of death, even though their cases were pending before the Committee under the Optional Protocol to the ICCPR and requests for interim measures for protection had been addressed to the state party. The Committee concluded that the disregard of the Committee's requests for interim measures constituted a grave breach of Tajikistan's obligations under the ICCPR and the Optional Protocol.¹⁶⁸

Pardon or commutation

The Constitution gives the president authority to grant clemency.¹⁶⁹ Death sentences may be commuted to 25 years' imprisonment.¹⁷⁰ The cases of all individuals sentenced to death are automatically considered by the Clemency Commission regardless of whether the person sentenced to death has submitted an appeal for clemency.¹⁷¹ Sentences are not executed until a decision on clemency has been issued.

According to official statistics, the president pardoned 23 people who had been sentenced to death in the period from 1999 through 2004.¹⁷²

Relatives

Relatives are not informed in advance of the date of execution. The body is not returned, and the place of execution and the place of burial are not disclosed.¹⁷³ The Criminal Executive Code provides that the court that passed the death sentence should inform the relatives of the fact that the execution has taken place; however, it does not indicate the time frame after execution within which this information should be made available to the relatives.

The UN Human Rights Committee expressed its concern about the fact that, when prisoners under sentence of death were executed, the authorities systematically failed

¹⁶⁷ Tajikistan acceded to the First Optional Protocol to the ICCPR on 4 January 1999.

¹⁶⁸ Concluding observations of the Human Rights Committee, Tajikistan, CCPR/CO/84/TJK, 18 July 2005, para. 8.

¹⁶⁹ Article 69 (27) of the Constitution. Article 216 of the Criminal Executive Code provides that individuals sentenced to death can apply to the president for clemency.

¹⁷⁰ Article 59 of the Criminal Code.

¹⁷¹ The Commission was established by Presidential Decree No. 721, 8 May 1997.

¹⁷² Initial Report of Tajikistan submitted under Article 40 of the ICCPR, CCPR/C/TJK/2004/1, 11 April 2005.

¹⁷³ Article 221 of the Criminal Executive Code. Information of this nature is treated as a state secret. Article 9 (22) of the Law "On the enumeration of information constituting a state secret", 10 May 2002.

to inform the families and relatives of the date of execution or to reveal the place of burial of the executed persons. The Committee concluded that these practices amounted to a violation of Article 7 of the ICCPR (prohibition against torture or other ill-treatment) with respect to the family and relatives of the executed persons. The Committee also concluded that those practices had the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental stress.¹⁷⁴

¹⁷⁴ Concluding observations of the Human Rights Committee, CCPR/CO/84/TJK, 18 July 2005, para. 9; CCPR/C/86/D/1044/2002, 26 April 2006, para. 9; CCPR/C/85/D/985/2001, 16 November 2005, para. 6.7 and 7.

4.8 UNITED STATES OF AMERICA

Relevant International Instruments

International Instruments	Ratification Status ¹⁷⁵
ICCPR	R
Second Optional Protocol to the ICCPR	-
CRC	S
American Convention on Human Rights	S

Status: retentionist

Legal Framework

The death penalty is retained at the federal level and in the majority of the 50 states.¹⁷⁶ The states that have abolished the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin, as well as the District of Columbia.

The United States Code identifies 42 crimes (38 homicide and four non-homicide) for which the death penalty may be used. The crimes that carry the death penalty differ from state to state, although all states envisage the death penalty for murder.¹⁷⁷ The Uniform Code of Military Justice allows for the death penalty as a possible punishment for 15 offences, many of which must occur during a time of war.

In March 2006, the USA Patriot Act Improvement and Reauthorization Act of 2005¹⁷⁸ was enacted by Congress. The Act created a number of new offences, including some for which death is a potential punishment, and shortened the appeals process by expediting capital *habeas corpus* petitions in federal court. In addition, the Act clarifies appropriate death penalty procedures for certain cases under the Controlled Substances Act,¹⁷⁹ and expands on the authorities governing provision of counsel to defendants liable to the death penalty and who are unable to afford counsel.

¹⁷⁵ R = ratified, S = signed, a dash (-) indicates that the participating State has neither signed nor ratified the relevant instrument.

¹⁷⁶ The death penalty is also retained in military law for 15 crimes.

¹⁷⁷ A complete list of capital crimes can be found at www.deathpenaltyinfo.org.

¹⁷⁸ H.R. 3199.

¹⁷⁹ The Controlled Substances Act (Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970) is the legal basis by which the manufacture, importation, possession, and distribution of certain drugs are regulated by the federal government of the United States.

As of June 2006, both South Carolina Governor Mark Sanford and Oklahoma Governor Brad Henry had signed into law legislation that allows the death penalty to be imposed for repeat child molesters. The law of South Carolina permits the death penalty as a form of punishment if the accused has twice been convicted of raping a child younger than 11 years old. Oklahoma law makes the death sentence a potential penalty for anyone convicted of a second or subsequent conviction of rape, sodomy, or lewd molestation involving a child under 14. Consequently, Oklahoma, South Carolina, Montana, Louisiana, and Florida are now the only states to allow the death penalty for certain sex crimes. However, since the US Supreme Court reinstated capital punishment 30 years ago, no one convicted of a sex offence alone has been executed.

Moratorium

There is no moratorium on executions in place at the federal level. At the state level, Illinois and New Jersey have instituted a moratorium on the use of the death penalty.

In December 2005, the State Senate of New Jersey introduced a one-year moratorium on executions by the state. The measure was passed by the legislature on 10 January 2006, and was signed into law on 12 January 2006. New Jersey is the first state to impose a moratorium pertaining to the death penalty legislatively, rather than by executive order. The moratorium will remain in effect until 15 January 2007. The Commission was created to study all aspects of capital punishment in the state and to report on its findings and recommendations not later than 15 November 2006.¹⁸⁰

In June 2004, New York's highest court, the Court of Appeals, held that the central provision of the state's law on capital punishment violated the state Constitution,¹⁸¹ and the state's death penalty was overturned. Sustaining the court-ordered moratorium, in June 2006, members of the New York Assembly's Codes Committee voted against a bill to reinstate the death penalty.

In a December 2004 decision, the Kansas Supreme Court held that the state's death penalty law was invalid under the federal Constitution, because it gave the prosecution an unfair advantage over defendants during the sentencing process. Therefore a court-ordered moratorium was imposed. On 26 June 2006, the US Supreme Court overturned that decision in *Kansas v. Marsh*, holding that Kansas's death penalty law is in fact constitutional, thereby reinstating the death penalty in Kansas.

