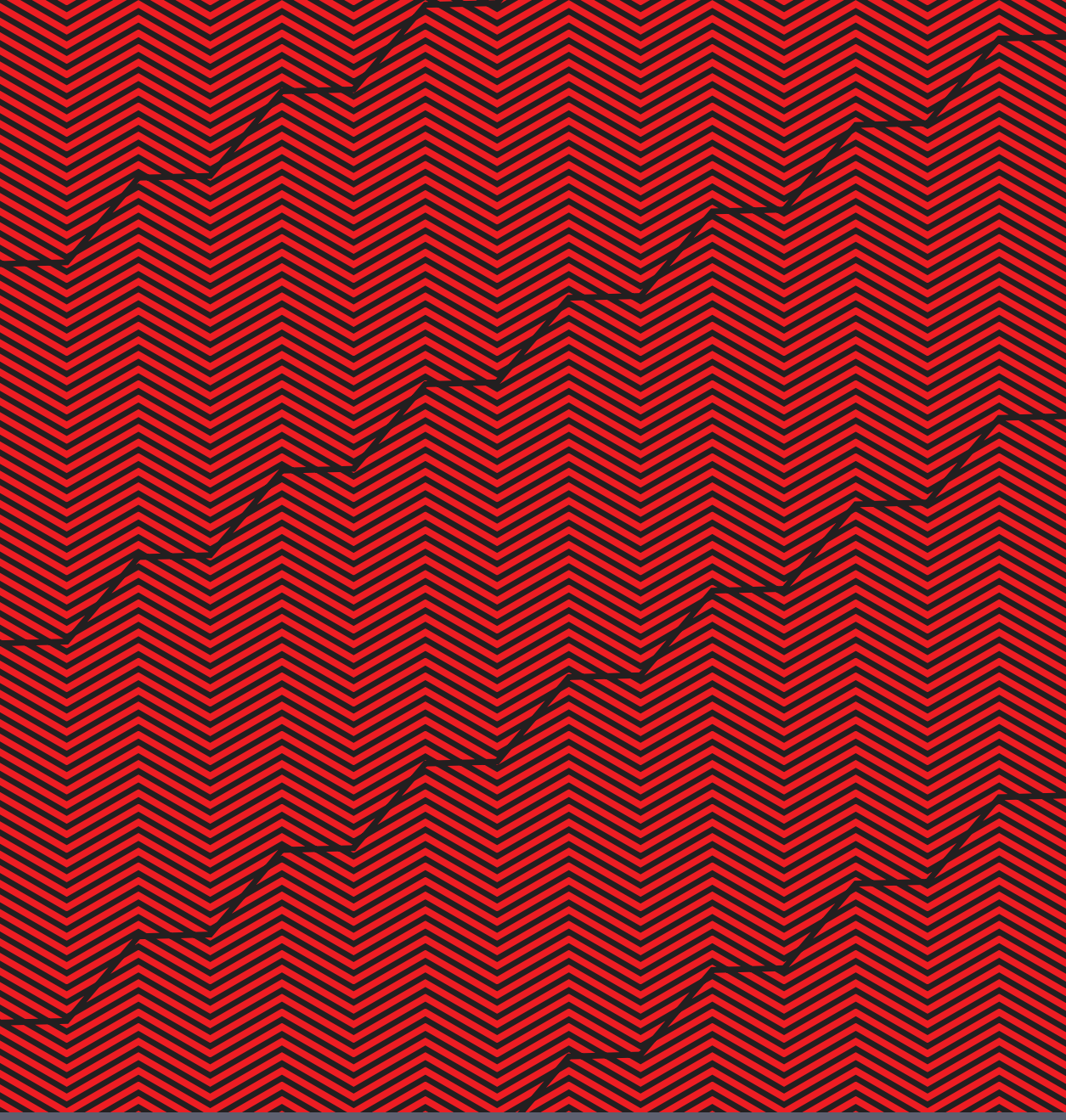

The Death Penalty in the OSCE Area

Background Paper 2022

OSCE ODIHR

The Death Penalty in the OSCE Area

Background Paper 2022

Special Focus: the role of lawyers in capital punishment cases

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 2021*. 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 2021 to 31 March 2022.

All comments or suggestions should be addressed to ODIHR's Human Rights Department at 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

ISBN 978-83-66690-79-0

Designed by Homework

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Introduction

Noting the restrictions and safeguards regarding the use of the death penalty adopted by the international community, as well as the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of capital punishment, OSCE participating States have made a number of commitments relating to the death penalty.[1] They have committed to exchange information on the question of the abolition of the death penalty and to provide information on the use of the death penalty to the public.[2] 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.[3]

OSCE participating States have also made a number of other commitments relevant to the application of the death penalty, such as ensuring the right to life, the right to a fair trial and the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment.[4]

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.[5] The paper is based on information gathered by ODIHR on the situation of the death penalty in all 57 OSCE

1 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, (hereafter, Copenhagen Document 1990), paras. 17.2, 17.3 and 17.4.

2 *Ibid.,* paras. 17.7 and 17.8. See also: Concluding Document of the Third Follow-up Meeting, Vienna 4 November 1986 to 19 January 1989, (hereafter, Vienna Document 1989); Final Document of the Sixteenth Meeting of the Ministerial Council Helsinki, 4 and 5 December 2008, (hereafter, Helsinki Document 2008).

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

4 Vienna Document 1989, Copenhagen Document 1990, Helsinki Document 2008.

5 The Death Penalty in the OSCE Area: Background Paper 2016; The Death Penalty in the OSCE Area: Background Paper 2017; The Death Penalty in the OSCE Area: Background Paper 2018; The Death Penalty in the OSCE Area: Background Paper 2019; The Death Penalty in the OSCE Area: Background Paper 2020; The Death Penalty in the OSCE Area: Background Paper 2021.

participating States during the reporting period, incorporating information from international and regional human rights bodies, non-governmental organizations and media reports.

This year's background paper contains an introductory essay by Sandra Babcock, Clinical Professor of Law at Cornell Law School and an expert in human rights and international and comparative law[6]. Part II focuses on the work and experiences of lawyers in capital punishment cases inside and outside the OSCE region. Part III covers the status of the death penalty in the OSCE region during the reporting period from 1 April 2021 to 31 March 2022.

Throughout this 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.

6 The opinions expressed in the essay are hers and do not necessarily reflect those of the OSCE or ODIHR. For more information about Sandra Babcock, please see here.

Part I: Introductory Essay
by Sandra Babcock[7]

The Role of Defence Lawyers in Capital Cases

Lawyers who defend those facing the death penalty often receive little sympathy for their struggles. Their clients have often caused terrible suffering, and lawyers appear beside those clients in court and defend them against accusations of wrongdoing. Yet capital defence lawyers fill a vital role in criminal justice systems around the world. Their presence beside the defendant protects individuals against the excesses of state power and helps guard against wrongful convictions and death sentences. Without defence lawyers, criminal prosecutions would be inquisitions.

Yet capital defence lawyers around the world face unique challenges that have largely escaped the notice of the international community. In contrast to prosecutors, who receive far more resources and training opportunities and who rely on police officers to assist them in investigating and presenting evidence, defence lawyers in most countries receive little to no support for investigation, transportation, or expert assistance. On top of the financial hardships and difficult working conditions, capital defence lawyers are targets of harassment, government surveillance and public opprobrium. Lawyers in countries around the world have been arrested, interrogated, attacked and disbarred for their work on behalf of capital defendants.[8]

Even in resource-rich countries, capital defence lawyers face unique challenges. As a young lawyer defending people on death row in Texas, in the United States, I was part of an organization that was the frequent target of politicians who objected to our work on behalf of condemned prisoners. They vilified us when we were successful in preventing executions. They sought to eliminate our sources of funding and were

7 Clinical Professor, Cornell Law School. Faculty Director and Founder, Cornell Center on the Death Penalty Worldwide.

8 Sandra Babcock, "An Unfair Fight for Justice: Legal Representation of Persons Facing the Death Penalty", in Carol S. Steiker & Jordan M. Steiker, Eds., *Comparative Capital Punishment*, (Cheltenham, UK, 2019), pp. 103-05.

ultimately successful in shutting down our office. Many of us received hate mail, some of it threatening, much of it unspeakably vulgar. Several female defence lawyers I know, myself included, have been threatened with sexual violence—not by crime victims, but by often-anonymous strangers who read about our work.

Most lawyers develop a thick skin and shrug off such attacks. What is harder to ignore are the physical and psychological consequences of vicarious trauma. One of our tasks, as capital defence lawyers, is to investigate the circumstances of our clients' lives to explain the factors that led to their arrest and incarceration. In doing so, we spend hundreds of hours speaking to our clients and their families, reviewing medical and school records and reading police reports. Our clients will often tell us secrets they have harboured their entire lives—stories of abuse, violence and suffering. Others tell of police torture and the terror they felt as they lay helpless on the floor of a jail cell. We hear about parents who punished them, men who raped them, children who died and friends shot in the streets. They tell us of accidents, brain injuries, and hospitalizations. Mentally ill clients tell us about the images that haunt them. Intellectually disabled clients struggle to find the words to describe the bullying they endured as children. We listen, and then we ponder the meaning of those experiences in the context of a death penalty trial or appeal. We think often about our clients and their suffering, and the suffering of those who may have been victimized by our clients.

