



# The Death Penalty in the OSCE Area

Background Paper 2019

OSCE  
ODIHR

This paper was prepared by the OSCE's Office for Democratic Institutions and Human Rights (ODIHR). Every effort has been made to ensure that the information contained in this paper is accurate and impartial.

This paper updates *The Death Penalty in the OSCE Area: Background Paper 2018*. It is intended to provide a concise update to highlight changes in the status of the death penalty in OSCE participating States since the previous publication and to promote constructive discussion of the issue. It covers the period from 1 April 2018 to 31 March 2019.

All comments or suggestions should be addressed to ODIHR's Human Rights Department at [office@odihr.pl](mailto:office@odihr.pl).

Published by the OSCE's Office for Democratic Institutions and Human Rights  
(ODIHR)

Miodowa 10

00-557 Warsaw

Poland

[www.osce.org/odihr](http://www.osce.org/odihr)

© OSCE/ODIHR 2019

ISBN 978-83-66089-83-9

All rights reserved. The contents of this publication may be freely used and copied for educational and other non-commercial purposes, provided that any such reproduction is accompanied by an acknowledgement of ODIHR as the source.

# The Death Penalty in the OSCE Area

Background Paper 2019



# Contents

<b>Introduction</b>	<b>5</b>
1. Overview	5
2. Introductory Essay: The shrinking foothold of the death penalty in international law	6
<b>The Situation of the Death Penalty in the OSCE Area</b>	<b>13</b>
1. Arguments used to retain or eventually reintroduce the death penalty	13
2. Other aspects of the situation of the death penalty in the OSCE area	21
2.1 Retentionist participating States	21
2.1.1 United States	22
2.1.2 Belarus	34
2.2 Abolitionist participating States	43
2.2.1 New developments at the international and regional levels on the abolition of the death penalty	44
2.2.2 Participating States' engagement in national or international activities relevant to the issue of the death penalty	48
2.2.3 Concerns around reintroduction of the use of the death penalty or the extension of its scope	51
2.3 De-facto abolitionist participating States	53
2.3.1 Abolitionist for ordinary crimes only	55

# Introduction

## 1. Overview

OSCE participating States have made a number of commitments regarding the death penalty, including consideration of the question of capital punishment, exchange of information on the question of the abolition of the death penalty and the provision of information on the use of the death penalty to the public.<sup>1</sup> Where the death penalty is still in use, participating States have agreed that it can be imposed only for the most serious crimes and only in line with international commitments.<sup>2</sup>

In accordance with these commitments and its mandate, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) monitors trends and new developments regarding human rights standards and practices among OSCE participating States related to the death penalty. The findings are presented each year in the *Background Paper on the Death Penalty in the OSCE Area*.<sup>3</sup> The background paper is based on information gathered by ODIHR on the situation of the death penalty in all 57 OSCE participating States during the reporting period, incorporating information from international and regional human rights bodies, non-governmental organizations and media reports.

The reporting period for ODIHR's 2019 background paper covers developments from 1 April 2018 to 31 March 2019. This year's edition includes a thematic focus on the relationship between the death penalty and the right to life, as highlighted in the new General Comment No. 36 of 30 October 2018 of the United Nations Human Rights Committee on Article 6 of the International Covenant on Civil and Political Rights (ICCPR). The new General Comment on Article 6 of the ICCPR is relevant to the

---

1 "Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE", OSCE, 29 June 1990, Copenhagen, paras. 17.7 and 17.8, <<http://www.osce.org/odihr/elections/14304>>. See also: "Concluding Document of the Third Follow-up Meeting, Vienna, 4 November 1986 to 19 January 1989", OSCE, (hereafter, "Vienna Document 1989"); "Document of the Sixteenth Meeting of the Ministerial Council Helsinki 2008", OSCE, (hereafter, "Helsinki Document 2008").

2 "Vienna Document 1989", para. 24, *op. cit.*, note 1.

3 "The Death Penalty in the OSCE Area: Background Paper 2016", OSCE/ODIHR, 21 September 2016, <<https://www.osce.org/odihr/266186>>. "The Death Penalty in the OSCE Area: Background Paper 2017", OSCE/ODIHR, 19 September 2017, <<https://www.osce.org/odihr/343116>>. "The Death Penalty in the OSCE Area: Background Paper 2018", OSCE/ODIHR, 12 September 2018, <<https://www.osce.org/odihr/393728>>.

56 OSCE participating States that have ratified this core instrument of the human rights framework.<sup>4</sup> Part I of the 2019 background paper contains an introductory essay written by a member of the UN Human Rights Committee and co-drafter of this General Comment, Professor Christof Heyns.<sup>5</sup> Part II of the background paper covers the status of the death penalty in the OSCE region during the reporting period, including new developments and main areas of concern, as well as a thematic discussion of arguments used to retain or even to reintroduce the death penalty in some OSCE participating States. Since 2016, ODIHR has included such thematic discussions on various aspects of the death penalty in this annual background paper in an attempt to further assist OSCE participating States in their exchange of information on the death penalty and the further consideration of its abolition.

Throughout the background paper, an *abolitionist* state is defined as an OSCE participating State in which there is no death penalty, in law, for any crimes. A *de-facto abolitionist* state is one in which the death penalty is foreseen in law, but in practice the punishment is not imposed. A *retentionist* state is one that continues to implement this penalty by sentencing and carrying out executions.

## **2. Introductory Essay: The shrinking foothold of the death penalty in international law**

*Christof Heyns, UN Human Rights Committee*<sup>6</sup>

The wording of Article 6 of the ICCPR on the right to life clearly reflects a compromise between the drafters: on the one hand conveying the message that the death penalty should be abolished over time, yet on the other that, at the time of drafting, an absolute prohibition would not be imposed. Under narrowly defined circumstances, there was still – for the time being – some space for this form of punishment. We have subsequently moved some seven decades forward, toward its eventual vanishing point.

In my final report as Special Rapporteur on extrajudicial, summary or arbitrary executions to the UN General Assembly in 2016, I contended it was no longer tenable to describe international law as “retentionist” but instead that it could better be understood as *progressively abolitionist*. This was a concept borrowed from thinking

---

4 Only the Holy See is not a state party to the ICCPR.

5 Christof Heyns is also the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions. The opinions expressed in the essay are his and do not necessarily reflect those of the OSCE or ODIHR.

6 Professor of Human Rights Law and Director of the Institute for International and Comparative Law in Africa, University of Pretoria. Heyns served as UN Special Rapporteur on extrajudicial, summary or arbitrary executions from 2010-2016, and has been a member of the UN Human Rights Committee since 2017, including during the adoption of General Comment No. 36 on the right to life.

around economic, social and cultural rights, entailing an obligation of conduct, rather than result, on the state to be taking steps toward abolition. For example, by adopting sentencing guidelines to restrict the application of the death penalty even among the most serious cases, by granting clemency or by imposing a prospective moratorium, states move toward progressive abolition. Less directly, it could also involve steps aimed at sensitising the public, or particular constituencies to the arguments in favour of abolition, or by keeping the question under near-constant policy review. This corresponds with the commitment made by OSCE participating States to keep complete abolition “under consideration.”

The origins of the need for “progressive abolition” go back to the drafting of the Covenant. William Schabas has discussed how during the drafting of the ICCPR between 1947 and 1954, the death penalty as a potential limitation on the right to life became a divisive issue. On one side were a significant number of states that then still retained the death penalty and, on the other, was a collective expectation that the future would bring its eventual total abolition, and seemingly an acknowledgement that the death penalty inherently conflicts with the norms underlying respect for human rights.<sup>7</sup> The provision in Article 6 (2) that “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes ...” was designed to resolve this impasse: Roger Hood has described the term as “a product of its time” and a “marker” for the policy of moving towards abolition through restriction. According to the Chairperson of the Working Group on the drafting of Article 6, the wording of Article 6 (2) was intended to show the direction in which the Working Group hoped the situation would develop. A “constant reappraisal” of the meaning of the term would be needed. The wording chosen reflected the expectation that the category of permissible capital offences would narrow over the years as the value attached to life and other inalienable human rights increased.<sup>8</sup>

This understanding of Article 6 (2) as a progressively narrowing exception is supported by the inclusion of Article 6 (6), which provides that nothing in Article 6 may be invoked to delay or prevent the abolition of capital punishment by any state party to the Covenant. The important implication of this for the present volume is that were the death penalty, or any part of its imposition, found to be a violation of another human right – most obviously the prohibition of cruel, inhuman, or

---

<sup>7</sup> William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd edition (Cambridge: Cambridge University Press, 2002), p. 68.

<sup>8</sup> Roger Hood, “The Enigma of the ‘Most Serious’ Offences”, (2006) Center for Human Rights and Global Justice Working Paper No. 9, p. 3.

degrading treatment or punishment in Article 7 of the Covenant – then the provision of Article 6 (2) cannot “save” the death penalty.<sup>9</sup>

More recently, during the period covered by this report, the UN Human Rights Committee has adopted a General Comment (No. 36), on the right to life, which spends considerable time in carefully making clear that support for the remaining foothold is running out. Building upon Article 6 (6), the General Comment notes “that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, *de facto* and *de jure*, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights.”<sup>10</sup>

The understanding of international law as progressively abolitionist was shared in 2015 by the African Commission on Human and Peoples’ Rights, in its General Comment No. 3 on the right to life, which highlighted that the vast majority of African States have now abolished the death penalty in law or in practice, and which underlined that “international law requires those States that have not yet abolished the death penalty to take steps towards its abolition in order to secure the rights to life and to dignity, in addition to other rights such as the right to be free from torture, and cruel, inhuman or degrading treatment.”<sup>11</sup>

The imperative to move away from the death penalty is clear. According to the UN Human Rights Committee, states “must be on an irrevocable path” towards its complete eradication, and the African Commission requested states to “take steps” in that direction. The same message of a need to gravitate towards abolition is conveyed by the politically binding commitment of the OSCE participating States to keep complete abolition “under consideration.”

I have previously described this as the debate taking a “practical turn,” moving beyond the question of whether the death penalty *per se* is a violation of the right to life, and turning to the practical question of whether it can ever be implemented

---

9 See Christof Heyns & Thomas Probert, “The Right to Life and the Progressive Abolition of the Death Penalty”, in *Moving Away from the Death Penalty: Argument, Trends and Perspectives*, (New York: United Nations, 2015), p. 217.

10 UN Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, U.N. Doc. CCPR/C/GC/36, 30 October 2018, para. 50.

11 African Commission on Human and Peoples’ Rights, *General Comment No.3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)* (2015), 9 August 2012, para. 22.



without violating other human rights, especially the right to be free from cruel, inhuman and degrading treatment or punishment.<sup>12</sup>

As a South African, I am reminded of Justice Chaskalson's observation in the *Makwanyane* decision, abolishing the death penalty in my country:

"In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment. Once sentenced, the prisoner waits on death row in the company of other prisoners under sentence of death, for the processes of their appeals and the procedures for clemency to be carried out. Throughout this period, those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows. Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it "...involves, by its very nature, a denial of the executed person's humanity," and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state."<sup>13</sup>

Over a number of years, the UN Human Rights Committee has voiced concern about the manner of execution in various countries, highlighting how several – for example stoning, injection of untested lethal drugs, gas chambers, burning and burying alive, and public executions – are contrary to Article 7 of the ICCPR.<sup>14</sup> However, at the same time, the Committee has also been concerned about whether the act of execution itself, however conducted, could be incompatible with the same provision. Juan E. Mendez, the former UN Special Rapporteur on torture, discussed the jurisprudence related to methods of execution that arguably violate the prohibition of torture and cruel, inhuman and degrading treatment at length in his 2012 report.<sup>15</sup> As long ago as 1993 the UN Human Rights Committee described itself as "aware that, by definition, every execution of a sentence of death may be considered to

---

12 Christof Heyns & Thomas Probert, "The Right to Life and the Progressive Abolition of the Death Penalty", *op. cit.*, note 9, p. 218.

13 Constitutional Court of South Africa, Judgement of 6 June 1995, *State v. Makwanyane and M Mchunu*, Case No. CCT/3/94 para. 26 (the quote is from US Supreme Court Justice Brennan's concurring opinion in *Furman v. Georgia* (1972)).

14 General Comment No. 36, *op. cit.*, note 10, para. 40 (citing: Concluding Observations: Iran (2011), para. 12; Concluding Observations: US (2014), para. 8; Communication No. 469/1991, *Ng v Canada*, Views adopted on 5 Nov, 1993, para. 16.4; *Malawi Africa Association v Mauritania*, Report of the ACHPR of 11 May 2000, para. 120. Concluding Observations: Democratic Republic of Korea (2001), para. 13).

15 Juan E. Mendez, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment", U.N. Doc. A/67/279, paras. 33-41.

constitute cruel and inhuman treatment within the meaning of Article 7 of the Covenant.”<sup>16</sup>

In last year’s General Comment No. 36, the Committee stated that:

“Although the allusion to the conditions for application of the death penalty in Article 6, paragraph 2 suggests that when drafting the Covenant the States parties did not universally regard the death penalty as a cruel, inhuman or degrading punishment per se, subsequent agreements by the States parties or subsequent practice establishing such agreements, may ultimately lead to the conclusion that the death penalty is contrary to Article 7 of the Covenant under all circumstances. The increasing number of States parties to the Second Optional Protocol, as well as by other international instruments prohibiting the imposition or carrying out of the death penalty, and the growing number of non-abolitionist States that have nonetheless introduced a de facto moratorium on the exercise of the death penalty, suggest that considerable progress may have been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment.”<sup>17</sup>

Various Special Rapporteurs on torture have highlighted the apparent contradiction between the prohibition of corporal punishment (even comparatively “lenient” forms) by international human rights law, and the fact that executions by methods such as hanging, electric chair, or firing squad are still regarded as permissible.<sup>18</sup> Juan E. Mendez argued that the way out of this contradiction is an “evolving standard”, drawing upon the thinking of the European Court of Human Rights in the *Selmouni* case that the definition of torture had to evolve with a democratic society’s understanding of the term.<sup>19</sup> Apropos, it is worth highlighting the 2002 opinion of the Parliamentary Assembly of the Council of Europe in which it recalled that, in its most recent resolutions, it had “reaffirmed its beliefs that the application of the death penalty constitutes inhuman and degrading punishment and a violation of the

---

<sup>16</sup> *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994) para.16.2

<sup>17</sup> General Comment No. 36, *op. cit.*, note 10, para. 51.

<sup>18</sup> See Manfred Nowak, “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,” U.N. Doc. A/HRC/10/44 and Corr.1, para. 38; Juan Mendez, *op. cit.*, note 15, para. 54.

<sup>19</sup> European Court of Human Rights, Judgement of 28 July 1999 in *Selmouni v. France*, Application No. 25803/94, para. 101.

most fundamental right, that to life itself, and that capital punishment has no place in civilized democratic societies governed by the rule of law.”<sup>20</sup>

Moreover, as Justice Chaskalson noted there is the problem of what has become known as the “death row phenomenon”.<sup>21</sup> The European Court found in a landmark decision *Soering v. United Kingdom* that the death row phenomenon as practised in the State of Virginia in the United States of America violated the prohibition of cruel, inhuman and degrading treatment.<sup>22</sup> The Human Rights Committee noted in its General Comment No. 36 that extreme delays in implementing a death penalty sentence “may also entail the violation of article 7 of the Covenant, especially when the long time on death row exposes sentenced persons to harsh or stressful conditions, including, solitary confinement [...]”<sup>23</sup>

Around the world, but perhaps especially starkly within some parts of the OSCE region, there are also concerns about the discriminatory nature of the impact of the death penalty, which has a bearing both on its arbitrariness (Article 6) and the animus underlying cruel or inhuman treatment (Article 7), as well as Articles 2 (1) and 26 of the ICCPR. In its General Comment No. 36 the Human Rights Committee noted that “Data suggesting that members of religious, racial or ethnic minorities, indigent persons or foreign nationals are disproportionately likely to face the death penalty may indicate an unequal application of the death penalty, which raises concerns under article 2 (1) read in conjunction with Article 6, as well as under article 26.”<sup>24</sup>

To return to my report to the UN General Assembly in 2016, I noted that the vast majority of States have moved away from the death penalty, if not in law (although more than half have done so), then at least in practice (80 per cent have now abolished it in law or in practice). I, therefore, pointed out that “Whereas retentionist States could in the past have argued that there was strong State practice to justify the use of the death penalty as a limitation on the right to life, that argument

---

20 PACE, Opinion 233, Draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances, January 2002, <<http://semantic-pace.net/tools/pdf.aspx?doc=aHRoc-DovLzFzc2VtYmx5LmNvZS5pbmQvbnNvZS5uZG90ZG9vWFJlZi1XRC1BVC1YUWwyUERGLnhz-bA=&xsstparams=ZmlsZWlkPTEzOTY2>>.

21 See “The Death Penalty in the OSCE Area: Background Paper 2016”, *op. cit.*, note 3, p. 20: “The phenomenon refers to a combination of circumstances that produce severe mental trauma and physical suffering in prisoners awaiting their execution in death row, including prolonged periods waiting for uncertain outcomes, solitary confinement, poor prison conditions, and a lack of educational and recreational activities.”

22 European Court of Human Rights, Judgement of 7 July 1989 in *Soering v. United Kingdom*, Application No. 14038/88, Series A, No. 161, para. 111.