¹⁸⁰ *Death penalty news*, Amnesty International, May 2006.

¹⁸¹ The court found that the sentencing provisions were coercive because they required judges to tell juries in capital cases that, if they deadlocked and failed to reach a verdict during the sentencing phase of a trial, the judge would impose a more lenient sentence.

On 31 May 2005, the North Carolina House of Representatives Judiciary Committee approved a moratorium measure, clearing the way for the House to vote on the measure.¹⁸² However, the House vote was delayed, and the bill has since been amended to implement a study on various aspects related to the death penalty rather than a moratorium.

In March 2005, members of the Connecticut Judiciary Committee voted on legislation to repeal the state's death penalty; the bill failed to pass in the House. Similarly, in March 2005, the New Mexico House of Representatives passed a bill to abolish the death penalty; the bill failed to pass in the House. In 2006, a moratorium bill was introduced in the Mississippi legislature, but the attempt was not successful. A similar situation took place in Virginia. In 2006, both Tennessee and Alabama state legislatures had moratorium bills introduced, which have now been moved to their House Judiciary Committees.

Method of execution

The possible methods of execution are lethal injection, electrocution, the gas chamber, hanging, and shooting. The most common method of execution is lethal injection, which is either the sole method or a possible method of execution in all states except Nebraska, where the sole method of execution is electrocution.

On 12 June 2006, the United States Supreme Court ruled in *Hill v. McDonough* that convicted individuals may bring civil rights challenges against lethal injection as a method of execution. Although the Court did not rule on the constitutionality of lethal injection as an execution procedure, it determined that convicted individuals who believed that the protocol most commonly used for lethal injections caused unnecessary pain and suffering could pursue a claim under a civil rights statute.

Statistics

Death sentences

According to official statistics, 3,370 prisoners were on civilian death row by the end of the first half of 2006, compared to 3,455 prisoners as of 30 June 2005. There are nine prisoners on the US military's death row.

Executions

Recently, the death penalty has primarily been exercised at the state level; there have been no executions at the federal level since 2003. Similarly, since 1961, there have been no executions under the Uniform Code of Military Justice.

¹⁸² The North Carolina state Senate passed a moratorium bill in 2003.

2005

According to official statistics, 60 individuals were executed in 16 states in 2005. Of these, 19 executions were carried out in Texas; five each in Indiana, Missouri, and North Carolina; four each in Ohio, Alabama, and Oklahoma; three each in Georgia and South Carolina; two in California; and one each in Arkansas, Connecticut, Delaware, Florida, Maryland, and Mississippi.¹⁸³

2006

According to official statistics, 32 individuals were executed in the first half of 2006. Of these, 16 executions were carried out in Texas; three each in North Carolina, Ohio, and Virginia; two in Oklahoma; and one each in California, Indiana, Nevada, South Carolina, and Tennessee.

International Safeguards

Pregnant women and minors

Pregnant women cannot be executed under federal or state law. Women can be executed, and, according to unofficial statistics, there were 49 women on death row as of 31 December 2005.¹⁸⁴

At the federal level, individuals who were below the age of 18 at the time of the crime cannot be sentenced to death.¹⁸⁵

On 1 March 2005, the US Supreme Court took a decision to abolish the death penalty for defendants who were under the age of 18 when they committed their crimes.¹⁸⁶ In *Roper v. Simmons*, the Supreme Court held that the execution of minors constitutes cruel and unusual punishment within the meaning of the Eighth Amendment to the Constitution. The Court found that a national consensus had emerged that such executions are a disproportionate punishment for juveniles, whom society views as categorically less culpable than adult criminals.

In July 2006, after having considered the second and third periodic reports submitted by the United States, the UN Human Rights Committee noted with concern reports that 42 states and the federal government had laws allowing persons under the age of 18 at the time the offence was committed to receive sentences of life in prison without the possibility of parole, and that some 2,225 youth offenders were serving such sentences in US prisons. The Committee found that sentencing children to

¹⁸³ The Bureau of Justice Statistics of the US Department of Justice.

¹⁸⁴ *Death Penalty Information Center*, www.deathpenaltyinfo.org.

¹⁸⁵ 18 U.S.C. § 3591(a)(2)(D), 18 U.S.C. § 3591 (b)(2).

¹⁸⁶ *Roper v. Simmons*, 543 U.S. (2005).

life sentences without the possibility of parole was not in compliance with Article 24(1) of the ICCPR (provision on the protection of children).¹⁸⁷

Individuals suffering from any form of mental disorder

The US Supreme Court has ruled that the execution of an insane person – somebody who is not aware of the impending execution or the reasons therefor – violates the US Constitution.¹⁸⁸ Furthermore, the Supreme Court has also ruled that the execution of a mentally retarded person violates the Constitution.¹⁸⁹ The American Association of Mental Retardation defines mental retardation as *substantial intellectual impairment appearing at birth or during childhood that impacts on the everyday life of the individual*, although definitions of mental retardation differ from state to state. However, there is no constitutional bar against the execution of individuals who are mentally ill but are not classified as “insane”, e.g., persons diagnosed with schizophrenia

Foreign nationals

The Vienna Convention on Consular Relations (VCCR) provides that state authorities must inform foreign nationals without delay of their right to have their consulate notified of their detention.¹⁹⁰

On 31 March 2004, the International Court of Justice (ICJ) ruled that the United States had violated its obligation to inform foreign nationals without delay of their right to have their consulate notified of their detention in 51 of the 52 cases of Mexican nationals brought before it by Mexico.¹⁹¹ The ICJ held that the United States should review the convictions and sentences in each case and determine whether the failure to provide consular notification caused actual prejudice to the defendant in the process of administration of criminal justice.

The United States’ concerns that the ICJ’s decisions had interpreted the VCCR in ways not intended or anticipated by the parties led the United States to withdraw from the Optional Protocol to the VCCR. Despite the United States’ concerns with the ICJ’s interpretation of the VCCR, on 28 February 2005, President Bush issued a memorandum to the US attorney general affirming that the United States would comply with the ICJ judgement.¹⁹² Under the president’s determination, the 51 Mex-

¹⁸⁷ Concluding observations of the Human Rights Committee: United States of America, advance unedited version, CCPR/C/USA/Q/3/CRP.4, para. 34.

¹⁸⁸ *Ford v. Wainwright*, 477 U.S. 399 (1986).

¹⁸⁹ *Atkins v. Virginia*, 536 U.S. (2002).

¹⁹⁰ Article 36 of the Vienna Convention on Consular Relations, 1963.