Defence attorneys bear an enormous psychological burden, likened to that of emergency room doctors, of discovering a 'cure' for their client's death sentence. They search for legal precedents, file appeals, and desperately seek a sympathetic audience in a sea of hostile courts and clemency boards. Cynthia Adcock, a former death penalty lawyer, wrote that the experience of trying to stop a client's execution was "a recurring cycle of hope and despair, hope and despair, hope and despair."[9] Attorneys worry that they will make a mistake—not filing an appeal in time, omitting a vital argument, not pursuing a line of investigation—that could lead to their client's execution. Attorneys who defend prisoners facing imminent execution must not only handle multiple, often simultaneous and complex legal appeals, but must counsel their clients as they prepare for death. Attorneys are also responsible, in most cases, for notifying family members when their loved one has been executed. Yet the vast majority of attorneys receive no training on grief counselling. Writing in 2006 about lawyers engaged in criminal defence work, one scholar commented, "there may be

9 Cynthia Adcock, The Collateral Anti-Therapeutic Effects of the Death Penalty, *11 Florida Coastal Law Review*, 289 (2010).

no other profession whose practitioners are required to deal with so much pain with so little support and guidance."[10]

The trauma of witnessing a client's execution is difficult to describe. One capital defence lawyer tried to put it into words: "You're laid out from the experience, emotionally you're laid out, and there's a kind of flattening. Underlying it is kind of—you're *wounded* in some way."[11] Others describe being "numb," "incapacitated," shocked and depressed.[12] After witnessing his first execution, another lawyer explained, "I'd never seen anybody be killed before. I witnessed a murder."[13]

I have witnessed three executions in my career, and I hope never to do so again. When my first client, Joseph "Stan" Faulder, was executed by the State of Texas, I was wholly unprepared for the experience of watching the state kill my client. I had known Stan and his family for eight years. I had stopped his execution nine times before, but all of my legal arguments failed in the end. When I walked into the execution chamber, it looked like a hospital room. This somehow made it worse: the chilling, clinical, and premeditated nature of the killing was accentuated by the barren room. My client was displayed, like a museum exhibit, in the middle of the room, lying on a white cot with his arms extended, crucifixion-style, to either side. The entire spectacle seemed staged for an audience—and it was, for in two separate rooms adjoining the execution chamber stood an array of witnesses, including journalists, prosecutors, and the victim's family members.

I stood behind the glass while Stan looked at me. I felt impotent, helpless to do anything other than put my hand on the glass in a mute expression of solidarity while hidden executioners pushed lethal poison into his veins. The horror of that experience will never leave me. Two more clients asked me to be present at their executions in subsequent years, and each killing I witnessed brought back memories of the first. At each execution, I walked past a gauntlet of protesters, some cheering my client's execution, and others lamenting it. Some fragments of memories are particularly vivid: holding back the hair of my client's daughter as she vomited after witnessing her father's execution; listening to prison guards joking and laughing while I sought to comfort another client in his final moments of life. Even writing about these events now, years later, my heart pounds and I feel echoes of rage, despair, and depression.

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10 Susan Bandes, Repression and Denial in Criminal Lawyering, *Buffalo Criminal Law Review*, Vol. 9, p. 339, 342 (2006).

11 Susannah Sheffer, *Fighting for Their Lives: Inside the Experience of Capital Defense Attorneys*, (Nashville, Vanderbilt University Press, 2013), p. 91.

12 *Ibid.*, pp. 90-91.

13 *Ibid.*, p. 90.

Recently, scholars have begun to examine the extent to which those who are involved in the apparatus of capital punishment—from victims to prison guards—are affected by the trauma they witness. Many years ago, researchers coined the term 'vicarious trauma' to describe a constellation of symptoms that sometimes afflict members of helping professions such as therapists, aid workers, social workers and medical staff.[14] Now, researchers are recognizing that vicarious trauma affects capital defence teams too.[15]

In 2016, a scholar carried out the first qualitative study of vicarious or 'secondary' trauma in a group of U.S. capital defence practitioners. Study participants—including lawyers, investigators, and paralegals—reported experiencing nightmares, insomnia, exhaustion, depression, low self-esteem, anger, and diminished trust in the world after defending clients facing the death penalty.[16] The mental anguish experienced by legal teams in the United States is not unique. A defence lawyer from India explains that when he takes on a death penalty case, "I feel I am living with a coffin tied to my back. It takes over my life, dominates my thoughts during the day, corrupts all pleasure and invades my dreams at night."[17] And in 2022, death penalty attorneys—from Bangladesh, Bahrain, Belarus, Cameroon, India, Iran, Japan, Malawi, Nigeria, the United Kingdom, and the United States who were consulted in connection with this report—reported feelings of distress, trauma, and depression.

For far too long governments have ignored the need to provide adequate support to capital defence teams. Prosecutors and police receive funding for training and capacity-building, while the defence bar is habitually underfunded.[18] Although international law provides that indigent capital defendants have the right to effective, state-appointed counsel at no charge,[19] lawyers are so grossly underpaid that they

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14 What is Vicarious Trauma?, U.S. Department of Justice, Office for Victims of Crime.

15 Although most studies focus on lawyers, non-lawyers involved in capital defence work, such as investigators, paralegals, and mitigation specialists, suffer equally from the symptoms described here.

16 Kyoko Yoshida Tavassoli, "*Secondary Trauma in Capital Trial Defense Practice for Indigent Clients*", PhD Dissertation, pp. 115-41 (2016).

17 Susannah Sheffer, Fighting for Clients' Lives: The Impact of Death Penalty Work on Post-Conviction Capital Defense Attorneys, in *Death Penalty and the Victims,* New York: United Nations, 2016), p. 333.

18 See generally, Sandra Babcock, "An Unfair Fight for Justice: Legal Representation of Persons Facing the Death Penalty", in *Comparative Capital Punishment*, *op.cit.*, note 8, pp. 100-02; "Access to Legal Aid in Criminal Justice Systems in Africa", U.N. Office on Drugs and Crime [UNODC], at vii (2011).

19 International Covenant on Civil and Political Rights, art. 14, Dec. 16 1966, 999 U.N.T.S 171. *See also* Economic and Social Council Res. 1989/64, "Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty", states have an obligation to "provide special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, *above and beyond the protection afforded in non-capital cases*", (emphasis added); U.N. Human Rights Comm., General

struggle to fulfil their professional obligations.[20] When lawyers are deprived of the time and resources to defend their clients, it not only magnifies their emotional and psychological anguish, but leads to unfair trials and wrongful convictions. Ultimately, the state's deliberate indifference to the needs of defence teams undermines the integrity of the legal system as a whole.

Governments could help alleviate the strain on defence lawyers and improve their ability to provide quality legal representation to the most vulnerable members of our society by taking a few concrete steps in the immediate term, such as increasing lawyers' pay; providing resources for investigators and experts; and providing training and professional counselling. But in the end, none of these can ever eliminate the damage wrought by a system that engages in ritualized killing as a response to crime. Horror and pain are the handmaidens of capital punishment. As long as the death penalty exists, lawyers will fight for its victims and bear witness to their pain. It is time to recognize that the death penalty itself is the problem—and that abolition is the only solution.

Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, para 38 states, "In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings. Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused."

20 See *Public Defender's Services in Ethiopia: Assessment of Current Gaps and the Way Forward,* Ethiopian Lawyers' Association & Ethiopian Young Lawyers' Association et al, (Addis Ababa: ELA & ELYA, 2015), pp. 51, 55-60, 63; Aurora E. Bewicke, Asian Developments in Access to Counsel: A Comparative Study, Northwestern Journal of International Human Rights, Vol.10 Issue 2, Winter 2011, p. 45, detailing that limited funding, heavy caseloads, and corruption renders the provision of adequate representation to be virtually impossible.

Part II: The role of lawyers in capital punishment cases

1. Methodology

This thematic chapter is based on desk research, and a survey and online consultations undertaken with the assistance of the International Bar Association. This approach was chosen in light of OSCE commitments to exchange information on the question of the abolition of the death penalty and to publicize available information about the use of the death penalty.[21] It is also a useful resource for OSCE participating States who are engaged in promoting the abolition of capital punishment worldwide. Furthermore, it is relevant to citizens of OSCE participating States who could be prosecuted for crimes in retentionist jurisdictions.

The survey was held between 26 May 2022 and 16 June 2022 and drew responses from 16 defence lawyers who have been representing clients in capital cases for between four and 36 years. These lawyers come from a range of jurisdictions both in and outside the OSCE region. They include those who represent clients at trial as well as post-conviction. Some of them work alone, while others practice in a law firm or organization. Although the volume of responses is not representative, their contributions give a valuable insight into their work and support the findings of other research conducted in this area.

The resources available and the applicable international and domestic legal frameworks vary dramatically in the different OSCE participating States, as well as in the jurisdictions of survey respondents from outside the OSCE region. Despite these differences, the findings of this report highlight the commonalities experienced by lawyers across the breadth of jurisdictions.

21 "Copenhagen Document 1990", *op.cit., note 4,* paras. 17.7, 17.8.

The OSCE Office for Democratic Institutions and Human Rights extends its sincere appreciation to all the lawyers who took part in this survey and whose input has informed its conclusions.