23 General Comment No. 36, *op. cit.*, note 10, para. 40.

24 *Ibid.*, para. 44.

has largely lost its force.”<sup>25</sup> However, as I became acutely aware during my time as Special Rapporteur on extrajudicial, summary or arbitrary executions, and as has been underlined by various events since then, the global movement away from the death penalty has not been a linear process: there have been and will be further setbacks. Yet the direction set by the ICCPR is clear, and remains the overall direction of state practice, in spite of temporary deviations.

International debates are greatly enriched by regional mechanisms and bodies, such as the OSCE, maintaining a vigilant watch over the use of the death penalty and the potentially profound injustices that can exist in those places where it stubbornly persists. Working as a vital part of the international human rights system, such bodies can also be a critical voice in circumstances in which policymakers seek political advantage in reversing progress away from the use of the death penalty.

For those reasons, among others, I highly commend the present report.

---

<sup>25</sup> Christof Heyns, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,” U.N. Doc. A/71/372, 2 September 2016, para.41.

# The Situation of the Death Penalty in the OSCE Area

## **1. Arguments used to retain or eventually reintroduce the death penalty**

Fifty-five (55) OSCE participating States have either completely abolished the death penalty or maintain moratoria on executions as an important first step towards abolition. However, in a global context where discussions focus on the threat of terrorism and a need to be tough on crime, it is perhaps not surprising that the question of reintroducing the death penalty surfaces at times, including in the OSCE region. As ODIHR Director Ingibjörg Sólrún Gísladóttir stated in October 2018, the idea of reinstating capital punishment in specific instances is worrying, and runs entirely counter to the global trend towards abolition.<sup>26</sup> It is, therefore, a good moment to reflect on the reasons why there is still support for the death penalty, considering the growing understanding that capital punishment is a cruel, inhuman and degrading punishment. Some of the most persistent arguments used to justify the use of the death penalty and its possible reintroduction will be discussed below.

### **“The death penalty is legal”**

The death penalty was, to a certain extent, legally condoned in international law at the early stage of development of the modern day human rights framework, in view of its ultimate abolition. Article 6 (2) of the ICCPR clearly states the conditions under

---

<sup>26</sup> “On International Day against Death Penalty, OSCE/ODIHR Director raises concern over suggestions in some states to reintroduce capital punishment in certain instances”, OSCE/ODIHR, 10 October 2018, <<https://www.osce.org/odihr/399284>>.

which the death penalty may be imposed.<sup>27</sup> General Comment No. 36, as described in the introductory essay, extensively prescribes the exact safeguards foreseen in Article 6, as well as the evocation in Article 6 (6) to abolish the death penalty. The fact that the death penalty is defined as an exception under the right to life is one of the main arguments of retentionist states, including in the OSCE region, to defend its existence. Furthermore, in the politically binding OSCE commitments, the death penalty is, to a certain extent, accepted. In the 1990 Copenhagen Document, participating States reaffirmed that they will keep the question of capital punishment under consideration and recognise the restrictions and safeguards regarding the use of the death penalty, mentioning specifically Article 6 of the ICCPR. However, OSCE commitments also refer specifically to the Second Optional Protocol to the ICCPR (entered into force 1991), aiming at the abolition of the death penalty and the Sixth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), also concerning the abolition of the death penalty.

As highlighted in ODIHR's 2016 background paper,<sup>28</sup> and in the introductory essay of this report, there is a trend on the international, regional and national levels, to consider the death penalty in connection with the absolute prohibition against torture and other ill-treatment (Article 7 ICCPR). In 2017, ODIHR also highlighted the impact of capital punishment on children of parents sentenced to death or executed, including the psychological stress experienced by family members of death row prisoners, especially due to transparency issues.<sup>29</sup> Some aspects of capital punishment have already been declared a form of ill-treatment or even torture and there is therefore no legal basis for such occurrences.<sup>30</sup> In addition, there seems to be an evolving standard to consider the death penalty *per se* as running afoul of the absolute prohibition of torture and other cruel, inhuman or degrading treatment, no

---

27 See Article 6, ICCPR: 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. Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

28 "The Death Penalty in the OSCE Area: Background Paper 2016", *op. cit.*, note 3.

29 "The Death Penalty in the OSCE Area: Background Paper 2017", *op. cit.*, note 3.

30 General Comment No. 36, *op. cit.*, note 10, para. 40.

matter how it is applied.<sup>31</sup> A majority of OSCE participating States have stated that they consider the death penalty a cruel, inhuman or degrading form of punishment, 37 of whom made statements in this regard during this reporting period.<sup>32</sup>

Recent developments in the torture-free trade discussions can be seen as a positive step towards establishing a firmer link between torture and capital punishment. On 24 September 2018, the first Ministerial meeting for the Alliance for Torture-Free Trade<sup>33</sup> took place in New York on the margins of the UN General Assembly. As a result, the Alliance issued a joint communique, in which they committed to the advancement of a draft resolution to establish common international standards for the import, export and transfer of goods used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.<sup>34</sup> Although not within the reporting period of this paper, it is worth mentioning that the UN General Assembly adopted a subsequent resolution on 21 June 2019.<sup>35</sup> However, some states, also within the OSCE region, stated that they would not support the resolution because of the connection made between capital punishment and torture, emphasising that they have the sovereign right to impose the death penalty and this is not a violation of international law, unlike torture.<sup>36</sup> This demonstrates the potentially problematic effects of linking the death penalty with torture, as this could weaken the anti-torture movement; for example, states that have not ratified the UN Convention against Torture (CAT) and have not abolished the death penalty may be less willing to proceed with ratification.<sup>37</sup>

Despite the evolving human rights standard, there is still resistance (or at least a lack of consensus) from some states about the position of the death penalty in international law and the need for its eventual abolition.

---

<sup>31</sup> See introductory essay and *Chitat Ng v. Canada*, *op. cit.*,, See also introductory essay of Juan E. Mendez in “The Death Penalty in the OSCE Area: Background Paper 2016”, *op. cit.*, note 3.

<sup>32</sup> Including statements during the reporting period to the OSCE Permanent Council from Norway, Andorra, Iceland, Liechtenstein, San Marino, Switzerland, Canada, Mongolia, Holy See and EU member states.

<sup>33</sup> The Alliance for Torture-Free Trade is an initiative of Argentina, the EU and Mongolia.

<sup>34</sup> “Alliance for Torture-Free Trade Joint Communique”, 24 September 2018, <[https://eeas.europa.eu/delegations/un-new-york\\_en/51030/Alliance%20for%20Torture-Free%20Trade%20Joint%20Communique%20-%2024%20September%202018](https://eeas.europa.eu/delegations/un-new-york_en/51030/Alliance%20for%20Torture-Free%20Trade%20Joint%20Communique%20-%2024%20September%202018)>.

<sup>35</sup> UN General Assembly, *Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards*, U.N. Doc. A/73/L.94, 21 June 2019.

<sup>36</sup> “General Assembly Adopts Texts on Torture-Free Trade, Assisting Terrorism Victims, Anniversary of Cairo Population Conference”, UN, 28 June 2019, <<https://www.un.org/press/en/2019/ga12160.doc.htm>>.

<sup>37</sup> All OSCE participating States have, however, already ratified the CAT.

## “The public supports the use of the death penalty”

A second and commonly used argument to maintain capital punishment is that a state can only abolish the death penalty once the general population supports this. In the reporting period, debates surfaced once again regarding the relationship between public opinion about the death penalty and government decision making. Some states, including some in the OSCE area, affirm that the public favours the use of capital punishment; some argue that if they were to abolish the death penalty without the majority of the population supporting this decision, then abolition would in fact undermine confidence in the rule of law.<sup>38</sup> The problems surrounding basing the decision to abolish the death penalty on public opinion are multifaceted and raise many questions:

- How is public opinion measured, opinion poll questions phrased and the results presented?<sup>39</sup>
- How much public awareness is there regarding the administration and effectiveness of the death penalty?
- Are politicians using public space to stir up popular support for the death penalty?
- How does this support vary depending on the crime committed or mitigating circumstances?
- Does retention of capital punishment build trust in the criminal justice system?<sup>40</sup>
- Does support for the death penalty indicate resistance to reform or to life sentences as an alternative?<sup>41</sup>

In a recent article analysing surveys in eight countries, including one OSCE participating State, it was concluded that the public does not feel *very* strongly or is not *very* interested in the death penalty and has *limited* knowledge about its use or effectiveness.<sup>42</sup>

The current United States President has expressed open support for the imposition of the death penalty, for example in tweets calling for the death penalty to be imposed on the suspected terrorist Sayfullo Saipov and, during the reporting period,

---

38 The Death Penalty Project, “On the question of public opinion and the death penalty”, A/HRC/39/NGO/182, 28 September 2018, p. 2, <<https://www.deathpenaltyproject.org/wp-content/uploads/2018/10/18.10.01-Written-statement-to-39th-HRC.pdf>>.

39 *Ibid.*, and for detailed discussion about public support and surveys see: Roger Hood, “Is Public Opinion a Justifiable Reason Not to Abolish the Death Penalty? A Comparative Analysis of Surveys in Eight Countries”, *Berkeley Journal of Criminal Law*, Vol. 23, No. 3, 2018, <<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1135&context=bjcl>>.

40 Mai Sato, “Vox Populi, Vox Dei? A closer look at the ‘public opinion’ argument for retention”, in *Moving Away from the Death Penalty: Argument, Trends and Perspectives*, *op. cit.*, note 9, p. 254.

41 Hood, *op. cit.*, note 39, p. 230.

42 *Ibid.*, p. 225-226.



he criticized the Governor of California's decision to impose a moratorium on executions.<sup>43</sup> There is evidence that public support for the death penalty in the United States has increased somewhat.<sup>44</sup>

Officials in Belarus have cited public opinion as a reason to defer the abolition of the death penalty.<sup>45</sup> However, public debate appears to be limited in Belarus, probably due to the distinct lack of information available regarding the application of the death penalty, "as it is virtually absent in the state print and electronic media."<sup>46</sup> As the UN Special Rapporteur on the situation of human rights in Belarus highlighted, the official line delivered on 28 February 2019 by the Chairperson of the Standing Commission of the House of Representatives on Human Rights, National Relations and Mass Media, Andrei Naumovich, was that Belarus will not abolish the death penalty until a majority of the population supports this move.<sup>47</sup> This is despite no apparent government initiatives to measure public opinion since a referendum in 1996.<sup>48</sup> Both international experts and local human rights activists maintain that it is the government who should lead the debate and work on changing perceptions to favour the abolition of the death penalty.<sup>49</sup>

After citing troubling suggestions by senior politicians in some participating States to put the death penalty back on the agenda or expand its use, the ODIHR Director stated in October 2018: "All countries in the OSCE have committed to keeping the complete abolition of the death penalty under consideration, and political leaders

---

43 "NYC terrorist was happy as he asked to hang ISIS flag in his hospital room. He killed 8 people, badly injured 12. SHOULD GET DEATH PENALTY!", 2 November 2017, <<https://twitter.com/realDonaldTrump/status/925931294705545216>>; "Defying voters, the Governor of California will halt all death penalty executions of 737 stone cold killers. Friends and families of the always forgotten VICTIMS are not thrilled, and neither am I!", 13 March 2019, <<https://twitter.com/realdonaldtrump/status/1105795445794717697?lang=en>>.

44 "Public support for the death penalty ticks up", Pew Research Center, 11 June 2018, <<https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/>>.

45 "Власти Беларуси не планируют отменять смертную казнь", [Belarusian authorities are not planning to abolish the death penalty], 28 February 2019, <<https://naviny.by/new/20190228/1551381481-vlasti-belarusi-ne-planiruyut-otmenyat-smertnyu-kazn>>.

46 Human Rights Center "Viasna", "Human Rights Situation in Belarus: 2018 Analytical review", p. 8, <[http://spring96.org/files/misc/review\\_2018\\_en.pdf](http://spring96.org/files/misc/review_2018_en.pdf)>; and, Penal Reform International (PRI), "Crime and punishment: Public perception, judgment and opinion", 2013, p. 40, <<https://cdn.penalreform.org/wp-content/uploads/2014/02/Belarus-public-opinion-survey-English-for-publication1.pdf>>.

47 Anaïs Marin, "Report of the Special Rapporteur on the situation of human rights in Belarus," U.N. Doc. A/HRC/41/52, 8 May 2019, para. 23.

48 "Во все разговоры – референдума в ближайшее время не будет", [Despite all talks, there will be no referendum anytime soon], 28 April 2018, <<https://ont.by/news/lidiya-ermoshina-prezident-vnyos-polnyyu-yasnost-vo-vse-razgovori-referendy>>.

49 Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, op. cit., note 47, para. 23; and: "Time to act towards true abolition of the death penalty, say HRDs", Viasna, 19 April 2018, <<http://spring96.org/en/news/89697>>.

have a responsibility to promote such discussion, not the opposite.”<sup>50</sup> More generally, governments and political leaders should consider the extent to which they are under the obligation to strengthen the human rights framework and ensure the protection of human rights of all citizens, even if this includes taking “unpopular” decisions. For instance, the abolition of torture and other ill-treatment has shown that in some states public opinion only shifted towards accepting the prohibition of torture after abolition and only after other methods of investigating crimes and evidence finding were shown to be more effective.<sup>51</sup> In a similar way, after the public is made more aware of the possibility of errors and bias in criminal justice systems, as well as the questionable deterrent effect of the death penalty, their support diminishes.<sup>52</sup>

Crucially, “...perceptions of public opinion cannot lead the debate on the death penalty or justify departure from human rights commitments – political leadership must be exercised.”<sup>53</sup> Public perceptions can only be influenced if there is much more awareness about the many serious problems associated with the death penalty as well as its lack of effectiveness in deterring crime, as discussed further below.<sup>54</sup> Current rhetoric, also in OSCE participating States, demonstrates a worrying tendency towards “death penalty populism” while states should make relevant information available to the public and contribute to changing the public perception of the death penalty.<sup>55</sup>

### **“The death penalty is an effective deterrent for crime” and other arguments for capital punishment**

Another commonly used argument to maintain capital punishment or to justify its reintroduction is its alleged effectiveness. Widespread public misconceptions are often based on ideas that the death penalty is a deterrent that will stop people

---

50 “ODIHR Director raises concern over suggestions in some states to reintroduce capital punishment,” *op. cit.*, note 26.

51 See Roger Hood’s examples of South Africa and Germany in terms of public opinion and abolition of death penalty, *op. cit.*, note 39, p. 221; and the examples of France and Greece here: Report of the United Nations High Commissioner for Human Rights, *High-level panel discussion on the question of the death penalty*, U.N. Doc. A/HRC/30/21, 16 July 2015, para. 31.

52 Hood, *op. cit.*, note 39, p. 228; and here: “World Congress Against the Death Penalty: Round table on “Why death penalty continues to be applied in Belarus?””, Council of Europe website, 28 March 2019, <<https://www.coe.int/en/web/human-rights-rule-of-law/-/world-congress-against-the-death-penalty-round-table-on-why-death-penalty-continues-to-be-applied-in-belarus->>.

53 The Death Penalty Project, “On the question of public opinion and the death penalty”, *op. cit.*, note 38.

54 Ivan Šimonović succinctly lists what he considers as the social, political and economic costs of retribution through death penalty: Ivan Šimonović, “Introduction – An Abolitionist’s Perspective” in *Moving Away from the Death Penalty: Argument, Trends and Perspectives*, *op. cit.*, note 9, p. 20.

55 See UN General Assembly, 73/175. *Moratorium on the use of the death penalty*, U.N. Doc. A/RES/73/175, 17 December 2018, para. 5: “Further welcomes initiatives and political leadership encouraging national discussions and debates on the possibility of moving away from capital punishment through domestic decision-making.”

committing serious crimes; that it is something people deserve; that the criminal justice system is fair and reliable and that it is cheaper or more humane to execute people.<sup>56</sup> Moral or religious arguments for and against capital punishment also contribute to forming public opinion.<sup>57</sup>

Many beliefs about the death penalty are ungrounded assertions that are difficult to prove and disregard the well-documented facts about the ineffective practical application of capital punishment.<sup>58</sup> In reality, there is no conclusive evidence that the death penalty is an effective deterrent (any more than other punishments); criminal justice systems are never free from all bias or possible mistakes; and the death penalty is not less expensive than life imprisonment.<sup>59</sup>

During the reporting period, various statements in the OSCE Permanent Council highlighted the issue of effectiveness and the death penalty in the United States and Belarus. Norway delivered a statement on behalf of Andorra, Iceland, Liechtenstein, San Marino and Switzerland emphasising their opposition to the death penalty in all cases and without exception, noting the irreversibility of the death penalty along with the inherent risk of mistakes in all criminal justice systems and the proven failure of the death penalty to deter crime.<sup>60</sup> The EU, on behalf of its 28 member States, has made similar statements at the OSCE Permanent Council.<sup>61</sup> In the report of the UN Secretary-General to the UN General Assembly in July 2018, he said that there is no evidence that capital punishment is any more of an effective deterrent than other punishments. He also stated that: “Curbing crime requires a strong focus on strengthening the justice system, so that it complies with international human

---

56 “5 reasons some people think the world needs the death penalty”, Amnesty International Australia, 8 June 2019, < <https://www.amnesty.org.au/5-reasons-some-people-think-the-world-needs-the-death-penalty/>>; and: Rudolph J. Gerber and John M. Johnson, *The Top 10 Death Penalty Myths*, (Westport, Connecticut, Praeger, 2007), pp. 165-171. And: PRI, *The Death Penalty: Myths & Reality*, (London: PRI, 2015), <<https://cdn.penalreform.org/wp-content/uploads/2015/10/PRI-DP-Myths-Realities-web.pdf>>

57 See Chapter 4 - Values in *Moving Away from the Death Penalty: Argument, Trends and Perspectives*, *op. cit.*, note 9, pp. 184-234.