¹⁹¹ Case concerning Avena and other Mexican nationals (*Mexico v. United States of America*), 31 March 2004. The International Court of Justice made a similar ruling in the LaGrande case (*Germany v. United States*), 27 June 2001.

¹⁹² *Mexico v. United States of America*, 31 March 2004.

ican nationals whose cases were affected by the ICJ ruling may file petitions in state courts seeking review and reconsideration.¹⁹³ The US government subsequently filed briefs with the US Supreme Court and the Texas Court of Criminal Appeals in a case involving Ernesto Medellin, one of the individuals named in *Mexico v. United States of America*. The government's *amicus* briefs argue that the president's decision is binding on state courts and, consistent with the US government's longstanding interpretation of the VCCR, that the VCCR does not grant a foreign national the right to challenge his or her conviction or sentence in the United States.

On 13 May 2004, Governor Henry of Oklahoma commuted the death sentence of Mexican national Osvaldo Torres, whose case was one of those before the ICJ, to life imprisonment without the possibility of parole. The governor noted that Torres had been denied his consular rights under the VCCR. That same day, the Oklahoma Court of Criminal Appeals remanded Mr. Torres' case for an evidentiary hearing on whether Mr. Torres was prejudiced by the state's violation of his rights under the VCCR and by his ineffective assistance by claim of counsel. The hearing was conducted on 29 November 2004, and on 18 March 2005, the district court judge found that Mr. Torres had suffered prejudice because he was not adequately informed of his rights under the VCCR. On 6 September 2005, the Oklahoma Court of Criminal Appeals found that Mr. Torres had actually suffered prejudice by the failure to inform him of his rights under the VCCR, but only in the context of his capital sentence. In light of the governor's granting of clemency and limitation of Torres' sentence to life without the possibility of parole, the court found that no further relief was required.¹⁹⁴

On 23 May 2005, the US Supreme Court dismissed Mr. Medellin's writ of *certiorari* as improvidently granted, noting that he had filed a successive state application for a writ of habeas corpus just four days before oral arguments, and "that state proceeding may provide Medellin with the review and reconsideration of his Vienna Convention claim that the ICJ required".¹⁹⁵ In September 2005, the Texas Court of Criminal Appeals heard oral arguments in *Ex Parte Jose Ernesto Medellin*.

On 28 June 2006, the US Supreme Court issued a decision in two cases involving breaches of the VCCR regarding Mexican nationals, Moises Sanchez-Llamas and Mario Bustillo, whose cases were addressed by the ICJ decision in *Mexico v. United States of America*. Both cases involved failures to inform arrested or detained foreign nationals that they could request consular notification and access. The Court did not

¹⁹³ State courts will be expected to give effect to the ICJ judgement in accordance with general principles of comity. Consistent with the *Mexico v. United States of America* judgement, the president's decision to provide review and reconsideration in these cases does not mean that there must be a different outcome.

¹⁹⁴ *Torres v. State*, 2005 OK CR 17.

¹⁹⁵ *Medellin v. Dretke*, 544 U.S., 23 May 2005.

decide whether Article 36 of the VCCR conveyed individual and judicially enforceable rights, but stated that even if it did, suppression of evidence was not an appropriate remedy for breaches of Article 36.¹⁹⁶ The Court pointed out that defendants have other alternatives for breaches of Article 36, such as diplomatic remedies. The Court also decided the defendants could be procedurally barred from making Article 36 claims if they did not raise them at trial.

According to unofficial statistics, 120 foreign nationals were on death row as of 24 May 2006.¹⁹⁷

Fair-trial guarantees

Racial prejudices

In its concluding observations on the periodic report of the United States in 2001, the Committee for the Elimination of Racial Discrimination noted with concern that, according to the special rapporteur of the United Nations Commission on Human Rights on extrajudicial, summary, or arbitrary executions, there is a disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty, particularly in Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. The Committee urged the state party to ensure, possibly by imposing a moratorium, that no death penalty be imposed as a result of racial bias.¹⁹⁸

Military commissions

The death penalty may be applied in accordance with the military order establishing military commissions to prosecute individuals currently detained at Guantanamo Bay.¹⁹⁹

On 29 June 2006, the US Supreme Court ruled that the Bush administration did not have authority to set up war-crimes tribunals and that the commissions were illegal under both military law and the Geneva Conventions. In this decision, the Court upheld the challenge of Salim Ahmed Hamdan against his trial at the US facility at Guantanamo. He is one of the 10 detainees facing a military tribunal there.²⁰⁰

¹⁹⁶ Article 236 of the Vienna Convention on Consular Relations contains provisions related to the communication and contact with nationals of the sending state.

¹⁹⁷ *Death Penalty Information Center*, www.deathpenaltyinfo.org.

¹⁹⁸ Concluding observations of the CERD on the United States, A/56/18, 14 August 2001, para. 396.

¹⁹⁹ Military Commission Order No. 1 "Procedures for trials by military commissions of certain non-United States citizens in the war against terrorism", 21 March 2002, Part 6 (g).

²⁰⁰ *Hamdan v. Rumsfeld*, 548 U.S., 126S.Ct. 2749, 29 June 2006.

Pardon or commutation

For federal death-row inmates, the president alone has the power to grant clemency. In cases relating to the death penalty, the Department of Justice states: “No petition for reprieve or commutation of a death sentence should be filed before proceedings on the petitioner’s direct appeal of the judgment of conviction and first petition under 28 U.S.C. § 2255 have terminated. A petition for commutation of sentence should be filed no later than 30 days after the petitioner has received notification from the Bureau of Prisons of the scheduled date of execution.” New guidelines also require that an inmate be given 120 days of notice of an execution date. The clemency process varies from state to state, usually involving the governor or a board of advisors, or both. In all cases, a formal petition for clemency must be filed. Under the Uniform Code of Military Justice, only the president has the power to commute a death sentence. Furthermore, no service member can be executed unless the president confirms the death penalty.

According to official statistics, since 2004, courts have overturned death penalty sentences in nine cases, including two in 2005 and one in the first half of 2006. In two of those cases, the individuals were retried and found not guilty. In the other cases, the prosecutors declined to retry the individuals and the cases were dismissed. Since 2004, an additional eight individuals sentenced to death have had their sentences commuted on humanitarian grounds. Of these commutations, two occurred in the first half of 2006. These commutations include the case of Osvaldo Torres, detailed above in the section on consular notification. The remaining commutations were issued as a result of the mental condition of the defendants or possible trial injustices.