2. The right to effective legal representation in capital punishment cases in law and practice

2.1. The right to effective legal representation

International law provides for the right to effective legal representation, including the right to be provided with legal assistance in serious criminal cases.[22] This right is especially important in capital cases where the defendant faces the death penalty. In such cases, the inadequate defence increases the risk that an individual will face the death penalty, particularly if they have been coerced into confession by means of torture or ill-treatment.[23] In Belarus, for example, Amnesty International reports, "[t]orture and ill-treatment are being widely used to force suspects to self-incriminate in the absence of a lawyer".[24]

The following aspects of the right to effective legal representation are particularly at risk for capital case defendants and those on death row.

- Legal representation must be provided free at all stages of the proceedings for those who are at risk of the death penalty and who cannot afford a lawyer.[25] Lawyers who responded to our survey were either salaried employees of a law firm, paid by the public defender's office or an organization, did the work pro bono, or were paid for by the family of the defendant.
- Representation must be effective, with "blatant misbehaviour or incompetence" by a state-funded defence attorney potentially being a violation of rights in international law.[26] However, as noted below, whilst legal representation may be provided for indigent persons, the quality of that representation may not always be adequate.

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22 Article 14 ICCPR; Human Rights Committee, General Comment No. 32, *op. cit.*, note 19, para 38; Human Rights Committee, General Comment No.36, CCPR/C/GC/36, para 41; see also, generally, UN Basic Principles on Role of Lawyers, adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba; ECOSOC Resolution 1989/64, Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, 24 May 1989, section 1(a).

23 See Innocent until proven guilty? Access to counsel crucial for those facing capital punishment, FIDH,9 October 2020; see also Death Penalty in Belarus. Murder on (Un)lawful Grounds, FIDH, VIASNA, October 2016, at pp. 8 - 12.

24 FIDH, VIASNA, *op. cit.*, note 23, at p. 70.

25 See General Comment No. 32, *op. cit.*, note 19, para. 38; see also Human Rights Committee, *Shaw v. Jamaica,* Communication No. 704/1996, Views adopted on 4 June 1998 (CCPR/C/62/D/704/1996), para. 7.6

26 General Comment No. 32, *op. cit.*, note 19, para 38.

- Legal representation in death penalty cases should be provided from the outset, starting with detention, arrest, suspicion, or charge, and continue through to appeal or other post-conviction proceedings.[27] This includes during investigation, when there is an increased risk of torture or ill-treatment resulting in confessions subsequently used in evidence against the accused. In practice, however, in various countries, individuals are denied access to a lawyer at various stages, including during pre-trial investigation, such that some may only meet their lawyer for the first time in court when the trial starts.[28]
- International standards require that there should be adequate time and facilities to prepare a defence. This includes access to information; the ability of the lawyer to consult with their client and in private; that the lawyer be paid sufficiently well to be able to represent their client effectively; and that there is time to prepare the case.[29] In addition, there should be special protection accorded to defendants in capital punishment cases; namely, that the time and facilities provided should be "above and beyond" that provided in other cases.[30]

The UN Human Rights Committee has found Belarus in violation of the right to access a lawyer in a number of death penalty cases. It notes, for example, that the clients were only visited once during pre-trial investigation, meetings were extremely short, were not held in private, or the accused was questioned without the presence of the lawyer, thereby negatively affecting the accused's defence.[31] Additional research has found that in Belarus, the accused may not have the assistance of a lawyer during the trial.[32] Furthermore, Amnesty International has documented cases where individuals in Belarus have not been able to speak with their lawyer in private, only in the presence of police officers.[33]

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27 *Ibid.*; see also UN General Assembly Resolution 67/187, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 28 March 2013, A/RES/67/187, paras. 20, 47(c); UN Economic and Social Council Resolution 1989/64, Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, 24 May 1989, para. 1.a.

28 See FIDH, *op. cit.*, note 2. FIDH, VIASNA, Death Penalty in Belarus. Murder on (Un)lawful Grounds, October 2016, at pp.38-39, *op. cit.* note 23.

29 See UN Basic Principles on the Role of Lawyers, *op. cit.*, note 22, principles 3, 8, 21 and 22; and the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, principle 18.

30 Resolution 1989/64, *op. cit.*, note 27, para. 1.a.

31 *Lyubov Kovaleva and Tatyana Kozyar v. Belarus*, Communication No. 2120/2011, U.N. Doc. CCPR/C/106/D/2120/2011 (2012), para 11.5; *Svetlana Zhuk v. Belarus*, Communication No. 1910/2009, U.N. Doc. CCPR/C/109/D/1910/2009 (2013), para 8.5.

32 Why the Death Penalty Continues to Be Applied in Belarus, ECPM Proceedings Brussels 2019, (accessed 19 August 2022).

33 Ending Executions In Europe. Towards Abolition Of the Death Penalty In Belarus, Amnesty International, EUR 49/001/2009, p. 23.

These are similar to the restrictions reported by many of the lawyers who responded to the survey. For example, some stated that the administration of the particular prison where their client was being held determined whether and when a lawyer was able to visit them. As one lawyer noted:

> "Rules for visitation, even legal visitation, vary institution by institution. Some prisons limit the days on which even legal visits can take place. At some institutions, it can take weeks to schedule a confidential legal phone call. Sometimes the time period for those legal visits is limited. Some prisons allow contact legal visits, some don't".

When visits are allowed, there may be restrictions that negatively affect the lawyer's ability to talk confidentially and effectively with their client. For example, some meetings have to take place behind glass or plastic partitions. This prevents the exchange or signature of documents and requires them to speak loudly.

Although some respondents to the survey noted that their client meetings always take place in private, others raised concerns about the lack of confidentiality, noting that they are not able to sit alone with their client due to the lack of appropriate space provided in the facilities. As one lawyer stated:

> "…police officers are always present for security purposes. I do ask them to distance themselves in order to ensure confidentiality. Nevertheless, despite being some distance away, they are always "visible" to the clients".

The timetable imposed by courts can leave little time for proper preparation. Although the time limits will vary depending on the court and the stage of the process, lawyers in the survey stated that, in some instances, the time is extremely limited. For example, in one instance cited by a respondent, the lawyer had just 21 days to prepare for trial. Some jurisdictions have legally prescribed minimum preparation times. However, from the experience of lawyers in other jurisdictions, the amount of time provided is arbitrary and can depend on "the mood of the judge and his schedule, some of them extending for months and some of them for a few days". The length "varies from hours to days/weeks/months depending on the nature of the case and presiding judge".

Besides the inevitable stresses that this type of case imposes on lawyers, these circumstances highlight the critical importance of appropriate experience and expertise in representing individuals facing the death penalty.

2.2. Quality of legal representation

The quality of legal representation is a crucial element in death penalty cases: "A competent attorney can mean the difference between life and death".[34] Legal representation should be effective, with lawyers who are adequately trained and competent and, if the individual cannot pay or where the interests of justice require, free.[35] Poor representation—for example, where lawyers do not carry out investigations, fail to obtain relevant reports or expert opinions, are not present at hearings, lack experience in dealing with these cases, or exhibit blatant incompetence or misconduct during the proceedings[36]—can result in the rights of the defendant being inadequately represented.

Furthermore, national standards on what is considered 'effective representation' may fail to provide the appropriate safeguards for the defendant. For example, in the United States, the prevailing legal standard to demonstrate the ineffective assistance of counsel is that the lawyer's performance must not only fall below an objective standard of reasonableness, but that there is a reasonable probability that the outcome of the proceedings would have differed, but for the lawyer's error.[37] Observers consider that this test imposes an "extremely high burden on the defendant".[38]

2.2.1. Funding

Related to the quality of the legal representation is the amount of pay lawyers receive, as well as the funding available to ensure an effective defence.[39] Resources available

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34 Inadequate Representation, ACLU, (accessed 19 August 2022). See also Bruce A. Green, Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers, *29 Geo. J. Legal Ethics* (2016) 527, pp. 533-535. See also dissenting opinion of Justice Sonia Sotomayor in the case of *Shinn v Ramirez* before the US Supreme Court: "Two men whose trial attorneys did not provide even the bare minimum level of representation required by the Constitution may be executed because forces outside of their control prevented them from vindicating their constitutional right to counsel", 937 F. 3d 1230 and 943 F. 3d 1211, No.20-1009, Decision 23 May 2022, p.19.

35 UN Human Rights Committee, General Comment 32, *op. cit.*, note 19, para 38. See also UN General Assembly, Resolution 67/187, *op. cit.*, note 27, para. 45(c) of Annex, and UN Basic Principles on the Role of Lawyers, *op. cit.,* note 22, para. 6.

36 *Ibid.;* Communication No. 838/1998, *Hendricks v. Guyana*, U.N. Doc. CCPR/C/76/D/838/1998, para. 6.4; Communication No. 775/1997, *Brown v. Jamaica*, U.N. Doc. CCPR/C/65/D/775/1997, para. 6.6, e.g., Slamming the Courthouse Doors. Denial of Access to Justice and Remedy in America, ACLU, December 2010.