58 Carolyn Hoyle & Roger Hood, “Deterrence and public opinion” in *Moving away from the Death Penalty: Arguments, Trends and Perspectives*. *op. cit.*, note 9. For a general discussion of deterrence, see Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 5th ed. (New York, Oxford University Press, 2015), chapter 9 or Daniel S. Nagin and John V. Pepper, eds., *Deterrence and the Death Penalty*, (Washington, DC, National Academy of Sciences, 2012).

59 See for example detailed chapters regarding wrongful convictions, myths of deterrence, and discrimination in *Moving away from the Death Penalty, arguments, trends and perspectives*, *op. cit.*, note 9; and: Hood, *op. cit.*, note 39, p. 221; and: UN General Assembly, 73/175. *Moratorium on the use of the death penalty*, *op. cit.*, note 55.

60 “Statement on the Death Penalty in the United States of America and Belarus”, OSCE Permanent Council, 14 June 2018, <<https://www.osce.org/permanent-council/385170?download=true>>.

61 “EU statement on the Death Penalty”, OSCE Permanent Council, 14 June 2018, <<https://www.osce.org/permanent-council/385182?download=true>>.

rights law and is more effective and humane.”<sup>62</sup> A further aspect to consider is the possible effect abolition would have on advancing improvements in criminal justice systems. The American Bar Association’s report *The State of Criminal Justice 2019* about the United States found that in states that have abolished the death penalty, the controversial issue of the death penalty does not hinder different actors from co-operating with one another more effectively to reform a variety of criminal justice system issues.<sup>63</sup>

The death penalty is not only ineffective in deterring crime, but also in ensuring only those who are culpable beyond reasonable doubt are convicted. Wrongful convictions continue to occur and its irreversible nature precludes even guilty prisoners from rehabilitation. Likewise, the death penalty does not make societies safer or fairer.<sup>64</sup> In the suggested list of issues relating to the death penalty that the Advocates for Human Rights submitted to the UN Human Rights Committee together with the World Coalition Against the Death Penalty in January 2019, they highlighted the ongoing concerns raised by the UN Human Rights Committee about the high number of people wrongly sentenced to death in the United States.<sup>65</sup> The UN Human Rights Committee considers executing people whose guilt has not been established beyond reasonable doubt an arbitrary deprivation of life.<sup>66</sup> If these aspects were better understood and publicized, public support for the death penalty would presumably decline.<sup>67</sup>

Moreover, the ineffectiveness of the death penalty is exacerbated by its discriminatory use.<sup>68</sup> At the UN high-level panel in February 2019, experts discussed how all biases could be addressed in the application of the death penalty to ensure it is

---

62 Report of the Secretary-General, *Moratorium on the use of the death penalty*, U.N. Doc. A/73/260, 27 July 2018, para. 60.

63 Ronald J. Tabak, “Capital Punishment”, *The State of Criminal Justice 2019*, The American Bar Association, p. 244, <[https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2019/capital\\_punishment\\_2019.pdf](https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2019/capital_punishment_2019.pdf)>.

64 “Joint Statement of UN Independent Experts”, 7th World Congress against the death penalty, March 2019, <<http://congress.ecpm.org/wp-content/uploads/2019/03/7thWC-joint-statement-UN-Special-Procedures-Man-date-Holders.pdf>>.

65 The Advocates for Human Rights and The World Coalition Against the Death Penalty, “The United States’ Compliance with the International Covenant on Civil and Political Rights Suggested List of Issues Relating to the Death Penalty”, January 2019, p. 5, <[http://www.theadvocatesforhumanrights.org/uploads/usa\\_tahr\\_wcadp\\_ic-cpr\\_loi\\_final\\_3.pdf](http://www.theadvocatesforhumanrights.org/uploads/usa_tahr_wcadp_ic-cpr_loi_final_3.pdf)>.

66 General Comment No. 36, *op. cit.*, note 10, para. 43.

67 Hood, *op. cit.*, note 39.

68 See Chapter 3 - Discrimination in *Moving Away from the Death Penalty: Argument, Trends and Perspectives*, *op. cit.*, note 9, pp. 100-184; and: Stephen B. Bright, “Discrimination, death and denial: the tolerance of racial discrimination in the infliction of the death penalty”, *Santa Clara Law Review*, Vol. 35, 1995, pp. 433-483, <[https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4454&context=fs\\_s\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4454&context=fs_s_papers)>.

non-discriminatory.<sup>69</sup> Awareness needs to be raised about the discriminatory aspects of the application of the death penalty and its disproportionate use against those most marginalized.<sup>70</sup>

The standard is evolving toward the abolition of the death penalty in all circumstances because its application inevitably leads to violations of both Article 6 and Article 7 of the ICCPR and, however it is applied, it is an inherently cruel, inhuman or degrading treatment or punishment. It is, moreover, important for all actors to address the underlying reasons for continuing support for the death penalty. These include the lack of public awareness about its complexities and a lack of political will to abolish it. As advised after the 7th World Congress, it would be beneficial “to carry out more research on the death penalty, including to make women on death row visible and to demystify arguments used to retain the death penalty, including public opinion, deterrence, terrorism.”<sup>71</sup> Crucially, governments should exert their political leadership to ensure the abolition of the death penalty (and not its reintroduction) is kept under consideration, in line with their international human rights obligations and OSCE commitments, while simultaneously encouraging constructive public dialogue aimed at changing public perceptions and generating support for the abolition of the death penalty. ODIHR welcomes that the vast majority of participating States in the OSCE remain committed to keeping the complete abolition of the death penalty under consideration.<sup>72</sup>

## **2. Other aspects of the situation of the death penalty in the OSCE area**

### **2.1 Retentionist participating States**

Belarus and the United States continue to be the only two retentionist participating States in the OSCE region, maintaining the application of the death penalty both in law and in practice.

---

69 “Human Rights Council holds high-level panel on the death penalty, in particular with respect to the rights to non-discrimination and equality”, OHCHR news, 26 February 2019, <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24215&LangID=E>>.

70 General Comment No. 36, *op. cit.*, note 10; and: “Human Rights Council holds high-level panel on the death penalty, in particular with respect to the rights to non-discrimination and equality”, *op. cit.*, note 69.

71 “Final Declaration”, 7th World Congress against the death penalty, March 2019, <<http://www.worldcoalition.org/media/resourcecenter/7congress-FinalDeclaration-EN.pdf>>.

72 Consider that 55 OSCE participating States voted in favour of the UN General Assembly resolution 73/175 moratorium on the use of the death penalty. For a list of domestic measures that states can take towards abolition see: “The Death Penalty in the OSCE Area: Background Paper 2018”, *op. cit.*, note 3, p. 8.

### **2.1.1 United States**

At the end of the reporting period (31 March 2019), 30 states retained the death penalty, as well as the federal government and the military.<sup>73</sup> In the United States, 20 states have abolished the death penalty and four have gubernatorial moratoria (California, Colorado, Oregon and Pennsylvania). There have been no federal executions since 2003 or executions by the military authorities since 1961.<sup>74</sup>

The United States has continued to defend its stance on the death penalty during the reporting period, emphasising at the OSCE Permanent Council the legality of the death penalty when imposed and carried out in a manner consistent with a state's international obligations and maintaining that it is a matter for individual countries to decide.<sup>75</sup>

#### ***Death sentences between 1 April 2018 and 31 March 2019***

Approximately 2,700 American prisoners are under sentence of death in more than 30 states as of 1 October 2018, including 55 women.<sup>76</sup> It is reported that 43 people were sentenced to death in 2018,<sup>77</sup> the fourth consecutive year with fewer than 50 death sentences.<sup>78</sup>

#### ***Executions between 1 April 2018 and 31 March 2019***

During the reporting period, 21 executions were carried out. Eleven of these took place in Texas, three in Tennessee, two in Alabama and one in each of the following states: Florida, Georgia, Nebraska, Ohio, and South Dakota. All executions were performed with lethal injections, except for two in Tennessee which were performed by means of electrocution. More executions took place in Texas than in the previous

---

73 "State by State", Death Penalty Information Center, <<https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>>.

74 Amnesty International, "Amnesty International Global Report: Death Sentences and Executions 2018", p. 15, <<https://www.amnesty.org/download/Documents/ACT5098702019ENGLISH.PDF>>.

75 "Reply to the European Union on the Death Penalty", United States Mission to the OSCE, 29 March 2019, <<https://www.osce.org/permanent-council/416090?download=true>>.

76 NAACP Legal Defense and Educational Fund, Inc., "Death Row USA. Fall 2018", p. 1, <<https://files.deathpenaltyinfo.org/legacy/files/pdf/DRUSAFall2018.pdf>>; Death Penalty Information Center, "The Death Penalty in 2018: Year End Report", p. 3, <<https://deathpenaltyinfo.org/documents/2018YrEnd.pdf>>.

77 This refers to the calendar year. "Recent Death Sentences by Name, Race, County, and Year", Death Penalty Information Center, <<https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-by-name-race-and-county>>.

78 Death Penalty Information Center, "The Death Penalty in 2018: Year End Report", *op. cit.*, note 76, p. 2.

reporting period.<sup>79</sup> Nebraska, South Dakota and Tennessee carried out their first executions in many years (since 1997, 2012 and 2009, respectively).<sup>80</sup>

Date of execution	Name	Age	Ethnic Group	Sex	State	Method
04/19/2018	Walter Moody	83	White	Male	Alabama	Lethal Injection
04/25/2018	Erick Davila	31	Black	Male	Texas	Lethal Injection
05/04/2018	Robert Butts	40	Black	Male	Georgia	Lethal Injection
05/16/2018	Juan Castillo	37	Latino	Male	Texas	Lethal Injection
06/27/2018	Danny Bible	66	White	Male	Texas	Lethal Injection
07/17/2018	Christopher Young	34	Black	Male	Texas	Lethal Injection
07/18/2018	Robert Van Hook	58	White	Male	Ohio	Lethal Injection
08/09/2018	Billy Irick	59	White	Male	Tennessee	Lethal Injection
08/14/2018	Carey Moore	60	White	Male	Nebraska	Lethal Injection
09/26/2018	Troy Clark	51	White	Male	Texas	Lethal Injection
09/27/2018	Daniel Acker	46	White	Male	Texas	Lethal Injection
11/01/2018	Edmund Zagorski	63	White	Male	Tennessee	Electrocution
11/14/2018	Roberto Ramos	64	Latino	Male	Texas	Lethal Injection
10/29/2018	Rodney Berget	56	White	Male	South Dakota	Lethal Injection
12/04/2018	Joseph Garcia	64	Latino	Male	Texas	Lethal Injection
12/06/2018	David Miller	61	White	Male	Tennessee	Electrocution
12/11/2018	Alvin Braziel	43	Black	Male	Texas	Lethal Injection
12/13/2018	Jose Jimenez	55	Latino	Male	Florida	Lethal Injection
01/30/2019	Robert Jennings	61	Black	Male	Texas	Lethal Injection
02/07/2019	Domineque Ray	42	Black	Male	Alabama	Lethal Injection
02/28/2019	Billie Coble	70	White	Male	Texas	Lethal Injection

### **Promising developments**

During the reporting period, there were several positive developments that show progress towards the abolition of the death penalty in the US.

On 11 October 2018, in the case of *State of Washington v. Gregory*, the Chief Justice of Washington Supreme Court declared that Washington’s death penalty was unconstitutional because it has been “imposed in an arbitrary and racially biased

79 Texas executed 7 people in the previous reporting period, see: “The Death Penalty in the OSCE Area: Background Paper 2018”, *op. cit.*, note 3, p. 15.

80 Amnesty International, “Amnesty International Global Report: Death Sentences and Executions 2018”, *op. cit.*, note 74, p. 14.

manner.”<sup>81</sup> She went on to assert that the death penalty does not serve its purpose as a punishment and the discriminatory way it is imposed is incompatible with the evolving standards of decency in society.<sup>82</sup> This decision resulted in the conversion of the remaining eight death row prisoners’ sentences to life imprisonment without the possibility of release.<sup>83</sup> This development brought the number of states that have abolished the death penalty to 20. The EU delegation to the OSCE recognised and welcomed the abolition of the death penalty in Washington State in a statement to the OSCE Permanent Council on 18 October 2018.<sup>84</sup> In the same statement, the 28 EU Member States reiterated their continued opposition to the imposition of the death penalty in all circumstances and reaffirmed that the death penalty is cruel, inhuman and degrading in nature.

Another positive development during this reporting period was the moratorium on executions issued by the Governor of California on 13 March 2019.<sup>85</sup> This is particularly noteworthy, considering that California has the largest number of death row inmates in the country.<sup>86</sup> This executive moratorium represents a reprieve for people under sentence of death in California but does not alter their conviction or sentence in any way. It calls for the repeal of California’s lethal injection protocol and the immediate closure of San Quentin State Prison’s death chamber.<sup>87</sup> The Bar Association report *The State of Criminal Justice 2019* stated that, in justifying this executive order, the Governor made clear statements about the unfairness of California’s death penalty system, and especially its uneven application “to people of color, people with mental disabilities”, the number of innocent people sentenced to death and the cost.<sup>88</sup> In the wake of this moratorium, two Supreme Court judges from California stated in their court opinions that California’s capital punishment system is expensive and dysfunctional.<sup>89</sup>

---

81 *State of Washington, Respondent, v. Allen Eugene Gregory, Appellant, Supreme Court of the State of Washington*, 11 October 2018, p. 2, <<https://cases.justia.com/washington/supreme-court/2018-88086-7.pdf?ts=1539270669>>.

82 *Ibid.*, p. 25.

83 “Washington Supreme Court Declares State’s Death Penalty Unconstitutional”, Death Penalty Information Center, 12 October 2018, <<https://deathpenaltyinfo.org/news/washington-supreme-court-declares-states-death-penalty-unconstitutional>>.

84 “EU statement on the abolition of the death penalty in Washington State, USA,” OSCE Permanent Council, 18 October 2018, <<https://www.osce.org/permanent-council/401618?download=true>>.

85 “California Governor Announces Moratorium on Executions”, Death Penalty Information Center, 13 March 2019, <<https://deathpenaltyinfo.org/news/california-governor-announces-moratorium-on-executions>>.

86 Death Penalty Information Center, “The Death Penalty in 2018: Year End Report”, *op. cit.*, note 76, p. 3.

87 Executive Order N-09-19, 13 March 2019, <<https://www.gov.ca.gov/wp-content/uploads/2019/03/13.19-EO-N-09-19.pdf>>.

88 Tabak, *op. cit.*, note 63, p. 247.

89 *Ibid.*



It should also be noted that, in the reporting period, there were various discussions relating to sentencing procedures that could, theoretically, make it more difficult to impose the death penalty. For example, in one man's appeal to the Missouri Supreme Court on 23 January 2019, it was argued that if a jury does not vote unanimously, and the trial judge determines whether the capital defendant lives or dies, this would violate his or her constitutional rights to due process, a trial by jury and to a unanimous jury verdict.<sup>90</sup> On 30 August 2018, the Nebraska Supreme Court heard the argument that their three-judge sentencing procedure constitutes a violation of the Sixth and Fourth Amendment, based on the precedent set in *Hurst v. Florida*, where the Supreme Court ruled that according to the Sixth Amendment, a jury, but not a judge alone, can sentence someone to death.<sup>91</sup> Finally, in July 2018, as a result of a new law in Florida which requires the unanimous agreement of the jury before a defendant can be sentenced to death, four capital defendants received life sentences.<sup>92</sup>

### ***Causes for concern***

During the reporting period a number of situations came to light that give cause for concern. Systemic issues, such as the conditions of detention on death row in the United States criminal system, would go beyond the scope of this report.<sup>93</sup> Instead this report focuses on methods of execution, the risk of the discriminatory application of capital punishment and the possibility of wrongful convictions. It should be noted that the United States voted against UN General Assembly resolution 73/175 on a moratorium on the use of the death penalty.<sup>94</sup>

---

90 "Missouri Supreme Court Hears Case on 'Hung Jury' Death Sentences", Death Penalty Information Center, 29 January 2019, <<https://deathpenaltyinfo.org/news/missouri-supreme-court-hears-case-on-hung-jury-death-sentences>>.

91 "Nebraska Supreme Court Hears Challenge to Three-Judge Death Sentencing", Death Penalty Information Center, 4 September 2018, <<https://deathpenaltyinfo.org/news/nebraska-supreme-court-hears-challenge-to-three-judge-death-sentencing>>.

92 "Florida Juries Reject Death Sentences for Four Men, Highlighting Impact of Unanimity Requirement", Death Penalty Information Center, 25 July 2018, <<https://deathpenaltyinfo.org/news/florida-juries-reject-death-sentences-for-four-men-highlighting-impact-of-unanimity-requirement>>.