4.9 UZBEKISTAN

Relevant International Instruments

International Instruments	Ratification Status ²⁰¹
ICCPR	R
Second Optional Protocol to the ICCPR	-
CRC	R

Status: retentionist

Legal Framework

The death penalty is envisaged for two crimes:²⁰² murder with aggravating circumstances and terrorism.²⁰³ Until August 1998, the death penalty had been envisaged for 13 crimes. The death penalty was abolished for five crimes in 1998, for four crimes in 2001, and for two more crimes in 2003.

On 1 August 2005, President Karimov signed a decree on the abolition of the death penalty as of 1 January 2008.²⁰⁴ The decree envisages that, from 1 January 2008, the death penalty shall be abolished in Uzbekistan as a form of criminal punishment; punishment in the form of life, or long-term, imprisonment shall be introduced in its place.²⁰⁵ On 29 June 2006, the president issued a decree about the additional measures for legislative amendments to be introduced in connection with the envisaged abolition.²⁰⁶

Moratorium

There is no moratorium on executions. The UN special rapporteur on the question

²⁰¹ R = ratified, S = signed, a dash (-) indicates that the participating State has neither signed nor ratified the relevant instrument.

²⁰² Article 51 of the Criminal Code, 22 September 1994, with further amendments as of 29 September 2004.

²⁰³ Articles 97 (2) and 155 (3) of the Criminal Code.

²⁰⁴ Decree of the President of the Republic of Uzbekistan "On abolition of the death penalty in the Republic of Uzbekistan", 1 August 2005.

²⁰⁵ Uzbek and international human rights organizations welcomed the decree but expressed concerns about the fate of those who have been already sentenced and those who will be sentenced before 2008. They have called for an immediate moratorium on executions and for sentences to be commuted to life imprisonment.

²⁰⁶ Decree of the President of Uzbekistan "On additional measures to develop legislative and normative acts, which are required to be adopted in connection with the abolition of the death penalty in the Republic of Uzbekistan", 29 June 2006.

of torture has called for the introduction of a moratorium on executions in Uzbekistan.²⁰⁷

Method of execution

Shooting²⁰⁸

Statistics

Access to statistics

Statistics on death sentences and executions are not made public. In its concluding observations on the second periodic report submitted by Uzbekistan, the UN Human Rights Committee expressed its concern about the lack of information on the number of prisoners sentenced to death, grounds for conviction, and the number of executions. The Committee has urged Uzbekistan to “publish such information periodically and make it accessible to the public”.²⁰⁹

In a press statement in September 2004, the UN special rapporteur on the question of torture highlighted “the lack of cooperation by the Government of Uzbekistan with United Nations human rights mechanisms in relation to reports on executions of persons whose sentences were allegedly based on confessions extracted under torture”.²¹⁰

Death sentences

Official statistics were not provided. According to information received from non-governmental organizations, at least nine individuals were sentenced to death during the period from 30 June 2005 to 30 June 2006. They are: Inomjon Abdullaev, Alisher Turabaev, Shermukhammad Khakimov, Jurabek Irgaybaev, Alexandr Sim, Igor Khan, Vadim Popov, Egambergan Razzakov, and Mikhail Sakhno.

Executions

Official statistics were not provided.

²⁰⁷ Report of the Special Rapporteur on the Question of Torture, Theo van Boven, Addendum, Mission to Uzbekistan, E/CN.4/2003/68/Add.2, 3 February 2003, para. 70 (s).

²⁰⁸ Article 51 of the Criminal Code. Article 140 of the Criminal Executive Code of 1 April 1995 provides that executions shall not be carried out in public.

²⁰⁹ Concluding observations of the Human Rights Committee: Uzbekistan, CCPR/CO/83/UZB, 26 April 2005, para. 7.

²¹⁰ Report of the Special Rapporteur on the Question of Torture, E/CN.4/2005/62, 15 December 2004, para. 7.

International Safeguards

Pregnant women and minors

Women and individuals who were below the age of 18 at the time of the crime cannot be sentenced to death.²¹¹

Fair-trial guarantees

The UN special rapporteur on the question of torture described the use of torture in Uzbekistan as systematic. He also reported a lack of respect for the principle of presumption of innocence, a lack of independence of the judiciary, and discretionary powers of the prosecutor with respect to access to detainees by legal counsel and relatives.²¹² Both the UN Human Rights Committee and the UN Committee against Torture have expressed their concern about the lack of independence of the judiciary in Uzbekistan.²¹³ In addition, the UN Human Rights Committee has also expressed its concern about “the continuing high number of convictions based on confessions made in pre-trial detention that were allegedly obtained by methods incompatible with article 7 of the Covenant [prohibition against torture or other ill-treatment]”.²¹⁴

Individual complaints to the UN Human Rights Committee

Uzbekistan has ratified the Optional Protocol to the ICCPR and thereby recognizes the competence of the UN Human Rights Committee to consider complaints from individuals claiming that their rights under the ICCPR have been violated.²¹⁵ In cases concerning the death penalty, the UN Human Rights Committee can issue urgent requests to suspend the execution of a death sentence while the case is pending before the Committee.

In considering communications from individuals in Uzbekistan on issues relating to the death penalty, the UN Human Rights Committee found a number of violations of the ICCPR, including of Article 6 (right to life), Article 7 (prohibition against torture and other ill-treatment), Article 10 (1) (right of persons deprived of their liberty to be treated with humanity) and Article 14 (right to a fair trial).²¹⁶ The Committee found that the death sentence had been pronounced without meeting the require-

²¹¹ Article 51 of the Criminal Code. This article also stipulates that men over the age of 60 at the time of sentencing cannot be sentenced to death.

²¹² Report of the UN Special Rapporteur on the Question of Torture, Mission to Uzbekistan, E/CN.4/2003/68/Add.2, 3 February 2003.

²¹³ Concluding observations of the Human Rights Committee, Uzbekistan, CCPR/CO/71/UZB, 26 April 2001; Concluding observations/comments of the Committee against Torture, CAT/C/CR/28/7, 6 June 2002; Concluding observations of the Human Rights Committee: Uzbekistan, CCPR/CO/83/UZB, 26 April 2005.

²¹⁴ Concluding observations of the Human Rights Committee: Uzbekistan, CCPR/CO/83/UZB, 26 April 2005, para. 10.

²¹⁵ Uzbekistan acceded to the Optional Protocol to the ICCPR on 28 September 1995.

²¹⁶ CCPR/C/80/D/917/2000, 29 March 2004, para. 6; CCPR/C/86/D/915/2000, 19 April 2006, para. 8.

ments of a fair trial and recalled that the initial imposition of the death penalty at the conclusion of a trial in which the provisions of the ICCPR have not been respected constitutes a violation of the right to life in Article 6 of the ICCPR.