37 See *Strickland v Washington*, U.S. Supreme Court, 466 U.S. 668, 694 (1984).

38 See, e.g., Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases, Innocence Project, September 2010, p. 1.

39 See generally Sherri DioGuardi, Examining the Death Penalty Insider Perspective: Capital Bench & Bar Interviews, *Journal of Qualitative Criminal Justice & Criminology* (2014).

at the post-conviction stage may be even more limited than those at the trial stage.[40] More broadly, these challenges are part of a broader picture of low funding for legal representation of indigent persons in some countries,[41] and the fact that many of those who require representation are poor and particularly vulnerable.[42]

Lawyers' responses to the survey varied in whether they considered they received adequate pay for their work. Although some were uncomfortable making comparisons with the pay of other lawyers, and felt they were compensated appropriately, others considered their pay inadequate. As one lawyer told us:

> "[T]he persons who may be charged for offences punishable by death are rarely in the elite category. Lawyers working on their defence will have to struggle with the little resources available or do it pro bono outrightly".

Many lawyers who work on death penalty cases have devoted their entire careers to doing so and have developed extensive expertise.[43] Some public defenders' offices, for example in the United States, are competitive workplaces and attract a wide selection of qualified applicants for open positions.[44] In addition, programmes have been established that provide services to those charged with capital offences, such as through Capital Defence Offices.[45] Indeed, there is some research from the U.S. to suggest that public defender offices may provide better representation than court-appointed lawyers. This could be for a number of reasons, including:

- They may be "more aggressive advocates due to a stronger ideological commitment to indigent defence";
- They are "highly competitive";
- They have the budget to be able to hire support such as experts and investigators;
- They receive a salary rather than a flat fee per case; and
- They have acquired the case based on their expertise.[46]

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40 Sean D O'Brien, Capital Defense Lawyers: The Good, the Bad, and the Ugly, *Michigan Law Review*, Vol. 105 (2007) 1067, at pp. 1084-1085.

41 See Secretary-General of the UN, "Extrajudicial, summary or arbitrary executions. Note by the Secretary-General", A/70/304, 7 August 2015, paras. 85-87.

42 See generally Death row 'reserved for the poor, OHCHR, 16 October 2018; see also UN Secretary General, *Moratorium on the use of the death penalty. Report of the Secretary-General*, A/73/260, 27 July 2018, paras. 49-50.

43 See e.g., Faculty Spotlight: As He Rose In His Career, Bonnie Made Case Against Death Penalty, UVA Today, 8 April 2021; Amanda Robert, Kelley Henry is a champion for death row inmates, 1 April 2021.

44 See LisaD. Williams, Careers In Indigent Defense: A Guide To Public Defender Programs, Harvard Law School, 2012, p. 10.

45 The Death Penalty in the OSCE Area. Background Paper 2021, OSCE/ODIHR, p. 15. See list at: https://www.ncids.org/capital-cases/capital-defender-offices/.

46 Scott Phillips, Legal disparities in the capital of capital punishment, 99 *Journal of Criminal Law and Criminology* 717 (2009), at 754.

In addition, in some jurisdictions, the unpredictable quality of court-appointed attorneys, combined with inadequate pay, means that public defenders offices can offer more consistent representation to indigent clients than court-appointed lawyers.[47]

However, lawyers representing death penalty clients may not always have adequate experience or devote substantial time or resources to such cases. For example, courts in the United States have held that lawyers working on capital cases rendered assistance that fell below the standard of effectiveness required by law.[48] One former United States Supreme Court justice stated that of the dozens of eve-of-execution emergency stay petitions she had examined as a judge, in none of them was the defendant "well represented at trial."[49]

As with other complex criminal cases, an effective defence requires a team to work on the case, rather than just one lawyer.[50] Lawyers responding to the survey also highlight the need for money for travel expenses, obtaining files and collecting evidence. Translation may also be required and in-depth investigation is essential to examine prosecution witnesses and discover evidence. Expertise is also crucial, for which fees and expenses must be allocated. The mental health issues of defendants will affect the case, highlighting the need for support from suitable professionals to ensure an adequate defence strategy is developed.[51] There may not be funding available for hiring the appropriate expertise. Said expertise may not be available locally, or there may be restrictions on which types of professionals the court may appoint. Guidance from organizations such as the Death Penalty Project, on forensic psychiatric practice in death penalty cases for example, may help to bridge the gaps.[52]

The right to a fair trial includes the principle of equality of arms. As the UN Human Rights Committee explains:

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47 See Matt Reynolds, Maine will hire its first public defenders to aid struggling indigent defense system, *ABA Journal*, 19 May 2022 (explaining that Maine, the last state in the U.S. without a public defender system, was in the process of hiring attorneys for a newly-established public defender's unit).

48 See, e.g., U.S. Supreme Court Orders Texas Court to Reconsider Case of Inadequate Representation, Death Penalty Information Center, 17 June 2020.

49 Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, 9 Apr. 2001.

50 Robin Maher, The legal profession's opportunity and obligation to support the defense effort in death penalty cases, 3 *Justice International* 27 (2019) at p. 28.

51 *Ibid.*, p. 28; see also A. Thornewell et al, A matter of life or death. Mental health experts play a key role in evaluating the mitigating evidence that informs a defendant's sentence, 47(7) *Monitor on Psychology Judicial Notebook,* 2016.

52 See, e.g., N. Eastman, S. Krlies, R. Latham, M. Lyall, *Handbook of Forensic Psychiatric Practice in Capital Cases*, Death Penalty Project, Forensic Psychiatry Chambers, 2nd edition, 2018.

> "This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant".[53]

Some lawyers who responded to the survey indicated that they believe their jurisdiction did not uphold the principle of equality of arms. Although some acknowledged the resources available to the prosecution were also limited, they cited inequalities for the defence:

> "It is unequal; the prosecuting authority have state-backed access to finance, investigative resources, such as compelling banks to produce client's financial records, access to call logs of suspect[s] from the network service providers, tax records etc. For a private lawyer undertaking the service of defending his client, [they] will have a hard time getting equal access to these investigative resources. The defence lawyer may be mandated to get court orders to obtain records or access to sensitive information which could be frustrating and time wasting".

In addition, lawyers note a perception that the system can be biased against the defence, citing imbalances not only in the approach of the court[54] but also in the defence's ability to access documents. In the words of one lawyer:

> "There is no equality. The prosecution have the investigation report, which we have to pay to be given a copy of, and if the client is not available then, as defense counsel, I will be seeing it in court for the first time during the tendering of documents or during the examination in chief. The prosecution is financed by the state while the client might not have access to his/her account".

2.2.2. Competency and Experience

Seasoned and specialized lawyers are better placed to defend death penalty clients. High quality, experienced representation can be very influential in the outcome of a case, including in enabling a judge or jury to fully understand the context of the alleged crime and the defendant's own mental state in relation to it.[55]

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53 UN Human Rights Committee, General Comment No. 32, *op. cit.,* note 19, para. 13.

54 For example, one respondent stated, "There is no equality of arms between the prosecution and defence. Moreover, in most cases, the defence motions for additional research are rejected by the court".

55 See W.S. White, The role of defense lawyers in capital cases, in *Litigating in the Shadow of Death*, (University of Michigan Press, 2006), chapter 1, at pp. 9-10.

The importance of extensive experience rests, in part, in knowing what type of resources and evaluations to seek in a death penalty case. For example, one respondent with decades of experience described the process for obtaining resources to defend clients effectively as follows:

> "I've had the most success obtaining resources by building a step-by-step argument for why the resources are necessary for an effective defence. If, for example, the government's burden is to prove that my client committed homicide with malice aforethought and specific intent to kill, e.g., after premeditation and deliberation, and I have records that show that a client had educational deficits, I could use those records for a request for funds for a clinical psychologist. If that clinical psychologist's evaluation suggested that my client might have some gross brain impairments, I would use that report to seek funds for a neuropsychological evaluation. If the neuropsychological evaluation revealed additional evidence of organic brain damage, I would use that neuropsychological report to request funds for an MRI or an fMRI or a CT scan, depending upon what the neuropsychologist thought would be most useful, etc. It all depends upon what the legal issues are. But it's necessary to show the court that holds the purse strings that the funding being requested is necessary for the defence".

Experienced defence lawyers will likely be better able to identify the necessary experts for the defence strategy. They may also have the necessary contacts to be able to provide further advice and support. As one expert puts it, "successful capital defence attorneys work with co-counsel, mitigation specialists, investigators, and experts in advance of trial."[56]

The importance of the lawyer being able to show a defendant's mental capacity and background including, for example, a history of abuse or mental health issues, is crucial to an effective defence.[57] Failure to do so can mean the difference between life and death.[58] This information can be presented effectively with specialized expertise, but an inexperienced litigator may not be aware of this. Experienced lawyers will also understand the emotional challenges for the defendant and their families in discussing these types of issues, appreciating the need for interviews to be conducted

56 O'Brien, "Capital Defense Lawyers: The Good, the Bad, and the Ugly", *op. cit.*, note 40, at p.1081.

57 "The Death Penalty in the OSCE Area", OSCE/ODIHR, *op .cit.,* note 45, p. 16; see also A. Robert, Kelley Henry is a champion for death row inmates, *ABA Journal*, 1 April 2021; D. Rose, Death Row: the lawyer who keeps losing, *The Guardian*, 24 November 2016.

58 For an example of a case where attorneys failed properly to utilize available evidence on mental capacity in a capital case, "State of Alabama Executes Matthew Reeves", Equal Justice Initiative, 27 January 2022.

appropriately and for the provision of mental health support to avoid exacerbating their client's mental state in the lead-up to, or during, a trial.