93 See for example: "Condemned to Death - And Solitary Confinement", The Marshall Project, July 23, 2017, <[www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement](http://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement)>; American Civil Liberties Union, *A Death Before Dying: Solitary Confinement on Death Row*, <[www.aclu.org/issues/prisoners-rights/solitary-confinement/death-dying](http://www.aclu.org/issues/prisoners-rights/solitary-confinement/death-dying)>; "Pennsylvania keeps all death-row inmates in solitary confinement", The Intercept, 25 January 2018, <<https://theintercept.com/2018/1/25/pennsylvania-death-row-solitary-confinement-aclu/>>.

94 Amnesty International, "Amnesty International Global Report: Death Sentences and Executions 2018", *op. cit.*, note 74, p. 53.

### **Methods of execution**

ODIHR's 2018 *Background Paper on the Death Penalty* included a detailed analysis of the use of lethal injections as a method of execution and how this can lead to a violation of the prohibition against torture or other cruel, inhuman or degrading punishment.<sup>95</sup> Debates about controversial methods of execution continued in this reporting period.

In April 2018, it was reported that one death row inmate's attorneys had entered into a private settlement with the State of Alabama after his attempted execution on 22 February 2018 was botched using a lethal injection. As a result of the settlement, the state will not set another date for his execution.<sup>96</sup> The man suffered from cancer and there was detailed knowledge about how his medical condition would make it difficult for the executioners to get access to his veins to administer the lethal injection. Despite this, the attempt went ahead, leaving the prisoner with "numerous punctures in his legs, feet, and groin that left him severely bruised and in such extreme pain that he began to wish for death."<sup>97</sup>

During the reporting period, debate about the use of lethal injection intensified particularly in Tennessee, due to the alleged painful death that could amount to torture caused by the three-drug lethal injection process used there (a combination of midazolam, vecuronium bromide and potassium chloride).<sup>98</sup> Following the execution of one man on 9 August 2018, an anaesthesiologist reported that the prisoner was "aware and sensate during his execution and would have experienced the feeling of choking, drowning in his own fluids, suffocating, being buried alive, and the burning sensation caused by the injection of potassium chloride."<sup>99</sup> His application for a stay of execution had been denied a few days prior to his execution, despite a dissenting opinion of United States Supreme Court Justice Sotomayer that emphasised that the execution of this prisoner using this type of lethal injection would inflict

---

95 "The Death Penalty in the OSCE Area: Background Paper 2018", *op. cit.*, note 3.

96 "Alabama Agrees Not to Seek Execution of Doyle Hamm After Failed Attempt", American Bar Association, website, 11 April 2018, <[https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2018/spring/alabama-agrees-not-to-seek-execution-of-doyle-hamm-after-failed-/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2018/spring/alabama-agrees-not-to-seek-execution-of-doyle-hamm-after-failed-/)>.

97 "The Barbarism of Alabama's Botched Execution of Bernard Harcourt", *The New York Review of Books*, 13 March 2018, <[www.nybooks.com/daily/2018/03/13/the-barbarism-of-alabamas-botched-execution](http://www.nybooks.com/daily/2018/03/13/the-barbarism-of-alabamas-botched-execution/)>.

98 "Tennessee Executes Mentally Ill and Sexually Abused Prisoner by Electrocutation", Death Penalty Information Center, 7 December 2018, <<https://deathpenaltyinfo.org/news/tennessee-executes-mentally-ill-and-sexually-abused-prisoner-by-electrocutation>>.

99 "Medical Expert: Billy Ray Irick Was Tortured During Execution", *Nashville Scene*, 7 September 2018, <<https://www.nashvillescene.com/news/pith-in-the-wind/article/21021361/medical-expert-billy-ray-irick-was-tortured-during-execution>>.

“torturous pain”, demonstrate the country’s failure to be a “civilized nation” and its acceptance of “barbarism.”<sup>100</sup>

This man was one of 33 death row inmates who unsuccessfully challenged Tennessee’s three-drug lethal injection protocol in February 2018, seeking to replace it by execution with a single barbiturate, pentobarbital.<sup>101</sup> They argued that the pain caused by using midazolam would violate the United States Constitution but they allegedly failed to show that a more humane alternative was readily available.<sup>102</sup> It is considered likely that the above mentioned execution and the resulting discussions over the use of the three-drug cocktail led two other Tennessee death row inmates to “choose” electrocution.<sup>103</sup> On 2 November 2018, four death row inmates filed a lawsuit in a federal district court in Nashville in which they asked to be executed by firing squad,<sup>104</sup> due to their argument that both the lethal injection and electrocution protocols in Tennessee violate the Eighth Amendment. This lawsuit was unsuccessful, as the Sixth Circuit Court of Appeals ruled that the firing squad represents, “an outmoded method of execution.”<sup>105</sup> Lawsuits related to the three-drug lethal injection as a method of execution were not limited to Tennessee. In July 2018, eight death row prisoners in Alabama chose to be executed by nitrogen asphyxiation (hypoxia)<sup>106</sup> after a new law was enacted authorizing the use of nitrogen gas without oxygen in March 2018.<sup>107</sup> The amount of pain this may induce

---

100 Justice Sotomayor dissenting, *Billy Ray Irick v. Tennessee* on application for stay, 9 August 2018, p. 6, <[https://www.supremecourt.gov/opinions/17pdf/18a142t\\_5h26.pdf](https://www.supremecourt.gov/opinions/17pdf/18a142t_5h26.pdf)>.

101 “Tennessee Supreme Court denies stay of execution for death row inmate”, Tennessee State Courts website, 6 August 2018, <<https://www.tncourts.gov/news/2018/08/06/tennessee-supreme-court-denies-stay-execution-death-row-inmate>>.

102 *Ibid.*, and: “Tennessee execution: Billy Ray Irick tortured to death, expert says in new filing”, Tennessee website, 13 September 2018, <<https://eu.tennessean.com/story/news/crime/2018/09/07/tennessee-execution-billy-ray-irick-tortured-filing/1210957002/>>.

103 Tabak, *op. cit.*, note 63, p. 238. Both Miller and Zagorski expressed their dilemma of having to choose between two unconstitutional and cruel methods of execution. See: “Tennessee Executes Mentally Ill and Sexually Abused Prisoner by Electrocution”, Death Penalty Information Center, 7 December 2018, <<https://deathpenaltyinfo.org/news/tennessee-executes-mentally-ill-and-sexually-abused-prisoner-by-electrocution>>; “Governor Rejects Jurors’ Plea for Clemency for Edmund Zagorski as Tennessee Court Allows Lethal Injections to Proceed”, Death Penalty Information Center, 9 October 2018, <<https://deathpenaltyinfo.org/news/governor-rejects-jurors-plea-for-clemency-for-edmund-zagorski-as-tennessee-court-allows-lethal-injections-to-proceed>>.

104 “Four Tennessee death row inmates ask for execution by firing squad”, *The Guardian*, 5 November 2018, <<https://www.theguardian.com/us-news/2018/nov/05/tennessee-death-row-inmates-execution-firing-squad>>.

105 “Tennessee executes another inmate by electric chair after supreme court battle”, *The Guardian*, 7 December 2018, <<https://www.theguardian.com/us-news/2018/dec/06/tennessee-execution-electric-chair-david-earl-miller>>.

106 “Alabama Prisoners End Execution Lawsuit, State Will Drop Lethal Injection in Favor of Nitrogen Gas”, Death Penalty Information Center, 12 July 2018, <<https://deathpenaltyinfo.org/news/alabama-prisoners-end-execution-lawsuit-state-will-drop-lethal-injection-in-favor-of-nitrogen-gas>>.

107 Death Penalty Information Center, “The Death Penalty in 2018: Year End Report”, *op. cit.*, note 76, p. 17.

is not clear.<sup>108</sup> This method of execution has not yet been used in the United States, although it is an approved option in Alabama, Mississippi and Oklahoma if the lethal injection drugs are unavailable or deemed unconstitutional.<sup>109</sup>

In November 2018, further serious concerns about the procurement of drugs used for lethal injections and the pain allegedly endured from the administration of pentobarbital were raised in Texas.<sup>110</sup> Six inmates are reported to have experienced feelings of burning and other painful side effects of this drug.<sup>111</sup> Debates in Nebraska focused on the execution of an inmate by an untested formula of lethal injection. This was the state's first execution in 21 years and first use of lethal injection.<sup>112</sup> The inmate waived his rights to jury trial and his final appeal and was executed using the untested formula,<sup>113</sup> despite ongoing lawsuits surrounding the alleged illegal sourcing of some of the drugs.<sup>114</sup> The UN Human Rights Committee has stated that the injection of untested lethal drugs would constitute a violation of Article 7 of the ICCPR and hence make the execution arbitrary in nature, violating Article 6 as well.<sup>115</sup>

The crux of many of these cases is the Eighth Amendment of the United States Constitution which forbids "cruel and unusual" methods of punishment. However, if an inmate wishes to halt an execution on these grounds, the inmate is required to prove an alternative method of execution is "feasible, readily implemented and in fact significantly reduces a substantial risk of severe pain."<sup>116</sup> This topic was the subject of many lawsuits in the United States in the reporting period, exemplified by the Supreme Court judgement in the case of *Bucklew v. Preclythe*.<sup>117</sup> On 19 March 2018 the Inter-American Commission on Human Rights recommended that due to

---

108 "Death by nitrogen should not be America's new capital punishment method", Newsweek, 1 June 2018, <<https://www.newsweek.com/death-nitrogen-should-not-be-americas-new-capital-punishment-method-opinion-940211>>.

109 "Alabama Prisoners End Execution Lawsuit, State Will Drop Lethal Injection in Favor of Nitrogen Gas", Death Penalty Information Center, *op. cit.*, note 106.

110 Tabak, *op. cit.*, note 63, p. 237.

111 "Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs", BuzzFeed News, 28 November 2018, <<https://www.buzzfeednews.com/article/chrismdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas>>.

112 "Nebraska Executes Carey Dean Moore in First Execution in 21 Years", Death Penalty Information Center, 14 August 2018, <<https://deathpenaltyinfo.org/news/nebraska-executes-carey-dean-moore-in-first-execution-in-21-years>>.

113 *Ibid.*, "Diazepam - the sedative Valium, fentanyl citrate - an opioid painkiller, cisatracurium besylate - a paralytic, and potassium chloride to stop the heart."

114 Death Penalty Information Center, "The Death Penalty in 2018: Year End Report", *op. cit.*, note 76, p. 10; "Nebraska first in US to use opioid fentanyl in execution", BBC News, 14 August 2018, <<https://www.bbc.com/news/world-us-canada-45185687>>.

115 General Comment No. 36, *op. cit.*, note 10, para. 40.

116 *Baze v. Rees*, Supreme Court of the United States, 16 April 2008, <<https://casetext.com/case/baze-v-rees-5?resultsNav=false#p61>>.

117 This case was argued on 6 November 2018 and decided upon on 1 April 2019.

Bucklew's rare medical condition and the risk of severe pain during execution his sentence should be commuted.<sup>118</sup> However, Justice Gorsuch delivered the Supreme Court decision rejecting Bucklew's claim that executing him by means of lethal injection would violate the Eighth Amendment. Bucklew preferred to be executed by nitrogen hypoxia considering the rare medical condition he suffers.<sup>119</sup> Gorsuch wrote:

“What does all this tell us about how the Eighth Amendment applies to methods of execution? For one thing, it tells us that the Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes.”<sup>120</sup>

According to the majority opinion, Bucklew failed to show that nitrogen hypoxia was readily implementable or that this execution method would be significantly less painful than pentobarbital.<sup>121</sup> The four dissenting judges objected to differing parts of the majority opinion, especially highlighting that the requirement for inmates to provide guidance on the administration of an alternate method (nitrogen hypoxia in this case) presents an “insurmountable hurdle.”<sup>122</sup> This is in line with many opinions by legal scholars, represented in an amicus curiae brief, who agree that it is too restrictive to reject alternative methods of execution because they are not immediately available or because they are not authorised by state law.<sup>123</sup> Media outlets published op-ed pieces making the case that this Supreme Court judgement

---

118 “IACHR Concludes that the United States Violated Russell Bucklew's Fundamental Rights, that His Execution Should Not Proceed and His Sentence Should be Commuted”, OAS website, 19 March 2018, <[http://www.oas.org/en/iachr/media\\_center/PReleases/2018/054.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/054.asp)>.

119 “Death row inmates not guaranteed ‘painless’ execution, US Supreme Court says”, Reuters, 1 April 2019, <<https://www.reuters.com/article/us-usa-court-execution-idUSKCN1RD2j5>>.

120 *Bucklew v. Precythe, Director, Missouri Department of Corrections, et al*, Supreme Court of the United States, 1 April 2019, p. 12, <[https://www.supremecourt.gov/opinions/18pdf/17-8151\\_1qm2.pdf](https://www.supremecourt.gov/opinions/18pdf/17-8151_1qm2.pdf)>.

121 “Supreme Court Update: *Bucklew v. Pettigrew* (No 17-8151), *Biestek v. Berryhill* (No. 17-1184), *Lorenzo v. SEC* (No. 17-1077), *Sturgeon v. Frost* (No. 17-949)”, *The National Law Review*, 9 April 2019, <<https://www.natlawreview.com/article/supreme-court-update-bucklew-v-pettigrew-no-17-8151-biestek-v-berryhill-no-17-1184>>; “The Supreme Court rules that a murderer has no right to a ‘painless death’”, *The Economist*, 2 April 2019, <<https://www.economist.com/democracy-in-america/2019/04/02/the-supreme-court-rules-that-a-murderer-has-no-right-to-a-painless-death>>.

122 *Bucklew v. Precythe, op. cit.*, note 120, p. 14.

123 Brief of Scholars and of academics of constitutional law as Amicus Curiae in support of petitioner, “On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit”, 23 July 2018, p. 3, <[https://www.supremecourt.gov/DocketPDF/17/17-8151/55160/20180723163457496\\_No.%20%2017-8151%20Bucklew%20v%20Precythe%20Brief%20of%20Scholars%20and%20of%20Academics%20of%20Constitutional%20Law%20as%20Amicus%20Curiae.pdf](https://www.supremecourt.gov/DocketPDF/17/17-8151/55160/20180723163457496_No.%20%2017-8151%20Bucklew%20v%20Precythe%20Brief%20of%20Scholars%20and%20of%20Academics%20of%20Constitutional%20Law%20as%20Amicus%20Curiae.pdf)>.

can be seen as legalizing torture<sup>124</sup> and represents a challenge to the “evolving standards of decency”<sup>125</sup> rationale that has previously governed Eighth Amendment jurisprudence.

### ***Unequal application of the death penalty***

In this reporting period, there were numerous examples of executions that raised the question of whether the death penalty is applied in a fair and non-discriminatory manner in the United States. As discussed above, the Washington Supreme Court found the state’s death penalty unconstitutional due to its racial bias and provided many case law examples to support their ruling.<sup>126</sup>

The unfair application of the death penalty not only affects racial minorities but also other groups who are, for varying reasons, marginalised in society.<sup>127</sup> People with mental or intellectual disabilities were executed and under sentence of death during the reporting period.<sup>128</sup> On 14 June 2018, the Kentucky Supreme Court found, in *Woodall v. Commonwealth*, that the test used to establish intellectual disability is outdated and unconstitutional under the Eighth Amendment.<sup>129</sup> The court ruled that the requirement to show proof of an IQ score of 70 or below in order to find a defendant intellectually disabled, and therefore ineligible for the death penalty, violated recent United States Supreme Court judgements.<sup>130</sup> It was pointed out that adjudication of intellectual disability should be “informed by the medical community’s diagnostic framework.”<sup>131</sup>

---

124 “The Supreme Court’s Conservatives Just Legalized Torture”, Slate, 1 April 2019, <<https://slate.com/news-and-politics/2019/04/supreme-court-neil-gorsuch-eighth-amendment-death-penalty-torture.html>>, Garrett Epps, “Debunking the Court’s Latest Death-Penalty Obsession.”, 17 June 2019, <<https://www.theatlantic.com/ideas/archive/2019/06/supreme-court-defends-death-penalty-again/591682/>>, “When it comes to the death penalty, the Supreme Court legalized torture long ago”, The Intercept, 6 April 2019, <<https://theintercept.com/2019/04/06/supreme-court-death-penalty-torture-bucklew/>>.

125 See US Supreme Court judgement written by Chief Justice Earl Warren in *Trop v. Dulles*, 31 March 1958, <<https://www.law.cornell.edu/supremecourt/text/356/86>>: “The (Eighth) Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

126 *State of Washington, Respondent, v. Allen Eugene Gregory, Appellant*, Supreme Court of the State of Washington, *op. cit.*, note 81, p. 23.

127 See Stephen Bright, “Imposition of the death penalty upon the poor, racial minorities, the intellectually disabled and the mentally ill”, in *Moving Away from the Death Penalty: Argument, Trends and Perspectives*, *op. cit.*, note 9, pp. 115-130. See the case of Rocky Myers: “Despite Possible Innocence and Intellectual Disability, Alabama Intends to Execute Rocky Myers,” Death Penalty Information Center, 22 March 2019, <<https://deathpenaltyinfo.org/news/despite-possible-innocence-and-intellectual-disability-alabama-intends-to-execute-rocky-myers>>.

128 Amnesty International, “Amnesty International Global Report: Death Sentences and Executions 2018”, *op. cit.*, note 74, p. 12.

129 *Robert Keith Woodall v. Commonwealth of Kentucky*, Supreme Court of Kentucky, 14 June 2018, <<https://cases.justia.com/kentucky/supreme-court/2018-2017-sc-000171-mr.pdf?ts=1528984969>>.