On 27 March 2006, in a report on the situation in specific countries or territories, the special rapporteur on the independence of judges and lawyers reiterated his serious concern about the generally deteriorating human rights situation in Uzbekistan. He expressed particular concern regarding the conduct of the executive and prosecutorial authorities and the legislative framework in relation to the conduct of trials. He stressed the need for in-depth reforms of the judiciary, including the role of prosecutors, judges, and lawyers in the judicial process.²¹⁷

According to official sources, Uzbekistan received urgent requests concerning 31 individuals from the UN Human Rights Committee in 2003–2004. Fifteen individuals (Sh. Andasbaev, U. Eshov, I. Babajanov, M. Ismailov, M. Mirzaev, A. Uteev, O. Ruzmetov, U. Ruzmetov, O. Makhmudov, N. Bazarov, O. Kupalov, B. Yusupov, J. Madrakhimov, I. Sultanov, A. Karimov) had been executed before the requests were received. Death sentences were commuted to different terms of imprisonment for seven individuals (A. Kornetov, A. Isaev, N. Karimov, E. Gungin, F. Karaev, I. Karimov, S. Alisov). In the cases of nine individuals (F. Nasibulin, I. Khudaiberganov, Sh. Juraev, F. Alimov, A. Buryachek, A. Tolipkhujayev, I. Ibragimov, Sh. Baibulatonov, S. Kadirov), execution of death sentences was suspended while the cases were pending before the Clemency Commission under the Office of the President.²¹⁸

In its concluding observations on the second periodic report submitted by Uzbekistan, the UN Human Rights Committee recalled that, in several cases, Uzbekistan had executed prisoners under sentence of death while their cases were pending before the Committee. The Committee reminded Uzbekistan that “disregard of the Committee’s requests for interim measures constitutes a grave breach of the state party’s obligations under the Covenant and the Optional Protocol”.²¹⁹

Pardon or commutation

Death sentences can be commuted to 25 years’ imprisonment.²²⁰ The cases of all

²¹⁷ Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, Addendum, Situation in specific countries or territories, E/CN.4/2006/52/Add.1, 27 March 2006, para. 297.

²¹⁸ Note Verbale from the Permanent Mission of Uzbekistan to the Office of the UN High Commissioner for Human Rights, E/CN.4/2005/G/21, 21 March 2005, para. 21.1.

²¹⁹ Concluding observations of the Human Rights Committee: Uzbekistan, CCPR/CO/83/UZB, 26 April 2005, para. 6.

²²⁰ Article 93 of the Constitution and Article 51 (3) of the Criminal Code. Regulation on the Procedure of Granting Clemency in the Republic of Uzbekistan. Approved by Decree of the President of the Republic of Uzbekistan NYII-1839, 11 September 1997.

individuals sentenced to death are automatically considered by the Clemency Commission under the Office of the President regardless of whether the sentenced person has submitted an appeal for clemency. Sentences are not executed until a decision on clemency has been issued.

Official statistics were not provided. According to information received from non-governmental organizations, during the period from 30 June 2005 to 30 June 2006, death sentences of two individuals, Yuldash Kasymov and Inomjon Abdullaev, were commuted.

Relatives

Relatives are not informed in advance of the date of execution. The body is not returned, and the place of burial is not disclosed.²²¹ Following his mission to Uzbekistan, the special rapporteur on the question of torture expressed serious concern regarding the situation of the relatives of people sentenced to death: “The complete secrecy surrounding the date of execution, the absence of any formal notification prior to and after the execution and the refusal to hand over the body for burial are believed to be intentional acts, fully mindful of causing family members turmoil, fear and anguish over the fate of their loved ones. The practice of maintaining families in a state of uncertainty with a view to punishing or intimidating them or others must be considered malicious and amounting to cruel and inhuman treatment.”²²²

In its concluding observations on the second periodic report submitted by Uzbekistan, the UN Human Rights Committee remained concerned that, “when prisoners under sentence of death are executed, the authorities systematically fail to inform the relatives of the execution, defer the issuance of a death certificate and do not reveal the place of burial of the executed persons”. The Committee stated that, “these practices amount to a violation of article 7 of the Covenant [prohibition against torture or other ill-treatment] with respect to the relatives of the executed persons”. The Committee urged Uzbekistan to change its practice in this regard in order to comply fully with the Covenant’s provisions.²²³

²²¹ This information is regarded as a state secret in accordance with Resolution of the Cabinet of Ministers of the Republic of Uzbekistan No. 239-33 “On measures of protection of state secrets of the Republic of Uzbekistan”, 5 May 1994, and Article 140 of the Criminal Executive Code.

²²² Report of the UN Special Rapporteur on the Question of Torture, Mission to Uzbekistan, E/CN.4/2003/68/Add.2, 3 February 2003, Note 153.

²²³ Concluding observations of the Human Rights Committee: Uzbekistan, CCPR/CO/83/UZB, 26 April 2005, para. 8.

Annexes

Annex 1

OSCE COMMITMENTS ON THE DEATH PENALTY

Concluding Document of the 1989 Vienna Follow-up Meeting

Questions relating to security in Europe

(24) With regard to the question of capital punishment, the participating States note that capital punishment has been abolished in a number of them. In participating States where capital punishment has not been abolished, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to their international commitments. This question will be kept under consideration. In this context, the participating States will co-operate within relevant international organizations.

Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE

17. The participating States

17.1 recall the commitments undertaken in the Vienna Concluding Document to keep the question of capital punishment under consideration and to co-operate within relevant international organizations;

17.2 recall, in this context, the adoption by the General Assembly of the United Nations, on 15 December 1989, of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;

17.3 note the restrictions and safeguards regarding the use of the death penalty which have been adopted by the international community, in particular Article 6 of the International Covenant on Civil and Political Rights;

17.4 note the provisions of the Sixth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty;

17.5 note recent measures taken by a number of participating States towards the abolition of capital punishment;

17.6 note the activities of several non-governmental organizations on the question of the death penalty;

17.7 will exchange information within the framework of the Conference on the Human Dimension on the question of the abolition of the death penalty and keep that question under consideration;

17.8 will make available to the public information regarding the use of the death penalty;

**Document of the 1991 Moscow Meeting of the Conference
on the Human Dimension of the CSCE**

(36) The participating States recall their commitment in the Vienna Concluding Document to keep the question of capital punishment under consideration and reaffirm their undertakings in the Document of the Copenhagen Meeting to exchange information on the question of the abolition of the death penalty and to make available to the public information regarding the use of the death penalty.