If the lawyer does not have the appropriate expertise to defend their clients, for example, by conducting detailed investigations into the circumstances of the case and the background of their clients, they may not be aware of, or able to demonstrate the vulnerabilities or disabilities of the defendant, nor be able to cross-examine prosecution witnesses effectively.[59] This is relevant given the disproportionate number of vulnerable and marginalized people facing the death penalty. In addition, challenges to securing adequate expertise can arise where death penalty attorneys are appointed by the state. In some jurisdictions, appointed counsel must obtain the approval of the judge to acquire critical services such as investigators and expert witnesses; such approval is often withheld.[60]

Even assuming that a judge or jury returns a guilty verdict, an experienced attorney can be the difference between life imprisonment and a death sentence. As the processes in death penalty cases may differ from other criminal proceedings, the lawyer must be aware of the relationship between the trial and sentencing.[61] In addition, post-conviction work in capital cases is even more complex, with an intense sense of urgency that makes experience all the more important: "[it] is about stopping a train that is already barrelling towards a client, rather than blocking that train from leaving the station".[62]

Experienced litigators acting on behalf of clients facing the death penalty will also be better prepared to negotiate appropriate plea bargains in jurisdictions where this is permissible and if it is in their client's interest. Experience lawyers are more likely to recognize that "one of the ironies of death penalty litigation is that defendants who claim innocence are at a greater risk of being sentenced to death than a defendant whose guilt is obvious".[63] Negotiating a plea before trial, where the defendant's guilt is clear, gives the defence lawyer a chance to persuade the prosecution not to seek the death penalty.

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59 See, Inadequate Representation, ACLU *op. cit.,* note 34.

60 See Phillips, "Legal disparities in the capital of capital punishment", *op. cit.,* note 46, p. 728.

61 Green, "Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers", *op.cit.,* note 34, pp.533-535.

62 Susannah Sheffer, "Fighting For Clients' Lives" op. cit., note 17, p. 332.

63 O'Brien, Capital Defense Lawyers: The Good, the Bad, and the Ugly, *op.cit.,* note 40, at p. 1075; see also White, Litigating in the Shadow of Death, *op. cit.* note 55, pp. 9-10.

Criminal defence lawyers are regulated by the laws and ethical rules applicable to lawyers in their jurisdiction. However, it has been acknowledged that more specific guidance may be needed for those representing clients in death penalty cases.[64]

Research has also identified particular challenges for lawyers defending clients who have elected to be executed. This may happen for a variety of reasons, including suicidal thoughts, mental health issues, guilt, remorse, or an inability to manage the emotional difficulties, among others. These situations raise ethical dilemmas for the lawyers defending the individuals, including whether the lawyer has a duty always to respect the wishes of the client, particularly if the client has mental health issues.[65]

The standards of competency of lawyers in this particular area of practice — particularly when the attorney is court-appointed — are not always provided. Attempts have been made to address these gaps, for example, in the United States with the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases66* and the National Legal Aid and Defender Association's *Standards for appointment and performance*.[67] However, it is not always the case that attorneys appointed to death penalty cases have adequate skills and experience.

In addition, in the United States, there are concerns over the method of appointment of those representing indigent individuals, as the fee they receive may be standardized and not necessarily based on the number of hours worked on the case. This creates serious incentive issues in such cases. There is also evidence in the United States of judges appointing defence lawyers "not based on their competence or experience, but based on their reputation for rapidly moving cases through the system".[68]

2.2.3. The need for other skills

Lawyers who responded to the survey pointed to various types of skills needed to defend capital cases effectively. These included knowledge of human rights, medical jurisprudence, and forensic skills "to be able to…prob[e] into evidence in murder cases, autopsy, and physical evidence from the death". In addition, some respondents

64 See generally, Green, Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers, *op.cit.* note 34. See also, *ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases,* American Bar Association.

65 *Ibid.*, p. 533. See also, generally, C. Lee Harrington, "A community divided: Defense attorneys and the ethics of death row volunteering", *Law and Social Inquiry* 25(3) (2000), pp. 849-881.

66 *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* American Bar Association, 2003.

67 NLADA, Standards for the Appointment and Performance of Counsel in Death Penalty Cases (Black Letter).

68 See, Inadequate Representation, ACLU, *op.cit.,* note 34.

noted the importance of psychological skills including "patience", the "ability to listen", "the ability to focus without distraction when….there is a live execution date", good case management and media relations skills. Research supports the proposition that death penalty lawyers often need to utilize skills which are not legal but "more therapeutic in nature",[69] particularly when clients make choices that are not necessarily in their own best interests.

The combination of these social and legal skills is important. As one lawyer told us:

> "The skills are the same, strong research, advocacy, knowledge of legal technicalities, investigative and critical thinking. However, discernment, psychology, [and] high social intelligence will help in understanding the mind of the judge, the prosecution, one's client and how to present the case in the most compelling manner. There are cases where, due to these skills, lawyers have been able to deploy legal dexterity to persuade judges to commute a case of a murder which is punishable by death to manslaughter which is [punishable by] a term of imprisonment".

2.2.4. Workload

Both workload and resources vary widely in the jurisdictions surveyed. Lawyers working on serious cases in some areas have such extensive caseloads that their ability to represent all their clients effectively may be compromised.[70] This possibility, while always problematic, takes on new dimensions where the case is a capital one. While some jurisdictions have established maximum caseload standards for capital punishment lawyers,[71] this is not the case for many others. Even when dealing with only a handful of cases, the workload in capital cases, which can involve thousands of hours of preparatory work, may be challenging or impossible for lawyers to manage without additional staff.

Of the survey respondents, some work alone, while others have an in-house team in their firm or organization with whom they share the caseload, sometimes accompanied by paralegals and support staff. Their situation has an impact on how many cases they may have at one time and how manageable they perceive that workload to be. For example, among those who work on even a small number of cases alone, one

69 Harrington, "A community divided", *op.cit.,* note 65, at p. 862.

70 See, e.g., Taylor Payne, Plight of the Public Defender: Excessive Caseload as a Non-Mitigating Factor in Sanctions for Ethical Violations, *Mo. L. Rev.* 83, 1087 (2018), at 1100-1103.

71 See, e.g., American Council of Chief Defenders Statement on Caseloads and Workloads, American Council of Chief Defenders (2007) at 2, note 2.

lawyer told us: "I now have three cases of execution, which constitute a heavy burden because it takes a lot of time and effort". For others who have a team behind them in their organization or firm, a larger number of cases may be feasible. Conversely, where additional staff and support are not available, the situation for the respondents was untenable, particularly when combined with other cases:

> "As a legal aid advocate, I am assigned to one district… Therefore, I am responsible for representing all defendants who cannot afford the services of a private lawyer in that district. Clearly, the case load is not manageable".

3. The independence and impartiality of judges and lawyers

Limitations to the independence of the judiciary and executive control over lawyers and the legal profession, for example in Belarus,[72] affects the extent to which defendants' right to effective legal representation is respected. This varies widely between jurisdictions and even within a country. In the United States, for example, depending on the state and county, the executive appoints judges while others are directly elected.[73]

Some lawyers who responded to the survey did feel that the judges they faced in capital cases lacked impartiality. As one lawyer informed us:

> "The judge is completely biased toward the prosecution and does not respond to the defence's requests, so he [the defence] cannot see all the case papers or request witnesses to be brought and discussed".

Respondents to the survey also reported a belief that some judges lacked independence from state agencies. As one lawyer stated:

> "…We have seen that most judges and courts are under the impact of fear or dependence on [the security services]".

Broader political trends, for example the view that certain offences should receive harsher sentences, can skew trials where capital punishment is the potential outcome. This is often reflected in media attention on the case, which can, according to one lawyer, result in putting "a lot of pressure on the courts to secure a conviction". As the prominent lawyer and legal scholar, Susan Bandes, has noted with respect to

72 "Ending Executions In Europe", Amnesty International, *op.cit.*, note 33, at pp. 20-21.

73 For example, in many U.S. jurisdictions, a local constituency directly elects judges. See Maher, "The legal profession's opportunity and obligation", *op.cit.,* note 50, pp. 28-29.

the media in the United States: "the media present distorted images of crime and justice. These images have serious consequences, including… a pernicious influence on the American system of capital punishment, both in the aggregate and in its application to individuals".[74]

The capriciousness of the system can also result in defendants not receiving a fair trial. This may be in part because of the racial bias in certain systems. Extensive research in the United States, for example, has set forth comprehensive evidence to demonstrate the pervasiveness of racism in capital punishment cases.[75] However, capricious outcomes in death penalty cases may also result from procedural flaws or inconsistencies.[76] These factors can have an impact not only on the defendants themselves, but also on the defence lawyers working on cases that end in arbitrary outcomes.

There are also questions over the independence of some of the lawyers acting on behalf of individuals in death penalty cases. For example, in Belarus, lawyers are subject to activity audits and discipline by the Ministry of Justice, which also controls the Bar Association through the licencing and qualifications process.[77] This control presents a real threat to the independence of lawyers; civil society has documented examples of Belarusian lawyers being disbarred for defending political prisoners.[78] Consequently, lawyers can be afraid to speak out for fear of losing their jobs. The Code of Criminal Procedure in Belarus also places restrictions on disclosure of any aspect of their cases, which—given the threat of disbarment and/or prosecution for violations—prevents many lawyers from making any public statement at all relating

74 Susan Bandes, "Fear Factor: The Role of Media in Covering and Shaping the Death Penalty", 1 *Ohio State Journal of Criminal Law* (2004) 585-597, p. 597.