130 “Kentucky Supreme Court Strikes Down Commonwealth’s Death-Penalty Intellectual Disability Law”, Death Penalty Information Center, 18 June 2018, <<https://deathpenaltyinfo.org/news/kentucky-supreme-court-strikes-down-commonwealths-death-penalty-intellectual-disability-law>>.

131 *Ibid.*

On 29 October 2018, a man was executed by lethal injection in South Dakota, after pleading guilty and telling the judge to sentence him to death.<sup>132</sup> There had been no thorough investigation into his intellectual disability, although this inmate had participated in the Special Olympics and attended special education classes at school.<sup>133</sup> Finally, on 19 February 2019, the Supreme Court ruled for the second time that a death row prisoner in Texas may not be executed because of his intellectual disability, countering Texas' ongoing efforts to execute this inmate.<sup>134</sup> According to the 2002 United States Supreme Court ruling in *Atkins v. Virginia*, sentencing people with mental or intellectual disabilities to death would be a cruel and unusual punishment and these persons are therefore "constitutionally barred from receiving the death penalty."<sup>135</sup> It is, furthermore, contrary to international human rights law, most recently re-emphasised in a UN General Assembly resolution on moratorium on the use of the death penalty.<sup>136</sup> The ban on imposition of the death penalty on certain types of people is explained in detail in General Comment No. 36.<sup>137</sup>

Other concerns regarding discrimination were raised during the reporting period, surrounding the alleged imposition of the death penalty on a man due to his sexual orientation. On 18 June 2018, the United States Supreme Court declined to review the death sentence of this man, who alleges that some of the jurors sentenced him to death in 1993 because of their own stereotypes.<sup>138</sup> In an amici curiae brief on 2 August 2018, various civil society organizations highlighted the evidence offered by the defendant, including quotes from jurors explaining that in their deliberations there was "a lot of disgust" regarding the man's sexual orientation and that others had suggested he "should not be allowed to spend his life with men in prison."<sup>139</sup> Such anti-gay bias in a jury decision raises serious concerns about the unequal application of the death penalty and could be seen to violate Article 2(1) of the ICCPR

---

132 Death Penalty Information Center, "The Death Penalty in 2018: Year End Report", *op. cit.*, note 76, p. 14.

133 *Ibid.*

134 "US Supreme Court Again Reverses Texas Court's Rejection of Intellectual Disability Claim", Death Penalty Information Center, 20 February 2019, <<https://deathpenaltyinfo.org/news/u-s-supreme-court-again-reverses-texas-courts-rejection-of-intellectual-disability-claim>>.

135 "Continuing Issues: Determining Intellectual Disability After Atkins", Death Penalty Information Center, <<https://deathpenaltyinfo.org/policy-issues/intellectual-disability/continuing-issues-determining-intellectual-disability-after-atkins>>.

136 UN General Assembly, 73/175. *Moratorium on the use of the death penalty*, *op. cit.*, note 55. See also: A/HRC/39/19, para 43; Economic and Social Council resolutions 1984/50 and 1989/64; CCPR/C/74/D/684/1996; A/67/279, para. 58.

137 General Comment No. 36, *op. cit.*, note 10, para. 49.

138 "A Jury May Have Sentenced a Man to Death Because He Is Gay. It's Time for a Federal Court to Hear His Bias Claim", ACLU Blog, 6 August 2018, <https://www.aclu.org/blog/lgbt-rights/criminal-justice-reform-lgbt-people/jury-may-have-sentenced-man-death-because-he>>.

139 Brief of Amici Curiae, ACLU and others, 2 August 2018, p. 1, <[https://www.aclu.org/sites/default/files/field\\_document/field\\_brief\\_of\\_amici\\_curiae\\_aclu\\_et\\_al.pdf](https://www.aclu.org/sites/default/files/field_document/field_brief_of_amici_curiae_aclu_et_al.pdf)>.

read in conjunction with Article 6, as well as Article 26, as highlighted in the introductory essay.

### ***Possibility of wrongful convictions***

Another cause for concern is the situation of death row inmates who could, in fact, be innocent or who have not committed “the most serious crimes”.<sup>140</sup> The possibility of mistakes and conviction of innocent people is particularly relevant when considering the death penalty due to its irreversible nature.

On 17 April 2018, a California inmate was exonerated after spending 26 years on death row. Later, on 5 November 2018, another death row inmate in Florida was released after 12 years in prison.<sup>141</sup> The reasons for the exoneration of these two individuals include the presence of false or misleading forensic evidence, inadequate legal defense, perjury or false accusation.<sup>142</sup> On 28 March 2019, another prisoner, who was sentenced to death and was serving a commuted life sentence in Florida, was exonerated and released after 40 years in prison. After the establishment of the first Conviction Integrity Unit in Florida, the director of this unit reported on various inconsistencies and stated that another man had “confessed to committing the murders.”<sup>143</sup> This means that, at the end of the reporting period, the total number of exonerations since 1972 comes to 165.<sup>144</sup>

Another man was executed in Texas on 16 May 2018, although there were ongoing concerns about his conviction being based on false testimony. It was reported that this man had been represented so badly that he chose to represent himself. In addition, evidence had been found that contradicted testimony and his appellate attorneys requested DNA testing.<sup>145</sup> During the reporting period, there were further developments in the case of one death row inmate, who has been on death row for over 42 years. From 25 to 30 November 2018, his case was featured in the Tampa Bay Times, after extensive research by an investigative journalist suggested that he is in fact innocent.<sup>146</sup> He has repeatedly asked for DNA testing of evidence to prove his

---

140 See General Comment No. 36, *op. cit.*, note 10, para. 35 for detailed information about what constitute “the most serious crimes.”

141 Death Penalty Information Center, “The Death Penalty in 2018: Year End Report”, *op. cit.*, note 76, p. 6-7.

142 “Innocence Database”, Death Penalty Information Center, <<https://deathpenaltyinfo.org/policy-issues/innocence-database?filters%5Byear%5D=2018>>.

143 Tabak, *op. cit.*, note 63, p. 280.

144 “The Death Penalty in 2018: A Punishment on the Decline”, ACLU Blog, 21 December 2018, <<https://www.aclu.org/blog/capital-punishment/innocence-and-death-penalty/death-penalty-2018-punishment-decline>>.

145 Death Penalty Information Center, “The Death Penalty in 2018: Year End Report”, *op. cit.*, note 76, p. 13.

146 “Blood and Truth”, Tampa Bay Times, 25 November 2018, <<https://www.tampabay.com/projects/2018/narratives/blood-and-truth/>>.



alleged innocence but has been denied this opportunity six times.<sup>147</sup> It is reported that eight people in Florida have been executed who had been denied DNA testing.<sup>148</sup>

***Capital punishment for less than the “most serious crimes”***

Recent reports from experts on the death penalty have highlighted worrying cases of people being sentenced to death and executed for crimes that do not involve intentional killing.<sup>149</sup> On 4 December 2018, under the Texas “law of parties”, one man was executed although he was not involved in the shootout that killed a police officer.<sup>150</sup> Various civil society organizations reinforced their concerns about such cases in their list of issues to the UN Human Rights Committee relating to the death penalty in January 2019, highlighting in particular that it is possible to be sentenced to death in Arizona even if a death results unintentionally, including a number of drug offenses, robbery, and sexual offenses, as well as for the death of a fetus.<sup>151</sup> On the federal level, there are certain crimes that are punishable by death, although they do not require a murder to have taken place, including trafficking in large amounts of drugs.<sup>152</sup> These cases are particularly controversial as the “most serious crimes” are interpreted by the UN Human Rights Committee as meaning crimes involving intentional killing only and imposing the death penalty for any other serious crimes is considered a violation of Article 6.<sup>153</sup>

---

147 “18 Years After Enacting DNA Law, Florida Death-Row Prisoners Are Still Being Denied Testing”, Death Penalty Information Center, 21 December 2018, <<https://deathpenaltyinfo.org/news/18-years-after-enacting-dna-law-florida-death-row-prisoners-are-still-being-denied-testing>>.

148 “Editorial: Let DNA testing remove doubt in death row cases”, Tampa Bay Times, 30 November 2018, <<https://www.tampabay.com/opinion/editorials/editorial-let-dna-testing-remove-doubt-in-death-row-cases-20181130/>>.

149 “When the state kills those who didn’t kill”, Ashoka Mukpo (ACLU website), 11 July 2019, <<https://www.aclu.org/issues/capital-punishment/when-state-kills-those-who-didnt-kill>>.

150 “Executed But Did Not Directly Kill Victim”, Death Penalty Information Center, <<https://deathpenaltyinfo.org/executions/executions-overview/executed-but-did-not-directly-kill-victim>>.

151 The Advocates for Human Rights and The World Coalition Against the Death Penalty, “The United States’ Compliance with the International Covenant on Civil and Political Rights Suggested List of Issues Relating to the Death Penalty”, *op. cit.*, note 65.

152 “Federal Laws Providing for the Death Penalty”, Death Penalty Information Center, <<https://deathpenaltyinfo.org/stories/federal-laws-providing-death-penalty>>.

153 General Comment No. 36, *op. cit.*, note 10, para. 35; and Report of the Secretary-General, *Moratorium on the use of the death penalty*, *op. cit.*, note 62, para. 24.

### 2.1.2 Belarus

Article 24 of the Constitution of the Republic of Belarus provides that the death penalty represents an exceptional measure of punishment for some especially serious crimes.<sup>154</sup> Belarus also reported that the Criminal Code of Belarus forbids imposing the death penalty on women, and persons who committed a crime when they were under 18 years of age, or are older than 65 at the time of the sentencing.<sup>155</sup> In accordance with Article 175 of the Criminal Law Enforcement Code, the death penalty is “carried out by firing squad with no members of the public present. The execution of the death penalty shall be carried out separately for each convict and without other death convicts present.”<sup>156</sup>

#### *Death sentences between 1 April 2018 and 31 March 2019*

According to information from international bodies, international and local civil society organizations, national courts in Belarus imposed one new death sentence in the reporting period. On 9 January 2019, Aliaksandr Asipovich was convicted of “aggravated murder” (Art. 139, Part 2 of the Criminal Code) and sentenced to death at Mahilioŭ Regional Court.<sup>157</sup> He was found guilty of killing two women in late July 2018 and the Supreme Court of Belarus upheld the death sentence on 14 May 2019.<sup>158</sup> The Parliamentary Assembly of the Council of Europe (PACE)’s General Rapporteur on the abolition of the death penalty and the Chairperson of the Political Affairs Committee both denounced the judgement of the Supreme Court of Belarus confirming the death sentence.<sup>159</sup>

In addition, two death sentences, handed down by the Supreme Court to Alyaksandr Zhylnikau and Vyachaslau Sukharka in January 2018 were upheld on 30 May 2018.<sup>160</sup>

154 The Criminal Code of the Republic of Belarus, as amended up to January 2016, envisages the death penalty for thirteen crimes: Art 122 (2): “Unleashing or conducting a war of aggression”, Art 124 (2): “Act of Terrorism directed against the representative of a foreign state or international organization”, Art 126 (3): “Act of International Terrorism”, Art. 127: “Genocide”, Art. 128: “Crimes against humanity”, Art. 134: “Use of weapons of mass destruction”, Art 135 (3): “Violation of laws and customs of war”, Art 139 (2): “Murder under aggravating circumstances, Art 289 (3) “Act of Terrorism”, Art 357 (3): “Conspiracy, or other actions, taken with a purpose to seize state power”, Art 359 (2): “Act of Terrorism directed against state or public official”, Art. 360 (2): “Sabotage”, Art. 362: “Murder of an employee of internal affairs bodies”, <<http://pravo.by/document/?guid=3871&po=hk9900275>>.

155 Criminal Code of the Republic of Belarus, Art. 59.2(2), <<http://pravo.by/document/?guid=3871&po=hk9900275>>.

156 FIDH – HRC “Viasna”, “Death Penalty in Belarus: Murder on (Un)lawful Grounds”, October 2016, p. 64, <[https://www.fidh.org/IMG/pdf/death\\_penalty\\_in\\_belarus\\_murder\\_on\\_un\\_lawful\\_grounds\\_en\\_web.pdf](https://www.fidh.org/IMG/pdf/death_penalty_in_belarus_murder_on_un_lawful_grounds_en_web.pdf)>.

157 “Man sentenced to death in Babrujsk”, Viasna, 9 January 2019, <<https://dp.spring96.org/en/news/91777>>.

158 “Supreme Court confirms death sentence for Aliaksandr Asipovich”, Viasna, 15 May 2019, <<http://dp.spring96.org/en/news/92933>>.

159 “Belarus: members denounced the judgment confirming the death sentence of Aliaksandr Asipovich”, Parliamentary Assembly, 16 May 2019, <<http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=7484&lang=2>>.

160 “Supreme Court confirms death sentences for Zhylnikau and Sukharko”, Viasna, 30 May 2018, <<https://spring96.org/en/news/90005>>.

The Supreme Court dismissed Alyksandr Zhylnikau's appeal and Vyachaslau Sukharka did not challenge his verdict and awaits execution.<sup>161</sup>

### **Executions between 1 April 2018 and 31 March 2019**

It is reported that Belarus executed four people during the reporting period.<sup>162</sup> As emphasised by the UN Special Rapporteur on the situation of human rights in Belarus, it is difficult to access statistics on the number of executions because of the secrecy surrounding the death penalty.<sup>163</sup>

<b>Reported date of execution</b>	<b>Name<sup>164</sup></b>	<b>Age (not confirmed)</b>	<b>Sex</b>	<b>Method</b>
15/05/2018	Viktar Liotau	31	Male	Firing Squad
15/05/2018	Aliaksei Mikhalenia	34	Male	Firing Squad
19/11/2018	Siamion Berazhny	31	Male	Firing Squad
19/11/2018	Ihar Hershankou	36	Male	Firing Squad

The execution of Viktar Liotau and Aliaksei Mikhalenia on the night of 15 May 2018 only became public knowledge when reported by a fellow inmate, when he appeared in court for Alyksandr Zhylnikau's appeal on 29 May 2018.<sup>165</sup> He reportedly shared a cell with both Viktar Liotau and Aliaksei Mikhalenia for four months and informed the court that these two prisoners were taken out of their cell on the night of 15 to 16 May and did not come back.<sup>166</sup> As stated by the non-governmental organisation Human Rights Center "Viasna" (Viasna), the authorities did not refute the media publications about these executions.<sup>167</sup> On 30 May 2018, the PACE General Rapporteur on the abolition of the death penalty, and the former PACE rapporteur on the situation in Belarus, strongly condemned the execution of these two prisoners.<sup>168</sup> Furthermore, the EU and a group of other states led by Norway condemned

161 *Ibid.*

162 Human Rights Center "Viasna", "Human Rights Situation in Belarus: 2018 Analytical review", *op. cit.*, note 46, p. 9.

163 Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, *op. cit.*, note 47, para. 19.

164 The spelling used follows that used in the 2018 background paper and/or report of the Special Rapporteur.

165 "Two more executions reported in Belarus", Viasna, 29 May 2018, <<https://dp.spring96.org/en/news/89987>>.

166 "Неофициально. В Беларуси расстреляли двух «смертников» – Алексея Михаленю и Виктора Лётова" [Unconfirmed. Two death row inmates have been shot – Viktar Liotau and Aliaksei Mikhalenia], Naviny news website, 29 May 2018, <<https://naviny.by/new/20180529/1527585573-neoficialno-v-belarusi-rasstrelyali-dvuh-smertnikov-alekseya-mihalenyu-i->>.

167 Human Rights Center "Viasna", "Human Rights Situation in Belarus: 2018 Analytical review", *op. cit.*, note 46, p. 9.

168 "Rapporteurs condemn two recent executions in Belarus", Parliamentary Assembly, 30 May 2018, <<http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=7085&lang=2>>.

these executions at the OSCE Permanent Council meeting on 14 June 2018.<sup>169</sup> These statements noted the secrecy surrounding the use of the death penalty in Belarus, emphasised its cruel, inhuman and degrading nature and called for the introduction of a moratorium as a step towards abolition.

Two other prisoners, Siamion Berazhny and Ihar Hershankou, whose death sentences had been upheld by the Supreme Court in December 2017, were reportedly executed on 19 November 2018.<sup>170</sup> This was despite news on 15 June 2018 that the Supreme Court of Belarus had suspended the death sentences of these two prisoners while their appeals were under consideration.<sup>171</sup> The PACE General Rapporteur on the abolition of the death penalty and the former rapporteur on the situation in Belarus had welcomed the suspension and review of these death sentences on 18 June 2018 and stated they hoped this would be progress towards a moratorium on executions and commutation of all death sentences.<sup>172</sup> The PACE General Rapporteur and the Chairperson of the Political Affairs Committee strongly condemned the two executions in November.<sup>173</sup> On 13 December 2018, the EU delegation to the OSCE as well as Iceland, Liechtenstein, Switzerland and Norway made statements at the OSCE Permanent Council pointing out their continued opposition to the death penalty and their concerns over the execution of these two individuals in Belarus, especially considering the lack of transparency surrounding their execution.<sup>174</sup>

### ***Promising developments***

In OSCE forums, Belarus has consistently maintained that the death penalty is used rarely and for particularly serious crimes only. The country has also highlighted their engagement to promote the eventual abolition of the death penalty through actively encouraging public discussion. The UN Human Rights Committee and the UN Special Rapporteur on the situation of human rights in Belarus welcomed the

---

169 “Statement on the death penalty in the United States of America and Belarus”, OSCE Permanent Council, 14 June 2018, <<https://www.osce.org/permanent-council/385170?download=true>>; “EU statement on the Death Penalty”, OSCE Permanent Council, 14 June 2018, <<https://www.osce.org/permanent-council/385182?download=true>>.