(36.1) They note

- (i) that the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty entered into force on 11 July 1991;
- (ii) that a number of participating States have recently taken steps towards the abolition of capital punishment;
- (iii) the activities of several non-governmental organizations concerning the question of the death penalty.

Concluding Document of the 1992 Helsinki Summit

The participating States

(58) Confirm their commitments in the Copenhagen and Moscow Documents concerning the question of capital punishment.

Concluding Document of the 1994 Budapest Summit

Capital Punishment

19. The participating States reconfirm their commitments in the Copenhagen and Moscow Documents concerning the question of capital punishment.

Annex 2

OTHER INTERNATIONAL STANDARDS ON THE DEATH PENALTY

UNITED NATIONS

Extract from International Covenant on Civil and Political Rights

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence 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.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Second Optional Protocol to the International Covenant on Civil and Political Rights

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

Article 3

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4

With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.
2. Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant.
2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 8

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 10

The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

- (a) Reservations, communications and notifications under article 2 of the present Protocol;
- (b) Statements made under articles 4 or 5 of the present Protocol;
- (c) Signatures, ratifications and accessions under article 7 of the present Protocol;
- (d) The date of the entry into force of the present Protocol under article 8 thereof.

Article 11

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

Extract from the Convention on the Rights of the Child

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

**Economic and Social Council: Safeguards guaranteeing protection
of the rights of those facing the death penalty**

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.
2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.
5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.
6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.
7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.
8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.
9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

General Comment 6 of the Human Rights Committee (extracts)

1. The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4)... It is a right which should not be interpreted narrowly.

...

6. While it follows from article 6 (2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes". Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the "most serious crimes". The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40, and should as such be reported to the Committee. The Committee notes

that a number of States have already abolished the death penalty or suspended its application. Nevertheless, States' reports show that progress made towards abolishing or limiting the application of the death penalty is quite inadequate.

7. The Committee is of the opinion that the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence.

UN Commission on Human Rights Resolution 2005/59

Question of the death penalty

The Commission on Human Rights,

Recalling article 3 of the Universal Declaration of Human Rights, which affirms the right of everyone to life, convinced that the abolition of the death penalty is essential for the protection of this right and recalling article 6 of the International Covenant on Civil and Political Rights and articles 6 and 37 (a) of the Convention on the Rights of the Child,

Taking note that the Second Optional Protocol to the International Covenant on Civil and Political Rights provides that no one within the jurisdiction of a State party shall be executed and that each State party shall take all necessary measures to abolish the death penalty within its jurisdiction,

Recalling the entry into force, on 1 July 2003, of Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), concerning the abolition of the death penalty in all circumstances,

Recalling also its previous resolutions in which it expressed its conviction that the abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights,

Welcoming the exclusion of capital punishment from the penalties that the Interna-

tional Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court are authorized to impose,

Welcoming also the abolition of the death penalty in some States since the last session of the Commission and decisions taken in other States that restrict the use of the death penalty, inter alia through excluding certain categories of persons or offences from its application,

Commending States that have recently acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights,

Welcoming the fact that many countries that still retain the death penalty in their penal legislation are applying a moratorium on executions, and also welcoming the regional initiatives aimed at the establishment of a moratorium on executions and the abolition of the death penalty,

Reaffirming the safeguards guaranteeing protection of the rights of those facing the death penalty, set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984, and the provisions regarding the implementation of the guidelines contained in Council resolutions 1989/64 of 24 May 1989 and 1996/15 of 23 July 1996,

Reaffirming also resolution 2000/17 of 17 August 2000 of the Sub-Commission on the Promotion and Protection of Human Rights on international law and the imposition of the death penalty on those aged under 18 at the time of the commission of the offence,

Deeply concerned about the recent lifting of moratoriums on executions in several countries,

Noting the consideration of issues relating to the question of the death penalty by the Human Rights Committee,

Welcoming the efforts of various sectors of civil society at the national and international levels to achieve the abolition of the death penalty,

1. *Expresses its concern* at the continuing use of the death penalty around the world, alarmed in particular at its application after trials that do not conform to international standards of fairness and that several countries impose the death penalty in disregard of the limitations set out in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child and of the safeguards guaranteeing protection of the rights of those facing the death penalty;
2. *Condemns* the continuing application of the death penalty on the basis of any discriminatory legislation, policies or practices;
3. *Condemns also* cases in which women are subjected to the death penalty on the

- basis of gender-discriminatory legislation, policies or practices and the disproportionate use of the death penalty against persons belonging to national or ethnic, religious and linguistic minorities;
4. *Welcomes* the seventh quinquennial report of the Secretary-General on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (E/2005/3), submitted in accordance with Economic and Social Council resolutions 1745 (LIV) of 16 May 1973, 1995/57 of 28 July 1995 and Council decision 2004/242 of 21 July 2004, which concludes that there is an encouraging trend towards the abolition and restriction of the use of the death penalty in most countries, but that much remains to be done in the implementation of the aforementioned safeguards in those countries that retain it;
 5. *Calls upon* all States that still maintain the death penalty:
 - (a) To abolish the death penalty completely and, in the meantime, to establish a moratorium on executions;
 - (b) Progressively to restrict the number of offences for which the death penalty may be imposed and, at the least, not to extend its application to crimes to which it does not at present apply;
 - (c) To make available to the public information with regard to the imposition of the death penalty and to any scheduled execution;
 - (d) To provide to the Secretary-General and relevant United Nations bodies information relating to the use of capital punishment and the observance of the safeguards guaranteeing protection of the rights of those facing the death penalty;
 6. *Calls upon* all States parties to the International Covenant on Civil and Political Rights that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty;
 7. *Urges* all States that still maintain the death penalty:
 - (a) Not to impose it for crimes committed by persons below 18 years of age;
 - (b) To exclude pregnant women and mothers with dependent infants from capital punishment;
 - (c) Not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person;

(d) Not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgement rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;

(e) To ensure that all legal proceedings, including those before special tribunals or jurisdictions, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in article 14 of the International Covenant on Civil and Political Rights;

(f) To ensure also that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence;

(g) To withdraw and/or not to enter any new reservations under article 6 of the Covenant that may be contrary to the object and purpose of the Covenant, given that article 6 enshrines the minimum rules for the protection of the right to life and the generally accepted standards in this area;

(h) To observe the safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under article 36 of the Vienna Convention on Consular Relations, particularly the right to receive information on consular assistance within the context of a legal procedure, as affirmed by the jurisprudence of the International Court of Justice and confirmed in recent relevant judgements;