75 Enduring injustice: the persistence of racial discrimination in the U.S. death penalty, Death Penalty Information Center, September 2020, pp. 33-50 (comprehensively setting forth evidence of racial bias at every stage of a capital case in the United States); T. Lyman, F.R. Baumgartner and G.L. Pierce, Race and Gender Disparities in Capitally-Charged Louisiana Homicide Cases, 1976-2014, *Southern University Law Review*, p. 1 ("No demographic combination was as likely to see a final capital charge or a death sentence as those cases with a black male offender and a white female victim."). See also Randee Fenner, Faculty Research Spotlight: Race and the Death Penalty, *Stanford Lawyer*, 17 June 2020; Faculty Spotlight: As He Rose In His Career, Bonnie Made Case Against Death Penalty, UVA Today, 8 April 2021.

76 For examples of the types of procedural flaws that can result in arbitrary outcomes in capital cases, see, Legally Irrelevant Factors Impact Death Penalty Sentencing, Death Penalty Information Center, (last accessed 23 August 2022).

77 FIDH, VIASNA, *Death Penalty in Belarus, op. cit.*, note 23, pp. 26-30.

78 *Ibid.*, p.27. See also 'Stay Strong': Noted Belarusian Lawyer Who Defended Political Prisoners Deprived Of License, Radio Free Europe/Radio Liberty, 26 October 2021; Some political prisoners released but lawyers under pressure, Human Rights House Foundation, 5 September 2021.

to their cases.[79] This is of particular concern when the accused have been subject to intimidation and coercion to sign a confession. In Belarus, there are also numerous documented cases of lawyers appointed to defendants being changed during the case without explanation.[80] In addition to presenting an obstacle to effective representation, this may also be an indicator of a lack of independence.

4. Secrecy and lack of transparency in proceedings

A lack of transparency in how death sentences and executions take place presents another issue.[81] Lack of information surrounding the execution itself presents a problem in many countries. This has been thoroughly documented, for example, in Belarus.[82] Lawyers from several countries who responded to the survey stated that, in some instances, families were informed about a pending execution by the prison authorities, but that the lawyer only learned of it from their client's family members. In other cases, lawyers did not know until after the execution had taken place, finding out from the media, or because correspondence with their client stopped:

> "In practice, I usually visit the client at least once a month and receive requests for visits by mail. When the letters are not coming anymore, I assume that the client was executed. Usually, it happens 7 or 8 months after the final appeal was denied".

Other respondents stated that lack of transparency was a matter of course in their jurisdiction:

> "All death cases are carried out without informing the lawyer or the family of the accused and, even if the accused person is not informed or allowed to say goodbye to his family, it is a surprise to everyone".

As noted above, an additional obstacle to transparency in death penalty proceedings in Belarus is the legislation relating to state secrets. In line with Belarusian law, death penalty lawyers may be required to sign an undertaking, punishable by a fine

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79 "Death Penalty in Belarus", FIDH, VIASNA, *op.cit.,* note 23, p.28.

80 *Ibid.*, p. 29.

81 "The Death Penalty in the OSCE Area", *op. cit.*, note 45, p. 42. For examples of concerns around transparency, see also Report of the Secretary-General, Question of the Death Penalty, A/HRC/48/29, 17 December 2021, paras. 6-17.

82 "Report of the Special Rapporteur on the situation of human rights in Belarus", UN Human Rights Council, 21 April 2017, A/HRC/35/40, paras. 103 and 104; Belarus: The secret executions in Europe's 'last dictatorship', BBC, 15 May 2018; ECPM Proceedings Brussels 2019, *op. cit.,* note 32. "Ending Executions In Europe", *op.cit.* note 33, p.19.

or imprisonment, not to disclose information about the trial.[83] This impacts upon the public nature of the hearing required by fair trial guarantees.

Some lawyers who responded to the survey have found that using media attention can be an effective tactic to address obstacles to representing their clients, such as limits on meetings, lack of private meeting space, or access to relevant files. As one lawyer stated:

> "In political cases, prisons are reluctant to [let] us visit. So, we file applications in court to visit the prisoner and ask the court to allow us to visit. … We make this application public, tell human rights organizations we are doing this and then it is publicized and then the court wants to avoid adverse publicity and is more likely to grant the application".

Secrecy may also be applied to procedures for clemency. In Belarus, the Clemency Commission, which reportedly operates in "utmost secrecy", does not provide its findings and recommendations to the lawyer and offers no opportunity to challenge them; the client is informed of the outcome just minutes before the execution takes place.[84] Similarly, the conditions in which detainees are held on death row may not be subject to public scrutiny despite there being evidence, in Belarus for example, that individuals can be held in solitary confinement and are poorly treated, making them extremely vulnerable.[85] Furthermore, after the execution has taken place, the state may refuse to return the body to the executed person's family or inform them where the remains have been buried.[86]

83 *Ibid.,* pp. 25-26.

84 *Ibid.,* pp. 27-28.

85 "Death Penalty in Belarus", *op. cit.* note 23, p. 5.

86 *Ibid.,* p. 5. Concluding observations on the fifth periodic report of Belarus, CAT/C/BLR/CO/5, 7 June 2018, para 54. Concluding observations on the fifth periodic report of Belarus, CCPR/C/BLR/CO/5, 22 November 2018, para 27(b).

5. The impact of COVID-19

While some lawyers who responded to the survey said that COVID-19 did not have an impact on their work, others explained that it had "slowed things down" and made investigations, meetings, in-person investigations and assessments, for example, on mental health, and case preparation "more difficult". As ODIHR has already highlighted, the pandemic complicated access for lawyers to their clients in capital cases, raising concerns about the right to a fair trial.[87] Some who were on death row also died from coronavirus during the pandemic.[88]

6. Cross-cutting professional and personal challenges faced by lawyers

6.1. The psychological impact and availability of support

6.1.1. Reasons for working on death penalty cases

Lawyers who work on death penalty cases choose to do so for a variety of reasons. Some respondents to the survey said that such cases are simply "part of the job" and that they take them in order to broaden their experience. Others choose this line of work because they oppose the death penalty and see it as part of contributing to the broader movement for abolition; and/ or because they consider the system to be inherently biased and discriminatory and want to ensure a fair trial for their clients. Again, others consider legal representation in capital punishment cases a form of "civil disobedience", and they see their job as "bearing witness" or "making a record for the future".[89]

As respondents told us:

> "I desired to become a capital defender so that I could do everything in my power to prevent executions by my government, as I have always lived in a democratic republic and felt responsible for the actions of the government".

> "I personally hold the view that the death penalty is inhumane, degrading, and unlawful. As such, I try my best to ensure that my clients are given a sentence limited to a number of years instead of the death penalty".

87 "The Death Penalty in the OSCE Area", *op.cit.,* note 45, at p. 58.

88 See e.g., in the US, COVID-19 on Death Row, American Bar Association.

89 Harrington, 'A community divided', *op.cit.,* note 65, at p. 857; Susannah Sheffer, Fighting for clients' lives: The impact of the death penalty on defence lawyers, Penal Reform International, 2014, p. 3.

> "The death penalty is an unfair punishment and I always wanted to help victims … I am against the death penalty, and I think one of the ways to help the abolishment of the death penalty is through awareness-raising and influencing the public opinion".

These responses suggest that for many capital defence attorneys, "[L]awyering in this context is more than just a job; rather it reflects attorneys' deeply held beliefs and values".[90]

6.1.2. Managing emotions and the weight of responsibility

Death penalty defence work differs from other criminal defence work: "capital cases are among the most emotionally and financially draining cases imaginable".[91] This is particularly true for post-conviction capital defenders because "the stakes are as high as can be: loss of a case means loss of a client's life".[92] Respondents to the survey cite "depression", "maddening stress", and "difficulty sleeping", among other results of working on death penalty cases. Lack of resources to provide quality representation, as noted above, may contribute to these feelings. As one lawyer told us:

> "Representing people facing the death penalty can be emotionally draining. In part, this is because we lack special resources to effectively represent our clients. Sometimes, we are unable to conduct comprehensive mental assessments, to engage forensic experts, or adequately prepare witnesses for trial. Any psychological or moral support is mainly personal as there is no official establishment for dealing with mental support during the pendency or aftermath of a case".

The potential consequence of these cases means that there is a particularly heavy weight of responsibility on the lawyers: "they feel that their clients' lives are in their hands".[93] This weight can feel personal.[94] This is exacerbated by the difficult circumstances in which they have to operate which may mean that they can feel helpless in influencing the outcome. As one lawyer responding to the survey said:

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90 Harrington, 'A community divided', *op.cit.,* note 65, at p. 858.

91 ACLU, Inadequate Representation, *op. cit.*, note 34.

92 Sheffer, "Fighting For Clients' Lives*", op. cit.*, note 17, p. 1.

93 *Ibid.*, p. 330.

94 *Ibid.*, p. 1.

> "Communication with a death row client carries a strong psychological burden. As a human, I unconditionally empathize with the client and try to help him/her. At the same time, I understand that within the [national] legal and court system there is very little I can do to help. There is almost no chances [sic] to help in these types of cases".