170 Human Rights Center “Viasna”, “Human Rights Situation in Belarus: 2018 Analytical review”, *op. cit.*, note 46, p. 9.

171 “Belarus: Unprecedented Supreme Court decision to suspend death sentences”, Amnesty International, 15 June 2018, <<https://www.amnesty.org/en/latest/news/2018/06/belarus-unprecedented-supreme-court-decision-to-suspend-death-sentences/>>.

172 “Rapporteurs welcome Belarus court decision to suspend and review death sentences”, Parliamentary Assembly, 18 June 2018, <<http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=7113&lang=2>>.

173 “Yves Cruchten and Ria Oomen-Ruijten condemn executions in Belarus”, Parliamentary Assembly, 29 November 2018, <<http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=7283&lang=2>>.

174 “Statement on the death penalty in the United States of America and Belarus”, OSCE Permanent Council, 13 December 2018, <<https://www.osce.org/permanent-council/407276?download=true>>, “EU Statement on the Death Penalty”, OSCE Permanent Council, 13 December 2018, <<https://www.osce.org/permanent-council/407279?download=true>>.

submission by Belarus of its fifth periodic report to the UN Human Rights Committee during the reporting period.<sup>175</sup>

There were a number of occasions in which Belarus engaged with international organizations and NGOs to address the situation of the death penalty in Belarus. In April 2018, the Council of Europe organized an event in Minsk entitled “Legal aspects of the abolition of the death penalty in Belarus” together with a working group studying the death penalty within the Belarus National Assembly.<sup>176</sup> Representatives of civil society were also present, including Viasna.<sup>177</sup> According to Viasna, there were hints from government officials about another referendum on the abolition of the death penalty, although Viasna experts highlighted that most lawmakers and officials are already in favour of abolition and should lead the way.<sup>178</sup>

On 10 October 2018, World Day against the Death Penalty, the Chairperson of the Standing Commission on International Affairs of the Lower House of the Belarusian Parliament participated in debates led by the PACE Legal Affairs Committee, together with civil society organizations.<sup>179</sup> On 28 November 2018, the Chairperson of the Standing Commission on Human Rights, National Relations and Mass Media of the Lower House of the Belarusian Parliament was present at the 11th International Conference of Ministers of Justice “A world without the death penalty”, organized by the Community of Sant’Egidio.<sup>180</sup>

On 9 October 2018, Interfax-Religion reported that His Eminence Metropolitan Pavel of Minsk and Zaslavl, the Patriarchal Exarch of All Belarus, spoke about introducing a moratorium on the death penalty.<sup>181</sup> He stated that the death penalty can deter people from committing crimes but that he also believes a moratorium on

---

175 Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, op. cit., note 47, para. 16; Human Rights Committee, *Concluding observations on the fifth periodic report of Belarus*, U.N. Doc. CCPR/C/BLR/CO/5, 22 November 2018, para. 2.

176 The full name of the group is: Working Group of the National Assembly of the Republic of Belarus on the Study of Death Penalty as a Measure of Punishment Applied in the Republic of Belarus. “Abolition of death penalty discussed in Minsk”, Council of Europe newsroom, 18 April 2018, <<https://www.coe.int/en/web/national-implementation/-/abolition-of-death-penalty-discussed-in-minsk>>.

177 “Time to act towards true abolition of the death penalty, say HRDs”, Viasna, 19 April 2018, <<http://spring96.org/en/news/89697>>.

178 *Ibid.*

179 House of Representatives of the National Assembly of the Republic of Belarus, 11 October 2018, <<http://www.house.gov.by/en/news-en/view/9-11-october-2018-valery-voronetsky-chairperson-of-the-standing-commission-on-international-affairs-of-the-58650-2018>>.

180 House of Representatives of the National Assembly of the Republic of Belarus, 29 November 2018, <<http://house.gov.by/en/news-en/view/on-27-november-2018-andrei-naumovich-chairperson-of-the-standing-commission-of-the-house-of-representatives-59251-2018/>>

181 «Белорусская церковь выступает за мораторий на смертную казнь» [Belarussian church speaks in favour of a moratorium on the death penalty], Interfax Religion, 5 October 2018, <<http://interfax-religion.ru/?act=news&div=70882>>.

such punishment is justified. Reportedly, the Belarusian Orthodox Church supports replacing the death penalty with other forms of punishment.<sup>182</sup>

### ***Causes for concern***

As already noted, the issues of secrecy make it difficult to report about many aspects of the death penalty in Belarus. A focus here will be placed on conditions of detention, the effect of the lack of transparency, as well as the extent of Belarus' co-operation with international bodies. It should be noted that Belarus abstained from UN General Assembly resolution 73/175 on a moratorium on the use of the death penalty.<sup>183</sup>

### ***Allegations of torture and other ill-treatment in detention***

In the concluding observations on the fifth periodic report of Belarus published on 7 June 2018, the UN Committee against Torture expressed concern about the “deplorable” conditions on death row, noting in particular reports that death row inmates are placed in solitary confinement.<sup>184</sup> The UN Committee against Torture went on to highlight further areas of concern in terms of detention conditions, although not specific to death row inmates. The UN Committee against Torture highlighted the alleged acts of torture and ill-treatment committed by law enforcement officers and prison personnel in places of deprivation of liberty, the inadequate staffing in those places and the lack of information available about injuries that could reveal torture.<sup>185</sup> Further concerns remain regarding the failure of Belarus to conduct prompt, effective and impartial investigations into allegations of torture, which was also highlighted in the concluding observations of the UN Human Rights Committee.<sup>186</sup> The UN Committee against Torture therefore recommended that prison conditions be brought into compliance with international human rights standards and that the judgement in any capital punishment case be suspended when there are allegations that a confession was obtained by means of torture.<sup>187</sup> Notably, the UN Committee against Torture also calls on Belarus to urgently consider establishing a moratorium on executions with a view to abolishing the death penalty.

---

182 “Belarusian Orthodox church supports moratorium on death penalty”, Viasna, 9 October 2018, <<http://dp.spring96.org/en/news/91044>>.

183 Amnesty International, “Amnesty International Global Report: Death Sentences and Executions 2018”, *op. cit.*, note 74, p. 53.

184 Committee against Torture, *Concluding observations on the fifth periodic report of Belarus*, U.N. Doc. CAT/C/BLR/CO/5, 7 June 2018, para. 54.

185 *Ibid.*, para. 21.

186 Human Rights Committee, *Concluding observations on the fifth periodic report of Belarus*, *op. cit.*, note 175, para. 29.

187 Committee against Torture, *Concluding observations on the fifth periodic report of Belarus*, *op. cit.*, note 184, para. 55.

In April 2018 civil society organizations put forward reports that highlight concerns about conditions of detention. They note that correspondence is often withheld from prisoners on death row (as is their correspondence to their relatives), contrary to Article 174(3) of the Criminal Enforcement Code.<sup>188</sup> Lawyer visits are also obstructed, providing serious obstacles to relatives' ability to get power of attorney to be able to submit an individual complaint to the UN Human Rights Committee on behalf of a convicted family member, for example. Death row prisoners reportedly experience almost total isolation, as well as humiliation.<sup>189</sup> It appears that prisoners on death row are, furthermore, prohibited from speaking about detention conditions during their one monthly visit from a family member.<sup>190</sup> The International Federation for Human Rights (FIDH) together with Viasna summarised that the conditions of detention of death convicts in Belarus "amount to psychological and physical torture, which has reportedly led to a number of suicide attempts."<sup>191</sup>

As described in ODIHR's *Background Paper on the Death Penalty 2018*, the court proceedings of Ihar Hershankou and Siamion Berazhny attracted widespread public attention, as well as from national and international organizations due to allegations about mistreatment of the prisoners.<sup>192</sup> Viasna corroborated these concerns in their end of year report, highlighting that Ihar Hershankou and Siamion Berazhny were reportedly victims of torture, used to force their incrimination and that ultimately no criminal proceedings were started against the police officers.<sup>193</sup> On 27 June 2018, Viasna reported that Ihar Hershankou began a hunger strike as a form of protest against the violation of his right to correspondence.<sup>194</sup> On 13 July 2018, the UN Human Rights Committee registered an official complaint submitted on behalf of Ihar Hershankou.<sup>195</sup>

The UN Special Rapporteur on the situation of human rights in Belarus drew attention to other areas of concern relating to torture, cruel, inhuman or degrading treatment. The Rapporteur's report stated that there is a lack of external independent oversight of detention facilities and a lack of public information about the conditions

---

188 FIDH - HRC "Viasna", "Death Penalty in Belarus: Murder on (Un)lawful grounds", Submission to CAT, April 2018, <[https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/BLR/INT\\_CAT\\_CSS\\_BLR\\_30786\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/BLR/INT_CAT_CSS_BLR_30786_E.pdf)>.

189 *Ibid.*

190 *Ibid.*

191 FIDH - HRC "Viasna", "Death Penalty in Belarus: Murder on (Un)lawful Grounds", *op. cit.*, note 156, p. 5.

192 "The Death Penalty in the OSCE Area: Background Paper 2018", *op. cit.*, note 3, p. 10.

193 Human Rights Center "Viasna", "Human Rights Situation in Belarus: 2018 Analytical review", *op. cit.*, note 46, p. 12.

194 "Death row prisoner Ihar Hershankou goes on hunger strike", Viasna, 26 June 2018, <<https://dp.spring96.org/en/news/90183>>.

195 "UN Human Rights Committee registers complaint of death convict Hershankou", Viasna, 16 July 2018, <<https://dp.spring96.org/en/news/90320>>.

of detention.<sup>196</sup> In an interview with Viasna, a human rights activist stated that Belarus has declined requests for a visit from the UN Special Rapporteur on torture for over 10 years.<sup>197</sup> Belarus has not signed the Optional Protocol to the Convention against Torture, which outlines international and national mechanisms for the prevention of torture in places of deprivation of liberty.

### ***Lack of transparency***

The difficulty in obtaining information regarding the death penalty in Belarus is due to Belarus continuing to classify data on the use of the death penalty a “state secret”.<sup>198</sup> As stated in the ODIHR death penalty background papers for 2016 and 2017, the lack of transparency and secrecy surrounding executions in Belarus may constitute cruel, inhuman or degrading treatment, or even torture.<sup>199</sup> This secrecy affects death row inmate themselves, their relatives and lawyers, as well as the wider public.

On 22 November 2018, the UN Human Rights Committee published its concluding observations and explicitly stated that when individuals on death row are not informed of their date of execution, this is a violation of Article 7 of the Covenant.<sup>200</sup> FIDH and Viasna’s 2016 report details the psychological effect this may have on the death row inmates, who are not informed of the date of their execution and spend, on average, a year on death row awaiting their execution.<sup>201</sup>

Furthermore, the effect that this lack of transparency can have on relatives of death row inmates causes unnecessary “pain and sorrow.”<sup>202</sup> According to the UN Human Rights Committee, the lack of information provided to relatives of death row prisoners regarding the date of execution, the body not being returned to them and the burial site not being disclosed also constitute a violation of the prohibition of torture and cruel, inhuman and degrading treatment.<sup>203</sup> The Committee against Torture has also stated that the nondisclosure of dates of executions or places of burial to

---

196 Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, *op. cit.*, note 47, para. 28.

197 “Human rights activists present alternative report on torture”, Viasna, 7 April 2018, <<http://spring96.org/en/news/89617>>.

198 Report of the Secretary-General, *Question of the death penalty*, U.N. Doc. A/HRC/39/19, 14 September 2018, para. 17.

199 “The Death Penalty in the OSCE Area: Background Paper 2016”, “The Death Penalty in the OSCE Area: Background Paper 2017”, *op. cit.*, note 3.

200 Human Rights Committee, *Concluding observations on the fifth periodic report of Belarus*, *op. cit.*, note 175, para. 27 b.

201 FIDH - HRC “Viasna”, “Death Penalty in Belarus: Murder on (Un)lawful Grounds”, *op. cit.*, note 156, p. 64.

202 Miklós Haraszti, “Report of the Special Rapporteur on the situation of human rights in Belarus,” U.N. Doc. A/73/380, 13 September 2018, para. 87.

203 General Comment No. 36, *op. cit.*, note 10, para. 56.



families in a timely manner goes against national legislation.<sup>204</sup> The UN Special Rapporteur on the situation of human rights in Belarus added that the additional pain and suffering of relatives continues after the execution when they face “insults and degrading comments” due to the social stigma attached to the death penalty.<sup>205</sup> With this in mind, the Human Rights Committee recommended that until Belarus abolish the death penalty, they should amend Article 175 of the Criminal Law Enforcement Code to avoid violation of Article 7.<sup>206</sup> Article 175 of the Criminal Law Enforcement Code states that the management of the institution where the execution took place has to notify the court that imposed the death sentence.<sup>207</sup> It is this court that is then supposed to inform one of the close relatives. Notably, there are no specific regulations as to when this notification should occur and no mention of notifying wider society of executions.<sup>208</sup>

According to a public statement made by Amnesty International regarding the alleged execution of Viktor Liotau and Aliaksei Mikhalenia, when they asked Belarusian authorities to confirm the execution of these two men, they were told, “we know as much as you do.”<sup>209</sup> As of 31 March 2019, ODIHR has seen no public confirmation from the Belarusian authorities about the execution of these two men, although it has been widely reported, also in the most recent report of the Special Rapporteur on the situation of human rights in Belarus.<sup>210</sup> This reflects the complete secrecy – at all levels, from death row inmates themselves to family members and the wider public, to state officials and international actors.

On 6 July 2018, the Human Rights Council adopted resolution 38/14 on the situation of human rights in Belarus, thereby extending the mandate of the Special Rapporteur for one year. In this resolution, it is clearly stated that there is deep concern about the lack of relevant information about the use of the death penalty and adds that the Special Rapporteur should continue to monitor developments, especially because “transparency is a requirement of fair and effective criminal

---

204 Committee against Torture, *Concluding observations on the fifth periodic report of Belarus*, *op. cit.*, note 184, para. 54.

205 Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, *op. cit.*, note 47, para. 22.

206 Human Rights Committee, *Concluding observations on the fifth periodic report of Belarus*, *op. cit.*, note 175, para 28 b.

207 Article 175 (5) of the Criminal Law Enforcement Code, in Russian: <[http://etalonline.by/document/?reg-num=hk0000365&q\\_id=799631](http://etalonline.by/document/?reg-num=hk0000365&q_id=799631)>.

208 FIDH - HRC “Viasna”, “Death Penalty in Belarus: Murder on (Un)lawful Grounds”, *op. cit.*, note 156, p. 66.

209 “Belarus: Amnesty International condemns execution of two more prisoners”, Amnesty International Public Statement, 5 December 2018, <<https://www.amnesty.org/download/Documents/EUR4995212018ENGLISH.pdf>>.

210 Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, *op. cit.*, note 47, para. 19 and 20.

justice.”<sup>211</sup> The UN Human Rights Committee has also commented on the use of the death penalty in Belarus without guarantee of due process.<sup>212</sup> This resolution was adopted by a vote of 19 to 6, with 21 abstentions.<sup>213</sup>

### ***Co-operation with international bodies***

There are also ongoing concerns about Belarus’ interactions with international bodies. In October 2018, the EU noted its concern about secrecy surrounding the death penalty in Belarus and the fact that its ongoing application of capital punishment “runs counter to Belarus’ stated willingness to engage with the international community.”<sup>214</sup> Despite various visits and events that Belarus took part in or hosted (often in co-operation with the Council of Europe), the current UN Special Rapporteur, who officially assumed her functions on 1 November 2018, did not receive an answer after requesting to visit Belarus. She states that this continues “the policy of non-engagement implemented by the Government during the six-year term of her predecessor.”<sup>215</sup>

Belarus has also not addressed the requests of the UN Human Rights Committee. As the Special Rapporteur emphasized, Aliaksei Mikhalenia, Siamion Berazhny and Ihar Hershankou were all executed in the reporting period, although the UN Human Rights Committee had called for a stay on executions while the individual complaints of each of these death row prisoners were considered.<sup>216</sup>

As reported by the UN Human Rights Committee in their concluding observations in November 2018, Belarus justifies this non-compliance with interim measures, even in death penalty cases, by arguing that such measures are not binding, but advisory.<sup>217</sup> The UN Human Rights Committee states further that Belarus is not “fully co-operate[ing] with the Committee in the framework of individual communications, due to the Committee’s practice of registering cases without requiring that the supervisory review procedure be first exhausted and of accepting cases not

---

211 Human Rights Council, 38/14. *Situation of human rights in Belarus*, U.N. Doc. A/HRC/RES/38/14, 16 July 2018, para. 6.

212 Human Rights Committee, *Concluding observations on the fifth periodic report of Belarus*, *op. cit.*, note 175, para 27 a.

213 Notably, OSCE participating States Georgia, Kyrgyzstan and Mongolia abstained. Human Rights Council, 38/14. *Situation of human rights in Belarus*, *op. cit.*, note 211.