(i) To ensure that, where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering and shall not be carried out in public or in any other degrading manner, and to ensure that any application of particularly cruel or inhuman means of execution, such as stoning, be stopped immediately;

(j) Not to execute any person as long as any related legal procedure, at the international or at the national level, is pending;

8. *Calls upon* States that no longer apply the death penalty but maintain it in their legislation to abolish it;
9. *Calls upon* States that have recently lifted or announced the lifting *de facto* or *de jure* of moratoriums on executions once again to commit themselves to suspend such executions;

10. *Requests* States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that the death penalty will not be carried out, and calls upon States to provide such effective assurances if requested to do so, and to respect them;
11. *Requests* the Secretary-General to submit to the Commission at its sixty-second session, in consultation with Governments, specialized agencies and intergovernmental and non-governmental organizations, a yearly supplement to his quinquennial report on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, paying special attention to the imposition of the death penalty on persons younger than 18 years of age at the time of the offence and on persons suffering from any mental or intellectual disabilities;
12. *Decides* to continue consideration of the matter at its sixty-second session under the same agenda item.

COUNCIL OF EUROPE

Extract from the European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2 – Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3 – Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4 – Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 5 – Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

Article 6 – Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 7 – Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

Article 9 – Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. any date of entry into force of this Protocol in accordance with Articles 5 and 8;
- d. any other act, notification or communication relating to this Protocol.

**Protocol No. 13 to the Convention for the Protection of Human Rights
and Fundamental Freedoms, Concerning the Abolition of the Death Penalty
in All Circumstances**

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2 – Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 3 – Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 4 – Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 5 – Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 6 – Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 8 – Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. any date of entry into force of this Protocol in accordance with Articles 4 and 7;
- d. any other act, notification or communication relating to this Protocol.

EUROPEAN UNION

Extract from the Charter of the Fundamental Rights of the European Union

Article 2

Right to Life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Guidelines on EU Policy Towards Third Countries on the Death Penalty (extracts)

III Minimum standards paper

Where states insist on maintaining the death penalty, the EU considers it important that the following minimum standards should be met:

- (i) Capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with

lethal or other extremely grave consequences. The death penalty should not be imposed for non-violent financial crimes or for non-violent religious practice or expression of conscience.

- (ii) Capital punishment may be imposed only for a crime for which the death penalty was prescribed at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
- (iii) Capital punishment may not be imposed on:
 - persons below 18 years of age at the time of the commission of their crime;
 - pregnant women or new mothers;
 - persons who have become insane.
- (iv) Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for alternative explanation of the facts.
- (v) Capital punishment must only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, and where appropriate, the right to contact a consular representative.
- (vi) Anyone sentenced to death shall have an effective right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals become mandatory.
- (vii) Where applicable, anyone sentenced to death shall have the right to submit an individual complaint under international procedures; the death sentence will not be carried out while the complaint remains under consideration under those procedures.
- (viii) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases of capital punishment.
- (ix) Capital punishment may not be carried out in contravention of a state's international commitments.
- (x) The length of time spent after having been sentenced to death may also be a factor.

- (xi) Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering. It may not be carried out in public or in any other degrading manner.
- (xii) The death penalty should not be imposed as an act of political revenge in contravention of the minimum standards, e.g. against coup plotters.

Annex 3

RELEVANT RECOMMENDATIONS MADE AT OSCE HUMAN DIMENSION IMPLEMENTATION MEETINGS (2002-2005)

Recommendations to OSCE participating States:

- The death penalty should be abolished;
- Belarus, the United States, and Uzbekistan should institute a moratorium on executions;
- Those OSCE participating States that have moratoria in place should take steps to abolish the death penalty;
- The death penalty should only be imposed for the most serious crimes and in a manner not contrary to the states' international commitments, including fair-trial guarantees;²²⁴
- Those states that have not yet abolished the death penalty should not impose it on persons who, at the time of the crime, were under 18 years of age or suffering from any form of mental disorder;
- Those OSCE participating States that have not yet done so should ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights;
- Those OSCE participating States that are members of the Council of Europe and have not done so should ratify Protocol 6 and Protocol 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- Those OSCE participating States that retain the death penalty should be guided by the ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty and UN Commission on Human Rights Resolution 2005/59 on the Question of the Death Penalty;
- OSCE participating States in which the death penalty is not used should not extradite any persons to states where there is a risk of their being condemned to death;
- OSCE participating States should make available information about their use of the death penalty to the public.²²⁵ This information should include legislative changes to the scope or use of the death penalty, the number and identity of persons sentenced to death, the exact crime for which the death sentence is

²²⁴ Vienna Document of 1989.

²²⁵ Copenhagen Document of 1990.

imposed, the number of persons on death row, the number of acts of clemency, and the number of persons executed;

- OSCE participating States should allow NGOs to visit prisons, including death row and execution chambers.

Recommendations to the OSCE, its institutions and field operations:

- The OSCE should continue to condemn the veil of secrecy surrounding the use of the death penalty in some of those states that still apply it, and should continue to explore ways of assisting the authorities in those states to ensure that statistical and other information on the death penalty is made public;
- The OSCE should develop guidelines for participating States as to what exactly the commitment to make information on the use of the death penalty available to the public entails;
- The OSCE should condemn disregard for existing standards on the use of the death penalty and explore ways of assisting those states that still use the death penalty in order to ensure compliance with these standards;
- The OSCE political bodies should strongly support the efforts of relevant OSCE field operations to place the issue of the death penalty on the agenda for dialogue with their host governments;
- The ODIHR should continue to facilitate exchange of information on the question of the abolition of the death penalty through dissemination of information, publications, and the organization of roundtables and conferences;
- Upon request, the ODIHR should provide technical assistance and expertise to the OSCE participating States on the implementation of international standards on the use of the death penalty.

Annex 4

QUESTIONNAIRE ON THE DEATH PENALTY

LEGAL FRAMEWORK

- 1) Has the number of crimes that carry the death penalty been increased or decreased since the last publication? Please also attach a copy of the complete text of all criminal offences that carry the death penalty.
- 2) Do any crimes under your country's Code of Military Law carry the death penalty? Please attach a copy of the complete text of all military criminal offences that carry the death penalty.
- 3) Have any steps been taken to introduce, retain or remove a moratorium on executions since last year's publication?
- 4) If a moratorium is in place, please indicate the legal basis of the moratorium, and explain in detail how it works in practice. Please attach copies of relevant legislation or presidential decrees.
- 5) If a moratorium is in place, please detail the specific procedure regulating the treatment and rights of persons subjected to the moratorium. Please attach copies of relevant legislation or presidential decrees.
- 6) If a moratorium is in place, please list the name and place of detention of all persons currently subjected to the moratorium.