It is difficult to compartmentalize work if a client is facing execution, and the case can dominate the working and personal life of the lawyer.[95] The time leading up to an execution is difficult; conversely, an execution that takes place with little or no notice to the lawyer is "devastating in another way". [96]

If the client is executed, there may be an enormous sense of failure for not saving their life. Research from the United States quotes one capital defence lawyer: "Every time someone's executed, you feel like you've failed. Even if you know going into it that the deck is stacked against you".[97] As another lawyer responding to the survey stated, "…after the execution of the sentence, I always was in great pain, as if I had lost a member of my family". Execution of a client however, can also motivate a lawyer to continue to work on other cases:

> "At first I feel disappointed and I enter a state of shock, but this is what fuels me to recover in a speedy manner and work thoroughly on other [death penalty] cases to save lives".

For lawyers who are able to speak with their client in the hours or minutes before they are executed, these conversations are "wrenching".[98] As one lawyer stated to a researcher: "You're trying to offer solace to somebody who's about to die. It's unbelievable. No one can be adequate in that situation. How could you possibly?"[99] Lawyers must also face the difficult task of engaging with their client's family members, including, in some situations, in the moments before their loved one is executed.[100]

There are emotional dilemmas implicit in choosing to witness the execution, in jurisdictions where this is a possibility. Those who do so may feel "complicit" in the

95 *Ibid.*, p. 333.

96 *Ibid.*, p. 2.

97 *Ibid.*, p. 334.

98 *Ibid.*, p. 2.

99 *Ibid.*

100 *Ibid.*

process, but may still be present "out of a personal commitment to the client and a desire to stick with him or her through to the end".[101]

Months or years after, some lawyers grapple with a range of emotions including flashbacks, depression and a sense of guilt about what could have been done differently. This can have serious long-term effects on their health. The Diagnostic and Statistical Manual of Mental Disorders in the US, for example, recognizes "exposure to actual or threatened death", as a criterion for post-traumatic stress disorder, including for those who have to do so repeatedly through their professional lives.[102] As researcher and activist Susannah Sheffer notes, "We can reasonably count capital defence attorneys among the professionals whose work contains this inherent risk [of trauma], with the added dimension that defence attorneys are not only exposed to the traumatic event of the execution but must bear the knowledge that it had been their specific job to try to avert it".[103]

Besides the psychological impact, one lawyer also told us that working on death penalty cases affects their respect for the judiciary:

> "It becomes difficult to respect the judges who are liberal in their confirmation of death sentences. One feels that they do not value human life and are not being judicious. This can and has affected my relationship with a number of judges".

6.2. Stigma, pressure, hindrance and interference

Lawyers defending clients who have been accused of serious crimes may receive considerable respect for their work. However, they can also be the subject of criticism, particularly so in a jurisdiction when there may be wide public support for the death penalty. In addition, those defence lawyers who provide representation can find themselves subject to criticism for their record in failing to prevent the imposition of the death sentence on their clients. One lawyer responding to the survey explained their own personal experience as:

> "…being perceived as both a hero and villain. To suspects, their families and friends and pro-defence stakeholders I come out as a hero. To the victims/victims' families and friends and pro-prosecution stakeholders I come out as a villain. There are people who do not understand why and that I can represent people who are perceived as evil or extremely bad".

101 *Ibid.*

102 *Ibid.*, p. 337.

103 *Ibid.,* p. 338.

Some of the lawyers who responded to the survey had suffered arrest and harassment by the police, by the media, and sometimes by the family of the defendant or victims. Those subject to harassment and intimidation because of the work they do on death penalty cases can experience great personal and professional loss. As one lawyer told us:

> "It had a really big impact. I lost my job and everything I established in my country and moved away from my family and friends to start a new life from scratch and start learning a new language, culture, society, and a completely new job".

Finally, lawyers may face ethical dilemmas in litigating death penalty cases, including, for example, how to proceed in a post-conviction case when the client is unresponsive in efforts to stay the execution; such situations will require the lawyer to balance their personal views with their professional obligations and reputation within the legal community.[104] Such situations will inevitably also have a psychological impact on the attorneys who work on these cases.

7. Support for Lawyers and steps towards abolition

7.1. Support for lawyers

Given the difficult role that lawyers play in defending individuals subject to the death penalty, there are numerous ways that the legal profession can support them in their work.[105] Some organizations, such as the American Bar Association, the Death Penalty Project and the World Coalition Against the Death Penalty, have extensive resources to assist death penalty lawyers.[106] As noted above, there can be a lack of specific guidance for these attorneys, whether this is about the standards they should adhere to, tailored ethical considerations or strategies on managing cases from legal, practical or emotional perspectives. Although guidance may be available from outside the jurisdiction, for example from international organizations, it may not be in an accessible language. Translation of resources, including technical, forensic, and training materials, is one of the needs identified by the lawyers who responded to the survey.

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104 See Green, "Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers", *op. cit.,* note 34, at p. 547.

105 See Maher, "The legal profession's opportunity and obligation", *op. cit.,* note 50, at p. 29.

106 See, for example, Death Penalty Representation Project, American Bar Association. See also The Death Penalty Project "Knowledge" page; the World Coalition against the Death Penalty "Library" page, Cornell Centre on the Death Penalty Worldwide, and Reprieve. For support for families of those subject to the death penalty, see also the Texas After Violence project's Access to Treatment Initiative.

Research indicates that the training a lawyer receives may not prepare them for managing death penalty work and the emotional and psychological challenges it presents.[107] Survey respondents noted that they had had to learn on the job, working as junior members of a team. Lawyers may also take the initiative to seek out additional courses and programmes specializing in human rights and death penalty work that are provided by national and international organizations,[108] although there is wide variance in what is available depending on jurisdiction and language. In addition, one lawyer responding to the survey highlighted that the overwhelming nature of the work itself limits their ability to seek support: "we don't often take the time to reflect on the emotional or psychological toll that the work takes; there is just so much work to do". Despite this, the survey respondents point specifically to the need for emotional and psychological support, including "group therapy for those lawyers who've had clients executed".

While some lawyers receive "great respect from colleagues" for undertaking this type of work, others do not. They want "humility from colleagues who've not experienced having a client executed but who wish to offer advice or consolation" and "humanitarian support to make them feel the importance of what they do with appreciation and respect, not criticism and the society's reluctance to deal with it". Support is also necessary for lawyers coping with a case where they feel a miscarriage of justice has occurred.

In some jurisdictions, there is a community of lawyers working on death penalty cases who can provide mutual support: a "close-knit community of capital defenders" or "individuals [who] kn[o]w each other personally". This is particularly important when there is broad public support for the death penalty in the lawyer's jurisdiction. However, disagreements arise even within the community of capital defenders, for example over issues such as how to respond when clients volunteer for the death penalty. Therefore, lawyers who have to engage with these moral dilemmas may not always be able to draw support from their community. [109] Some survey respondents indicated that only very few lawyers practice in this field in their jurisdiction. For them, the role of international organizations and individuals who work internationally would be especially important.

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107 See Sheffer, "Fighting for clients' lives", *op. cit.,* note 17, p. 3.

108 For example, Makwanyane Institute, Death Penalty Worldwide, accessed 27 September 2022; see also Training Resource: Protecting the rights of those facing the death penalty and life and long-term imprisonment, Penal Reform International, accessed 27 September 2022.

109 Harrington, "A community divided", *op.cit.,* note 65, pp. 875-876.

Respondents identified other types of support, including educational and professional support, financial support for pro bono work, financial and material resources, and protection or security. The techniques used by experienced lawyers to get financial resources for a case could be shared among peers. Worryingly, some lawyers also emphasized they needed protection for their own safety, for example, from the threat posed by certain government authorities.

Bar associations can provide particular support, although some of the lawyers who participated in the survey considered that support from their bar is "very limited", or they do not know if this assistance is available in their own jurisdiction. Those surveyed said that the bar association could, for example, be a place for obtaining advice and support from those experienced in working on these cases, for example, on the "strategy and arguments available". Others noted that the cooperation of a local bar association would also put pressure on the government to highlight problems in the system, such as violations of the right to a fair trial.

In addition, one lawyer noted that a bar association could monitor death penalty trials, as well as the quality of legal representation:

> "In my view the courts do not … regard death penalties with sufficient seriousness. A monitoring wing of the bar association would serve to enforce a sense of gravity to death confirmation proceedings. This would make the task of defence counsel easier".

In some countries the independence of the bar association may be in question and, therefore, less likely to provide help to lawyers on death penalty issues.

7.2. Steps towards abolition

Lawyers working on death penalty cases have a unique insight they can use to advocate for abolition.[110] Indeed, one lawyer responding to the survey considered it their responsibility to do so: "lawyers should be open to working with organizers and activists for the benefit of their clients". Their in-depth and nuanced knowledge of the domestic processes can provide invaluable insights into the system and the underlying issues.