214 “EU statement on European and World Day against the Death Penalty”, OSCE Permanent Council, 11 October 2018, <<https://www.osce.org/permanent-council/400133?download=true>>.

215 Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, *op. cit.*, note 47, para. 11.

216 *Ibid.*, para. 20.

217 Human Rights Committee, *Concluding observations on the fifth periodic report of Belarus*, *op. cit.*, note 175, para 7.

submitted by the alleged victims themselves but by their legal representatives.”<sup>218</sup> The UN Human Rights Committee then details why it is so important for interim measures to be observed, i.e., to avoid irreparable damage to the victim of an alleged violation of the Covenant, especially by irreversible measures like the death penalty. Executing people before the “consideration of their communications, compromises the protection of the ICCPR rights and constitutes a serious violation of the Optional Protocol.”<sup>219</sup>

After the execution of Siamion Berazhny and Ihar Hershankou in November 2018, a group of human rights experts<sup>220</sup> deplored the ongoing use of the death penalty while registered complaints were pending before the UN Human Rights Committee, and after they had requested Belarus to stay the executions while their communications were under consideration.<sup>221</sup> As the Chair of the UN Human Rights Committee said in December 2018, “the repetitive failure of Belarus to respect the Committee’s procedures and the interim measures it has issued is simply unacceptable. The fact that such failures occur in the context of capital cases which implicate the right to life, and which the Committee considers to be the ‘supreme right’, is particularly unconscionable.”<sup>222</sup> In this statement, the human rights experts affirmed that their interim measures are binding under international law. This same expert group confirmed that the Human Rights Committee will still consider the cases of Aliaksei Mikhalienia, Siamion Berazhny and Ihar Hershankou, irrespective of their executions and noted that: “All three cases contain allegations of torture in detention, forced confessions, denial of access to legal assistance and unfair trial.”<sup>223</sup>

## **2.2 Abolitionist participating States**

In the OSCE region, 52 of the 57 participating States are classified as abolitionists, meaning that the death penalty has been abolished for all crimes, in law and in practice.

Bosnia and Herzegovina is one of the 52 abolitionist states, although the Constitution of the Republika Srpska still provides for capital punishment.<sup>224</sup>

---

218 *Ibid.*

219 *Ibid.*, para. 8.

220 UN Special Rapporteur on the situation of human rights in Belarus and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, together with the UN Human Rights Committee.

221 “UN human rights experts condemn Belarus executions”, OHCHR news website, 12 December 2018, <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24009&LangID=E>>.

222 *Ibid.*

223 *Ibid.*

224 Republika Srpska is one of the two entities comprising Bosnia and Herzegovina.

### **2.2.1 New developments at the international and regional levels on the abolition of the death penalty**

All abolitionist OSCE participating States have been active on issues related to the death penalty in various forms and fora. This includes the United Nations system (all OSCE participating States are members of the UN) and regional bodies such as the Council of Europe (all 47 Council of Europe member states are also OSCE participating States<sup>225</sup>) and the EU (all 28 European Union members are also OSCE participating states). Many events and reports highlighted the discriminatory or unequal application of the death penalty and the clear trend towards fighting for the universal abolition of capital punishment, which is a cruel, inhuman and degrading punishment.

On 27 July 2018, UN member states were presented with the Secretary-General's report providing information on the implementation of General Assembly resolution 71/187 regarding a moratorium on the use of the death penalty. The report includes a dedicated section on people with mental or intellectual disabilities and more in-depth sections examining the discriminatory application of the death penalty against women and minorities and its disproportionate impact on poor or economically vulnerable individuals.<sup>226</sup>

On 14 September 2018, the Secretary-General of the United Nations presented his report to update previous reports on the question of the death penalty pursuant to Human Rights Council decision 18/117.<sup>227</sup> The UN Secretary-General included a section on the worrying discussions about reintroduction of the death penalty and the extension of its scope, which are also taking place in some countries in the OSCE region.<sup>228</sup> The report emphasizes the importance of transparency in those states where the death penalty is still imposed and that secrecy endangers the protection of the right to life.<sup>229</sup> Specific sections address the issue of children and people with mental or intellectual disabilities, reminding states that, in accordance with international human rights law, the death penalty should not be imposed on such individuals. Further discussion focuses on children of parents sentenced to death, referencing ODIHR's 2017 background paper<sup>230</sup> and the need for adequate information

---

225 "Our member States", Council Europe, <<https://www.coe.int/en/web/about-us/our-member-states>>. In addition, the OSCE participating States of Canada, the Holy See and the United States are Council of Europe observer states. It is therefore assumed that statements of the CoE, including its Parliamentary Assembly, reflect the views of a vast majority of OSCE participating States. Seven OSCE participating States have no formal involvement with the Council of Europe.

226 Report of the Secretary-General, *Moratorium on the use of the death penalty*, *op. cit.*, note 62.

227 Report of the Secretary-General, *Question of the death penalty*, *op. cit.*, note 198.

228 *Ibid.*, para. 12. See section 2.3.

229 *Ibid.*, para. 16.

230 "The Death Penalty in the OSCE Area: Background Paper 2017", *op. cit.*, note 3.

for all those involved.<sup>231</sup> There is a strong message that the death penalty may only be imposed for the “most serious crimes” and that this is consistently interpreted as meaning intentional killing.

On 24 September 2018, the first Ministerial meeting for the Alliance for Torture-Free Trade took place in New York on the margins of the UN General Assembly session. The Alliance issued a Joint Communiqué in which they committed to the advancement of a draft resolution to be adopted by the UN General Assembly.<sup>232</sup> They requested that member states be asked about the possibility of a legally binding instrument to establish common international standards for the import, export and transfer of goods used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment and that a group of governmental experts be set up to assess the option. On 12 September 2018, ODIHR organised a side-event attended by several OSCE delegations at the margins of the 2018 Human Dimension Implementation Meeting in Warsaw to encourage OSCE participating States and civil society to elaborate on actions and activities already underway in this area, and to explore how OSCE participating States could add to the regional and global movement to restrict trade in torture tools.<sup>233</sup> In a statement to the OSCE Permanent Council on 11 October 2018, the EU encouraged all states to support the Global Alliance for Torture-Free Trade.<sup>234</sup>

On 10 October 2018 the 16th World Day against the Death Penalty was observed, focussing on living conditions on death row. The lead organiser is the World Coalition against the Death Penalty and, in their factsheet on this theme, they pointed out that when death row inmates are faced with prolonged periods of solitary confinement, are kept in cages or are denied medical care, for example, these experiences can amount to torture.<sup>235</sup> The fact that many prisoners in the US spend more than a decade on death row is also highlighted as an area of concern.<sup>236</sup> On this day, the European Union High Representative for Foreign Affairs and Security Policy and the Secretary General of the Council of Europe made a joint declaration stating that the death penalty is contrary to the right to life and has no established deterrent

---

231 Report of the Secretary-General, *Question of the death penalty*, *op. cit.*, note 198, para. 46.

232 “Alliance for Torture-Free Trade Joint Communiqué”, *op. cit.*, note 34.

233 “Measures to end trade in torture tools in OSCE region focus of expert discussion in Warsaw”, OSCE ODIHR, 13 September 2018, <<https://www.osce.org/odihr/394460>>.

234 “EU statement on European and World Day against the Death Penalty”, *op. cit.*, note 214.

235 “Living conditions on death row: detailed factsheet”, World Coalition Against the Death Penalty, October 2018, <[http://www.worldcoalition.org/media/resourcecenter/EN\\_FactSheet\\_WD2018](http://www.worldcoalition.org/media/resourcecenter/EN_FactSheet_WD2018)>.

236 “Time on Death Row”, Death Penalty Information Center, <<https://deathpenaltyinfo.org/death-row/conditions-on-death-row/time-on-death-row>>.

effect.<sup>237</sup> They confirmed their support of the planned UN General Assembly resolution on a moratorium on the use of the death penalty and, pending the introduction of a moratorium, urged states imposing the death penalty to commute death sentences to prison terms and ensure that conditions of detention respect human dignity. They noted that member states should not support those states where drug offences are sanctioned with the death penalty and should avoid (even indirect) involvement with countries using the death penalty – for example by supporting the Global Alliance to end trade in goods used for capital punishment and torture.

In honour of the World Day against the Death Penalty, a group of UN experts<sup>238</sup> drew attention to the problems faced by women and girls on death row and how they require specific gender-based responses and policies.<sup>239</sup> They welcomed research directed at this under-examined area, especially studies that focus on “situations where gender intersects with other identity markers such as poverty or race” when it comes to the death penalty.<sup>240</sup> On the occasion of World Day against the Death Penalty, the Committee on Legal Affairs and Human Rights of the Council of Europe also released a statement reaffirming its commitment to the abolition of the death penalty which is cruel, inhuman and degrading.<sup>241</sup> The Committee reinforced the link between the confinement of inmates on death row and resulting physical and mental suffering that may lead to contraventions of Article 3 of the ECHR. The Committee called on Council of Europe member states to ratify Protocols numbers 6 and 13 to the ECHR on the prohibition of the death penalty, if they have not done so and appealed to Belarus and to states that have co-operation status with the Council of Europe (the United States and Kazakhstan in the OSCE region) to introduce a moratorium on capital punishment with a view to its eventual abolition.

On 26 February 2019, the Human Rights Council held its biennial high-level panel on the death penalty and focused on the rights to non-discrimination and equality.<sup>242</sup> The United Nations High Commissioner for Human Rights made a keynote speech in which she highlighted that her office’s visits to death rows around the

---

237 “Joint Declaration by the European Union High Representative for Foreign Affairs and Security Policy, and the Secretary General of the Council of Europe”, 10 October 2018, <<https://rm.coe.int/joint-declaration-by-the-european-union-high-representative-for-foreign/16808e49c6>>.

238 “World Day Against the Death Penalty”, UN human rights experts, 10 October 2018, <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23705&LangID=E>>.

239 *Ibid.*

240 *Ibid.*; See this report for interest: The Cornell Center on the Death Penalty Worldwide, “Judged for More Than Her Crime A Global Overview of Women Facing the Death Penalty”, September 2018, <<http://www.deathpenalty-worldwide.org/pdf/judged-for-more-than-her-crime.pdf>>.

241 “Greater commitment is needed for the universal abolition of capital punishment”, Parliamentary Assembly, 10 October 2018, <<http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7233&lang=2&cat=5>>.

242 “Human Rights Council holds high-level panel on the death penalty, in particular with respect to the rights to non-discrimination and equality”, *op. cit.*, note 69.

world demonstrate “that death rows were disproportionately populated by the poor and economically vulnerable; members of ethnic minorities; people with psycho-social or intellectual disabilities; foreign nationals; indigenous persons; and other marginalized members of society.”<sup>243</sup> During this panel discussion, Belgium made a statement on behalf of many states, including OSCE abolitionist states France, Moldova, Mongolia, and Switzerland, stating that: “the death penalty was a violation of a basic human right, that to life, and that it was not a question of culture, as human rights were universal, but one of political will” and that maintaining the death penalty did not deter people from committing crimes.<sup>244</sup>

From 26 February to 1 March, the 7th World Congress Against the Death Penalty took place in Brussels, organized by Ensemble Contre la Peine de Mort under the sponsorship of Belgium, the European Union, the European Parliament, Switzerland and Norway, in partnership with the World Coalition Against the Death Penalty.<sup>245</sup> This represents the largest global meeting on capital punishment with an estimated 1,500 participants including government officials, civil society activists, researchers and lawyers. The Final Declaration provided a comprehensive summary of the current concerns surrounding the death penalty and included detailed recommendations aimed at many different actors, who together can advance the abolition of the death penalty. On top of this, a group of Human Rights Council independent experts released a joint statement agreeing with the sentiment expressed in the introductory essay that:

“although the death penalty is not explicitly prohibited under international law, it is almost impossible to practice it without violating some of the most fundamental human rights, such as, most notably, the freedom from torture and other cruel, inhumane, and degrading treatments or punishments.”<sup>246</sup>

The experts raised concerns about the discriminatory application of the death penalty and its application for offences that are not the most serious crimes and reiterated that the death penalty is not a reliable deterrent and is, in fact, “about vengeance which perpetuates the cycle of violence and suffering, whereas, on the contrary, justice aims to repair the situation.”<sup>247</sup> They stated that the death penalty is not just about national criminal justice but a matter of fundamental human rights and dignity.

---

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>245</sup> “Final Declaration 7th World Congress Against the Death Penalty”, 1 March 2019, <<http://www.worldcoalition.org/media/resourcecenter/7congress-FinalDeclaration-EN.pdf>>.

<sup>246</sup> “Joint Statement of Independent Experts: 7th World Congress Against the Death Penalty”, <<http://congress.ecpm.org/wp-content/uploads/2019/03/7thWC-joint-statement-UN-Special-Procedures-Mandate-Holders.pdf>>.

<sup>247</sup> *Ibid.*

### **2.2.2 Participating States' engagement in national or international activities relevant to the issue of the death penalty**

The activities of certain OSCE participating States were commented upon in the UN Secretary-General's report in July 2018.<sup>248</sup> Italy, working with Amnesty International Italy, Nessuno tocchi Caino (Hands Off Cain) and the Community of Sant'Egidio, continued to strengthen co-operation in the activities carried out in the run-up to the UN General Assembly resolution. Slovenia emphasised that it had raised the issue of the death penalty in the Human Rights Council and in the context of the Universal Periodic Review. Sweden's efforts to advocate for the abolition of the death penalty worldwide through its foreign policy were also noted.<sup>249</sup>

On 25 September 2018, during the UN General Assembly session, there was a high-level side event on the death penalty, centring on how it affects those living in poverty and addressing the right to legal representation. This was organized by the Mission of Italy and France to the UN, in co-operation with the Office for the High Commissioner for Human Rights and others.<sup>250</sup> On this occasion, the UN High Commissioner for Human Rights made a statement on the same topic. The High Commissioner emphasised the need for a reliable rule of law system to achieve the Sustainable Development Goals (particularly number 16: equal access to justice for all) and clarified that rule of law is indistinguishable from human rights. She stated emphatically that "there is no more heart-rending example of the failure of the rule of law than when inequity in justice systems is compounded by poverty to expose people to the ultimate injustice of the death penalty."<sup>251</sup>

At this high-level side event, Archbishop Paul Richard Gallagher spoke on behalf of the Holy See, quoting Pope Francis' new revision of number 2267 of the Catechism of the Catholic Church on the death penalty.<sup>252</sup> In this revision from 2 August 2018,

---

248 Report of the Secretary-General, *Moratorium on the use of the death penalty, op. cit.*, note 62, para. 11.

249 "World Day Against the Death Penalty", Swedish Foreign Policy Stories, 10 October 2018, <<http://www.swemfa.se/2018/10/10/world-day-against-the-death-penalty-10-october/>>.

250 "UN General Assembly, High-level side event on death penalty: poverty and the right to legal representation", 25 September 2018, <[https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/fdmfEiYWSNCsG3ED-CDmJ\\_180925pm-italy-deathpenalty.pdf](https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/fdmfEiYWSNCsG3ED-CDmJ_180925pm-italy-deathpenalty.pdf)>.

251 "Poverty makes people especially vulnerable to injustice", Statement by UN High Commissioner for Human Rights, 25 September 2018, <<https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=23631&LangID=E>>.

252 "Death penalty: poverty and the right to legal representation", H. E. Archbishop Paul Richard Gallagher, 25 September 2018, <<https://holyseemission.org/contents/statements/5baaaf31efb8d.php>>.



Pope Francis confirmed that the Church teaches that the death penalty is inadmissible and that:

“there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes. In addition, a new understanding has emerged of the significance of penal sanctions imposed by the state. Lastly, more effective systems of detention have been developed, which ensure the due protection of citizens but, at the same time, do not definitively deprive the guilty of the possibility of redemption.”<sup>253</sup>

At the OSCE Human Dimension Implementation Meeting 2018, the death penalty was addressed in Working Session 5: Rule of law II.<sup>254</sup> Several recommendations came out of this session: participating States should consider ratifying all international conventions and protocols on torture and ill-treatment, the abolition of the death penalty and the prevention of enforced disappearances; and they should follow the global trend toward abolition of the death penalty and abolish the death penalty by law. Although one group of participating States described the death penalty as cruel, inhuman and degrading in nature and called for its abolition, one participating State expressed respect for those advocating abolition, but stated that capital punishment was not prohibited under international law.

On 11 October 2018, many states made statements at the OSCE Permanent Council regarding the World Day against the Death Penalty. Norway made a statement on behalf of Canada, Iceland, Liechtenstein, Mongolia and Switzerland, reminding all states that conditions of death row inmates can, in the worst cases, constitute a violation of the prohibition against torture and other cruel, inhuman and degrading treatment.<sup>255</sup> In this statement, these countries urged all other states, particularly in the OSCE region, to support the UN resolution 73/175 on a universal moratorium on the death penalty and reiterated their opposition towards the death penalty in all cases and without exception. The EU also made a statement on 11 October 2018, stating that the EU planned to co-host the 7th World Congress against the Death Penalty at the end of February 2019. The EU reaffirmed its “strong and unequivocal opposition” to the death penalty and reminded states that they should

---

<sup>253</sup> “New revision of number 2267 of the Catechism of the Catholic Church on the death penalty – Rescriptum “ex Audentia S.mi”, Vatican press office, 2 August 2018, <<https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802a.html>>.