STATISTICS

- 7) Please provide us with statistics on the number of persons who were sentenced to death in the period 30 June 2005 to 30 June 2006.
- 8) Please provide us with the full name and age of persons who were sentenced to death in the period 30 June 2005 to 30 June 2006.

- 9) Please indicate the specific crime for which each of these persons was sentenced.
- 10) Please list which of these sentences has entered into force, i.e., all appeal stages have been exhausted.
- 11) Please list which court passed each of the sentences.
- 12) Please indicate if any of the persons sentenced to death in the period from 30 June 2005 to 30 June 2006 were:
 - Under the age of 18 at the time the crime was committed;
 - Pregnant women or women with dependent infants;
 - Diagnosed as having any form of mental disorder;
 - Non-nationals. Please indicate whether or not each of these persons received consular assistance.
- 13) Please detail the regulations in place regarding the treatment of persons on death row and attach copies of the relevant legislation and regulations.
- 14) Please provide us with the full name and age of persons who were executed in the period 30 June 2005 to 30 June 2006. Please also indicate the specific crime for which each of these persons was executed.
- 15) Please indicate if any of the persons executed in the period from 30 June 2005 to 30 June 2006 were:
 - Under the age of 18 at the time the crime was committed;
 - Pregnant women or women with dependent infants;
 - Diagnosed as having any form of mental disorder;
 - Non-nationals. Please indicate whether or not each of these persons received consular assistance.
- 16) Which state body is responsible for keeping statistics on sentences, executions and commutations? Please attach any the legal or administrative regulations on the compilation and retention of such statistics.

- 17) Please provide us with the full name and age of any persons sentenced to the death penalty who have been granted clemency and have had their sentence commuted since 30 June 2005.

SAFEGUARDS

(In your answers to these questions, please provide us with separate answers with regard to civilian and military crimes.)

- 18) Please describe the procedure for informing all non-nationals who have been accused of committing a crime for which the death penalty is a potential sentence of their right to receive consular assistance. Is this procedure mandatory?
- 19) Please list all cases regarding the use of the death penalty that have been decided since the last publication, or are currently ongoing, before international bodies, e.g., UN Human Rights Committee, International Court of Justice, European Court of Human Rights.
- 20) What system do you have in place to ensure that interim stays by the UN Human Rights Committee are complied with and transmitted to all the relevant actors at the national level?
- 21) Please list the names of any persons who were executed while a procedure regarding their case was ongoing before an international body.
- 22) Please describe the procedural process of considering a request for clemency, including the factors that are taken into account when considering such a request. Please attach copies of relevant legislation or regulations.
- 23) Please indicate the procedure for informing relatives of the date of execution and the date that the execution was carried out. Please attach copies of the relevant legislation or decrees.
- 24) Please indicate the procedure for informing relatives of the place of burial of executed persons. Please attach copies of the relevant legislation or decrees.

MISCELLANEOUS

- 25) Please indicate ways in which you have co-operated with other intergovernmental organizations on this issue.

Annex 5

<i>Status of Ratifications as of:</i>				ICCPR, 2nd Optional Protocol, CRC: 8 May 2006			
				ECHR, Protocol No. 6, Protocol No. 13: 29 August 2006			
Participating State	Status	ICCPR	2nd Optional Protocol	CRC	ECHR	Protocol No. 6	Protocol No. 13
Albania	PA	r		r	r	r	s
Andorra	A	s	s	r	r	r	r
Armenia	A	r		r	r	r	s
Austria	A	r	r	r	r	r	r
Azerbaijan	A	r	r	r	r	r	
Belarus	R	r		r	n/a	n/a	n/a
Belgium	A	r	r	r	r	r	r
Bosnia-Herzegovina	A	r	r	r	r	r	r
Bulgaria	A	r	r	r	r	r	r
Canada	A	r	r	r	n/a	n/a	n/a
Croatia	A	r	r	r	r	r	r
Cyprus	A	r	r	r	r	r	r
Czech Republic	A	r	r	r	r	r	r
Denmark	A	r	r	r	r	r	r
Estonia	A	r	r	r	r	r	r
Finland	A	r	r	r	r	r	r
France	A	r		r	r	r	s
Georgia	A	r	r	r	r	r	r
Germany	A	r	r	r	r	r	r
Greece	A	r	r	r	r	r	r
Holy See	A			r	n/a	n/a	n/a
Hungary	A	r	r	r	r	r	r
Iceland	A	r	r	r	r	r	r
Ireland	A	r	r	r	r	r	r
Italy	A	r	r	r	r	r	s
Kazakhstan	DA	r		r	n/a	n/a	n/a
Kyrgyzstan	DA	r		r	n/a	n/a	n/a
Latvia	PA	r		r	r	r	s
Liechtenstein	A	r	r	r	r	r	r
Lithuania	A	r	r	r	r	r	r
Luxembourg	A	r	r	r	r	r	r

Former Yugoslav Republic of Macedonia	A	r	r	r	r	r	r
Malta	A	r	r	r	r	r	r
Moldova	A	r		r	r	r	s
Monaco	A	r	r	r	r	r	r
Netherlands	A	r	r	r	r	r	r
Norway	A	r	r	r	r	r	r
Poland	A	r	s	r	r	r	s
Portugal	A	r	r	r	r	r	r
Romania	A	r	r	r	r	r	r
Russian Federation	DA	r		r	r	s	
San Marino	A	r	r	r	r	r	r
Serbia and Montenegro	A	r	r	r	r	r	r
Slovak Republic	A	r	r	r	r	r	r
Slovenia	A	r	r	r	r	r	r
Spain	A	r	r	r	r	r	s
Sweden	A	r	r	r	r	r	r
Switzerland	A	r	r	r	r	r	r
Tajikistan	DA	r		r	n/a	n/a	n/a
Turkey	A	r	r	r	r	r	r
Turkmenistan	A	r	r	r	n/a	n/a	n/a
Ukraine	A	r		r	r	r	r
United Kingdom	A	r	r	r	r	r	r
United States of America	R	r		s	n/a	n/a	n/a
Uzbekistan	R	r		r	n/a	n/a	n/a

Notes:

r = ratification

s = signature only

n/a = non-applicable

A = abolitionist

DA = *de facto* abolitionist

PA = partly abolitionist

R = retentionist