<sup>254</sup> OSCE ODIHR, “2018 Human Dimension Implementation Meeting”, September 2018, <<https://www.osce.org/odihr/398840?download=true>>.

<sup>255</sup> “Statement on the occasion of the World Day against the Death Penalty”, OSCE Permanent Council, 11 October 2018, <<https://www.osce.org/permanent-council/400142?download=true>>.

not reintroduce it after abolition or suspension, regardless of attempts at the legal justification of it due to terrorism concerns.<sup>256</sup>

On 17 December 2018, all abolitionist OSCE participating states voted in favour of the UN General Assembly resolution on the moratorium on the use of the death penalty. It was adopted with a record high number of votes in favour (121).<sup>257</sup> This resolution calls upon all states to establish a moratorium on executions with a view to abolishing the death penalty. It incorporates many of the sentiments included in the report of the UN Secretary-General, noting with deep concern the disproportionate number of vulnerable groups represented among those sentenced to death.<sup>258</sup> States are asked to share their experiences in terms of death penalty abolition, both those who have already abolished it and those that have a moratorium. States are reminded that they may not reintroduce the death penalty.<sup>259</sup> Finally, it includes a statement that the UN General Assembly "...welcomes initiatives and political leadership encouraging national discussions and debates on the possibility of moving away from capital punishment through domestic decision-making."<sup>260</sup>

At the high-level panel regarding the death penalty in February 2019, OSCE participating States made various statements. Iceland spoke on behalf of Nordic and Baltic countries and noted their alarm that the death penalty is applied in a discriminatory manner, "against persons belonging to racial and ethnic minorities, or based on their gender or sexual orientation."<sup>261</sup> Montenegro agreed that the death penalty is imposed in a discriminatory manner, highlighting that this also affects juvenile offenders, women victims of domestic violence as well as foreign nationals and persons with disabilities. Luxembourg noted its celebration of the fortieth anniversary of the abolition of the death penalty for all crimes, while raising concerns that despite the global trend towards abolition, there is a "risk of backlash in all parts of the world."<sup>262</sup>

---

256 "EU statement on European and World Day against the Death Penalty", *op. cit.*, note 214.

257 "Death penalty: Global abolition closer than ever as record number of countries vote to end executions", Amnesty International news, 17 December 2018, <<https://www.amnesty.org/en/latest/news/2018/12/global-abolition-closer-than-ever-as-record-number-of-countries-vote-to-end-executions/>>.

258 UN General Assembly, 73/175. *Moratorium on the use of the death penalty*, *op. cit.*, note 55.

259 *Ibid.*, para. 8.

260 *Ibid.*, para. 5.

261 "Human Rights Council holds high-level panel on the death penalty, in particular with respect to the rights to non-discrimination and equality", *op. cit.*, note 69.

262 *Ibid.*

### **2.2.3 Concerns around reintroduction of the use of the death penalty or the extension of its scope**

Despite the global trend towards the abolition of the death penalty, for many reasons brought to light in this report, there have also been discussions in numerous countries, including in the OSCE region, about bringing back the death penalty for specific crimes that do not necessarily meet the criteria of “most serious.” General Comment No. 36 clearly states that abolition of the death penalty is “legally irrevocable.” It adds that a state cannot transform an offence into a capital offence, unless it was already one upon ratification of the ICCPR.<sup>263</sup>

As highlighted in the UN Secretary-General’s report on the question of the death penalty<sup>264</sup>, there were widely reported discussions of reintroducing the death penalty in two abolitionist states, Mongolia and Turkey. On 2 April 2018, the President of Mongolia announced that he would be submitting a draft law to Parliament, suggesting that in cases of child sexual abuse, the perpetrator should face the death penalty.<sup>265</sup> He stated that this was motivated by the fact that he had received many verbal and written requests from citizens regarding the reinstatement of capital punishment and ran a public poll through his official website for one month. The EU Annual Report on Human Rights and Democratisation 2018 stated that if Mongolia reintroduced the death penalty, it would go against Mongolia’s international commitments.<sup>266</sup> Mongolia has, however, requested EU support with arguments against the death penalty, suggesting openness to strengthening public opinion against capital punishment.<sup>267</sup> As discussed above regarding participating States’ engagement in national or international activities relevant to the issue of the death penalty, Mongolia has, since April 2018, consistently and actively contributed to the abolitionist movement.<sup>268</sup>

During this reporting period, the Turkish President suggested that Turkey would like to reintroduce the death penalty. In August 2018, it was reported that capital punishment would be restored for “terrorism offences and the murder of women and

---

263 General Comment No. 36, *op. cit.*, note 10, para. 34.

264 Report of the Secretary-General, *Question of the death penalty*, *op. cit.*, note 198, para. 12.

265 “President Battulga to present to parliament draft bill on reinstating capital punishment for child sexual abuse offender”, Office of the President website, 2 April 2018, <<https://president.mn/en/2018/04/02/president-battulga-to-present-to-parliament-draft-bill-on-reinstating-capital-punishment-for-child-sexual-abuse-offenses/>>.

266 “Mongolia - EU Annual Report on Human Rights and Democratisation 2018”, EU EEAS website, 5 May 2019, <[https://eeas.europa.eu/headquarters/headquarters-homepage/62405/mongolia-eu-annual-report-human-rights-and-democratisation-2018\\_pt](https://eeas.europa.eu/headquarters/headquarters-homepage/62405/mongolia-eu-annual-report-human-rights-and-democratisation-2018_pt)>.

267 *Ibid.*

268 Consider their key involvement in launching the Global Alliance for Torture-free Trade.

children.”<sup>269</sup> In October 2018, a member of Parliament from the BBP party submitted a draft legislative proposal on this matter to parliament.<sup>270</sup> In March 2019, this debate rose again in the aftermath of the attacks on two Christchurch mosques in New Zealand which killed 50 people.<sup>271</sup> The President of Turkey vowed to approve legislation to restore the death penalty if parliament passes it, and openly stated his objection to providing food for those serving life sentences following the coup attempt in July 2016 and expressed his regret for abolishing the death penalty.<sup>272</sup>

Moreover, it is relevant to note states’ extraterritorial obligations when it comes to the death penalty as this affects the extent to which a state contributes to the global abolitionist trend. Most recently in General Comment No. 36, it is clearly stated that: “States parties that abolished the death penalty cannot deport, extradite or otherwise transfer persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained.”<sup>273</sup> During the reporting period, on 31 May 2018, the European Court of Human Rights confirmed its judgement that Romania had violated its international obligations by assisting in the transfer of Abd al-Rahim al-Nashiri in 2004 to the US.<sup>274</sup> The Court found violations of the right to life and the right not to be subjected to torture or other inhuman or degrading treatment or punishment because Romania had not sought assurances from the receiving authorities and there was a real risk that al-Nashiri could face the death penalty.<sup>275</sup> The trial of Abd al-Rahim al-Nashiri was ongoing at the United States naval base at Guantánamo Bay at the end of 2018.<sup>276</sup>

In a separate case, two men who are accused of committing crimes as members of the so-called “Islamic State”, and who have been stripped of their British citizenship, are facing possible extradition to the United States. This case, which was pending in the United Kingdom Supreme Court at the end of the reporting period,

---

269 “Turkish leaders agree to bring back death penalty”, Ahval news, 28 August 2018, <<https://ahvalnews.com/death-penalty/turkish-leaders-agree-bring-back-death-penalty>>.

270 “The Spectre of Trexit: Proposal to Reintroduce the Death Penalty in Turkey”, EJIL: Talk!, 10 October 2018, <<https://www.ejiltalk.org/the-spectre-of-trexit-proposal-to-reintroduce-the-death-penalty-in-turkey/>>.

271 “Turkey’s Erdogan calls on New Zealand to restore death penalty over shooting”, Reuters, 19 March 2019, <<https://www.reuters.com/article/us-newzealand-shootout-erdogan/turkeys-erdogan-calls-on-new-zealand-to-restore-death-penalty-over-shooting-idUSKCN1R0106>>.

272 “Turkey’s Erdoğan says removing death penalty was ‘wrong’”, Hurriyet Daily News, 19 March 2019, <<http://www.hurriyetdailynews.com/turkeys-erdogan-says-removing-death-penalty-was-wrong-142019>>.

273 *Ibid.*

274 *Al Nashiri v. Romania* (33234/12), European Court of Human Rights (2018) paras 721-722, <<https://hudoc.echr.coe.int/eng#{%22itemid%22:%22001-183685%22}>>.

275 Report of the Secretary-General, *Moratorium on the use of the death penalty*, *op. cit.*, note 62, para. 34.

276 Amnesty International, “Amnesty International Global Report: Death Sentences and Executions 2018”, *op. cit.*, note 74, p. 29.

raises questions about the United Kingdom's own commitment to the abolition of the death penalty.<sup>277</sup> On 18 January 2019, it was reported that the mother of one of these men was unsuccessful in challenging the Home Office "decision to share evidence with the US without seeking assurances that her son and another suspected jihadist terrorist would not face the death penalty."<sup>278</sup>

Situations surrounding the repatriation of foreign terrorist fighters<sup>279</sup> have also continued to attract widespread attention during the reporting period.<sup>280</sup> Many foreign terrorist fighters are facing the possibility of trial and execution in Iraq. The ongoing debates in numerous abolitionist OSCE participating states about whether and how to repatriate foreign fighters and their families, highlight the many different approaches being taken and a lack of agreement about how to proceed.<sup>281</sup> In this context, it is important to remind states about their international human rights obligations, including ensuring fair trials and the commitment to the eventual abolition of the death penalty.<sup>282</sup>

### **2.3 De-facto abolitionist participating States**

The Russian Federation and Tajikistan remain the only de-facto abolitionist countries in the OSCE region, while Kazakhstan is abolitionist for ordinary crimes, as will be discussed below. Both states retain capital punishment for crimes committed in peacetime, but executions are not carried out on the basis of moratoria, established in 1996 and 2004, respectively. Within the reporting period, neither the Russian Federation nor Tajikistan have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, regarding abolition of the

---

277 Committee on Legal Affairs and Human Rights, "Abolition of the death penalty in Council of Europe member and observer states, Belarus and countries whose parliaments have co-operation status – situation report", 11 October 2018, p. 14, <<http://website-pace.net/documents/19838/4228475/AS-JUR-2018-44-EN.pdf/91a2bcd1-5de0-4df3-9f37-gbofaff0e137>>.

278 "Mother of alleged Isis killer loses legal fight against Home Office", *The Guardian*, 18 January 2018, <<https://www.theguardian.com/law/2019/jan/18/mother-of-alleged-isis-hostage-killer-loses-legal-fight-home-office-death-penalty>>.

279 For the controversies relating to this term, and associated human rights issues, see section 3.1: OSCE ODIHR, "Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework", 2018, <<https://www.osce.org/odihr/393503?download=true>>.

280 For example, on 21 February 2019, the US President called for EU states to "take back" IS fighters: "Trump tells European countries to take back IS fighters", *BBC news*, 21 February 2019, <<https://www.bbc.com/news/world-middle-east-47269887>>.

281 Recent cases from various OSCE participating States are discussed here: "The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking", Tanya Mehra LL.M, Dr. Christophe Paulussen (ICCT), 6 March 2019, <<https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/>>.

282 For more information on responding to foreign terrorist fighter related challenges and threats from a human rights perspective, see: OSCE ODIHR, "Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework", *op. cit.*, note 279.

death penalty, nor has the Russian Federation, as a member State of the Council of Europe, ratified 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. In this reporting period, the Russian Federation and Tajikistan voted in favour of the UN General Assembly resolution 73/175 regarding a moratorium on the use of the death penalty.<sup>283</sup> Having said this, neither state has made tangible progress towards complete abolition.

In the Russian Federation, although the application of the death penalty has been prohibited since 1996, with the prohibition reiterated by the Constitutional Court in 1999 and 2009,<sup>284</sup> capital punishment is still mentioned in federal legislation and formally listed as one type of criminal punishment. The Criminal Code of the Russian Federation provides for the death penalty as an exceptional measure for five types of offences: aggravated murder, assassination attempts against a state or public figure, attempts on the life of a person administering justice or preliminary investigations, attempts on the life of a law-enforcement official and genocide. The Criminal Code further specifies that the death penalty is not imposed on women, or on offenders under the age of 18 or over 65 at the time of sentencing.<sup>285</sup> The Criminal Procedure Code of the Russian Federation also contains provisions on the death penalty.<sup>286</sup>

In a statement made on 28 March 2019 and regarding the establishment of a moratorium on the death penalty in California, the Russian delegation to the OSCE tentatively welcomed the moratorium but highlighted that this is a temporary measure dependent on the current Governor and that a moratorium does not solve the problem.<sup>287</sup> Specific reference was made to concerns about methods of execution in the United States and how these could produce suffering tantamount to torture, as well as the apparent racial bias present in death penalty cases in the United States. The Russian Federation also clearly stated that the “legislative repeal” of the death penalty should not be imposed on countries. This echoed a previous statement, made on the World Day against the Death Penalty in October 2018.<sup>288</sup>

---

283 Amnesty International, “Amnesty International Global Report: Death Sentences and Executions 2018”, *op. cit.*, note 74, p. 52.

284 “Russian court extends moratorium on death penalty”, Reuters, 19 November 2009, <<http://www.reuters.com/article/idUSLJ330478>>; see also, “Russia to decide on death penalty moratorium”, BBC News, 10 November 2009, <<http://news.bbc.co.uk/2/hi/8352090.stm>>.

285 Art. 59, para. 2 of the Criminal Code of the Russian Federation.

286 Art. 31, 51, 301, 310 of the Criminal Procedure Code of the Russian Federation.

287 “On the establishment of a moratorium on the death penalty in California, United States of America”, Permanent Representative of the Russian Federation, OSCE Permanent Council, 28 March 2019, <<https://www.osce.org/permanent-council/416084?download=true>>.

288 “On the World Day against the Death Penalty”, Statement by the Permanent Representative of the Russian Federation, 11 October 2018, <<https://www.osce.org/permanent-council/400136?download=true>>.

The Criminal Code of the Republic of Tajikistan permits the imposition of the death penalty for the following crimes: aggravated murder, terrorism-related offenses resulting in death and not resulting in death, rape not resulting in death and war crimes, crimes against humanity and genocide.<sup>289</sup> Individuals below the age of 18 when they commit a crime, women, pregnant women, women with small children, intellectually disabled people, mentally ill people and individuals over the age of 63 at the time of sentencing are all excluded from the death penalty in Tajikistan.<sup>290</sup> The UN Secretary-General noted in his report to the UN General Assembly in July 2018 that Tajikistan is one of a number of states that “adopted legislation providing that persons who develop mental illnesses after sentencing are exempt from execution.”<sup>291</sup>

### 2.3.1 Abolitionist for ordinary crimes only

Since 2010, Kazakhstan has been defined as *de facto* abolitionist in ODIHR background papers on the death penalty. However, it was previously classified as “partly abolitionist”, meaning that the death penalty was abolished for crimes committed in peacetime, but retained for crimes committed in wartime. In light of a death sentence handed down in 2016, it would be more appropriate to reclassify Kazakhstan as *abolitionist for ordinary crimes only*. This is a United Nations designation that refers to countries whose laws retain the death penalty only for exceptional crimes, such as crimes in times of war or those committed against the state, such as treason, terrorism or armed insurrection.<sup>292</sup> This is also how Amnesty International refers to Kazakhstan in its annual death penalty report.<sup>293</sup>

An indefinite moratorium on executions has remained in place until “the full abolition of the death penalty is resolved” in Kazakhstan since the issuance of a presidential decree in 2003, when Kazakhstan halted executions and introduced life imprisonment as an alternative to the death sentence.<sup>294</sup> However, amendments to the

---

289 “Tajikistan”, Death Penalty Database, <<http://www.deathpenaltyworldwide.org/country-search-post.cf-m?country=Tajikistan&region=&method=>>>.

290 *Ibid.*

291 Report of the Secretary-General, *Moratorium on the use of the death penalty*, *op. cit.*, note 62, para. 37.

292 Report of the Secretary-General, United Nations Economic and Social Council, “Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty”, 13 April 2015, E/2015/49, para. 10, <<https://www.ohchr.org/Documents/Issues/DeathPenalty/E-2015-49.pdf>>.

293 Amnesty International, “Amnesty International Global Report: Death Sentences and Executions 2018”, *op. cit.*, note 74, p. 48.

294 “The Death Penalty in the OSCE Area: Background Paper 2016”, *op. cit.*, note 3, p. 38.

Criminal Code that came into force on 1 January 2018 raised the number of offences subject to the death penalty from 18 to 19.<sup>295</sup>

At the end of the reporting period, one person was known to be under sentence of death. In November 2016, a specialized district criminal court of Almaty city handed down a death sentence on Ruslan Kulekbayev, who was found guilty of a shooting spree that resulted in the death of eight police officers and two civilians. His sentence can be commuted to life imprisonment or imprisonment for a fixed term by an act of grace by the President.

Kazakhstan voted in favour of the UN General Assembly resolution 73/175 on a moratorium on the use of the death penalty, adopted on 17 December 2018, signalling that there is no political will to remove the moratorium.

---

<sup>295</sup> International Commission against the Death Penalty (ICDP), "How states abolish the death penalty", May 2018, p. 32, <<http://www.icomdp.org/cms/wp-content/uploads/2018/07/ICDP-2018-MAYO-PENA-DE-MUERTE-V3.pdf>>.