Some of the respondents to the survey consider that by defending individuals facing the death penalty—a punishment they view to be contrary to moral and legal

110 See, e.g., Faculty Spotlight: As He Rose In His Career, Bonnie Made Case Against Death Penalty, UVA Today, 8 April 2021.

standards—they are consequently part of the abolition movement. Others undertake additional activities, including training for junior lawyers, participation in national and international conferences and symposiums calling for abolition of the death penalty, or events discussing various aspects of the criminal proceedings that lead to a death sentence. Others work directly with organizations campaigning against the death penalty, or undertake their death penalty work as part of that organization and may therefore become involved in its other activities. Some engage with parliamentarians in other jurisdictions, and with UN mechanisms, to alert them to particular cases where executions are pending, and lobby to prevent them from taking place. These interventions can have an effect: "We have been able to save the lives of several individuals by raising awareness and conducting advocacy with governments and international organizations".

Knowing that others in the profession support their cause also provides comfort to the lawyers themselves. In turn, these engagements and activities, according to some lawyers, enhance their own work in cases before the courts.

Some of the respondents take a particularly proactive role in becoming board members of organizations whose purpose is to advocate for abolition, or participate in studies and analysis of death sentences and laws in a particular jurisdiction or comparably across a number of countries.

Lawyers also engage with the media, bringing attention to their cases and to substantive or procedural violations that have occurred in their clients' cases. Some respondents stated that the media attention received in some cases also led to changes in legislation around abolition. As Susan Bandes writes, "The death penalty is especially susceptible to the influence of media, at a number of crucial pressure points. The feedback loop is especially visible at the legislative juncture, when crime control policies are made".[111] Because of their experiences, lawyers can also draw attention to broader systemic issues, such as problems in the criminal justice system more generally.

The very specific demands of lawyers working on death penalty cases highlight the need for support in developing legal strategies and arguments, including through guidance and training, but also in addressing the emotional and psychological challenges they face. Bar associations, international organizations, and other individuals working on death penalty cases can all be a potential source of such support.

111 Bandes, Fear Factor: The Role of Media in Covering and Shaping the Death Penalty, *op. cit.*, note 74, p. 591.

8. Conclusion

International law provides for a right to effective legal representation. Yet there is a risk that more people may be sentenced to the death penalty because they do not receive an adequate defence. The survey upon which this paper draws highlights some of the key threats to effective representation and some possible opportunities for greater support to lawyers who work on these cases.

High quality representation by attorneys who are experienced in death penalty cases is critical, because the stakes are extremely high. This experience should include not only appropriate legal skills and knowledge, but also soft skills that take into account a client's background and mental state. Unfortunately, legal training does not always provide these skills.

The barriers to effective defence representation in capital cases include factors such as inadequate financial or other support, lack of an independent judiciary, an inability to meet clients or speak to them confidentially, limitations on access to relevant resources including expertise, and lack of transparency in certain aspects of the proceedings, including when the execution actually takes place. COVID-19 may have exacerbated some of these challenges.

Although lawyers come to this area of work for different reasons, the psychological impact of defending death penalty cases can have a profound negative effect. The responsibility that comes with the high stakes of death penalty work can dominate the personal and professional life of a lawyer and an execution in particular can pose significant psychological challenges both immediately and in the long-term.

Whilst many lawyers undertaking death penalty work are respected, others can be subject to criticism and even harassment. In light of these substantial challenges, there are a number of ways that the legal profession, both within the lawyer's own country, as well as internationally, can provide support. These include legal guidance and training as well as resources to address the psychological challenges capital defenders face.

Part III: The situation of the death penalty in the OSCE region

1. Retentionist participating states

1.1. Belarus

Introduction

Belarus is the only country in Europe that still carries out the death penalty. According to Article 24 of the Constitution of the Republic of Belarus, capital punishment may be applied as an exceptional measure of punishment for some especially serious crimes until it is abolished.[112]

Article 175 of the Criminal Code of the Republic of Belarus states that 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."[113] Some groups are exempt from the imposition of the death penalty in the Criminal Code of Belarus; namely, women, people who were under 18 years of age when they committed the crime, and people who have reached

112 President of the Republic of Belarus, Constitution of the Republic of Belarus, article 24. 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".

113 FIDH – HRC "Viasna", "Death Penalty in Belarus: Murder on (Un)lawful Grounds", October 2016, p. 64.

the age of 65 at the time of the sentencing.[114] The President of Belarus has exercised his power to grant clemency just three times since 1994, with the second and third taking place in 2021.[115]

The Belarusian authorities continue to hold the position that the country's national legislation is not contrary to international law and that the use of the death penalty is only on a temporary basis.[116]

During the reporting period, various observers voiced their concerns about the application of the death penalty in Belarus. On World Day against the Death Penalty, in October 2021, the European Union (EU) and the Council of Europe urged Belarus to move towards the abolition of capital punishment and welcomed the fact that "the number of countries that are still executing people has continued to fall".[117] The EU Ambassador to Belarus warned, "The increasing lack of justice and rule of law in the country is reason enough for the introduction of a moratorium – the space for arbitrariness and juridical errors is vast".[118] Similarly, the European Parliament expressed its concerns about the retention of the death penalty in Belarus, calling for its "immediate and permanent abolition".[119]

In her 4 May 2021 report to the Human Rights Council, the United Nations (UN) Special Rapporteur on the situation of human rights in Belarus also reiterated that the country should "demonstrate political will and engage in education and advocacy in favour of abolishing the death penalty and, as an interim measure, promptly introduce a moratorium on executions".[120]

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114 Criminal Code of Belarus, Art. 59.2(2), *op. cit.,* note 112.

115 Amnesty International "Belarus: Rare clemencies overshadowed by latest suspected execution", 17 June 2021.

116 OSCE/ODIHR, The Death Penalty in the OSCE Area: Background Paper 2020, note 140, p. 38. Nevertheless, instead of moving towards abolition, Belarus recently adopted legislation that newly introduces the death penalty for certain offences. On 28 April 2022 (outside the reporting period for this paper), the Criminal Code of Belarus was amended to introduce the death penalty for attempted acts of terrorism. Article 59 now states "the death penalty for preparation for a crime and attempted crime shall not be imposed, with the exception of an attempt to commit the crimes provided for by Part 2 of Article 124, Part 3 of Article 126, Part 3 of Article 289 and Part 2 of Article 359 of this Code".

117 European and World Day against the Death Penalty, 10 October 2021: Joint statement by the High Representative on behalf of the EU and the Secretary-General on behalf of the Council of Europe, Council of the EU, 8 October 2021

118 World Day against the Death Penalty: EU urges Belarus to end capital punishment, EU Neighbours East, 11 Oct. 2021.

119 The situation in Belarus after one year of protests and their violent repression, P9_TA(2021)0420, European Parliament, 7 October 2021.

120 UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Belarus, 4 May 2021, A/HRC/47/49, para. 30.

The President of Belarus still considers that the abolition of capital punishment can only be decided through a national referendum.[121] In the last referendum on the topic — in 1996 — the majority voted in favour of capital punishment.[122] In September 2021, the Belarusian President reportedly referred to the referendum as a reason to uphold capital punishment, pointing out that he "did not go against the people's opinion".[123]

Death sentences between 1 April 2021 and 31 March 2022

At the end of the reporting period, at least one individual, Viktar Syarhel, was under sentence of death in Belarus.[124] In April 2021, the President of Belarus commuted the death sentences of Stanislau and Illia Kostseu to life imprisonment.[125] The two brothers had been on death row since January 2020. Their conviction sparked an Urgent Action initiative by Amnesty International calling for commutation of their sentences.[126] Shortly after, in his second and third known acts of clemency, the President replaced their death sentences with life imprisonment.[127] No new death sentences were handed down during the reporting period.

Executions between 1 April 2021 and 31 March 2022

Belarusian authorities allegedly executed two people during the reporting period.[128] Viktar Paulau, who had been sentenced to death following a conviction for murdering two people, was executed in May 2021. Viktar Paulau's family was only informed of his execution in August, after Vitebsk Regional Court provided them with a death certificate.[129] The UN Human Rights Committee condemned the execution of the prisoner, whose case was still under review by the Committee at that time.[130] Viktar Paulau's 2020 petition to the Committee alleged that he had been denied access to legal assistance and was tortured in detention.[131] This marked the 15th case since 2010 in which

121 UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Belarus, 8 April 2020, UN Doc. A/HRC/44/55, para. 23.

122 *Ibid.*

123 Lukashenko offers his take on death penalty, Belta,28 September 2021.

124 EU Statement on the death penalty, Delegation of the European Union to the Council of Europe, 7 April 2022

125 World Report 2022, Human Rights Watch,p. 87.

126 Amnesty International urges Belarus to stop execution of Kostseu brothers, Viasna, 24 June 2020.

127 World Report 2022, Human Rights Watch, p. 87.

128 *Ibid.*

129 Global Report, Death Sentences and Executions 2021, Amnesty International, p. 38.

130 Belarus: UN Human Rights Committee condemns execution, UN Treaty Body Press Release.

131 *Ibid.*

the Belarusian authorities executed a prisoner whose petition remained pending before the Committee.[132] Upon news of the likely execution, the EU also reaffirmed its "irrevocable opposition to the use of capital punishment under any circumstances".[133]

In September 2021, a state TV channel announced that another prisoner on death row, Viktar Skrundzik, had been executed.[134] He had been convicted of murder and attempted murder, and his appeal to the Supreme Court had been dismissed.[135] At the end of the reporting period, the Belarusian authorities had not yet confirmed the execution or informed his family.

Legislative developments

During the reporting period, Belarus amended its constitution. In September 2021, the Chairperson of the Belarusian Constitutional Court and the Constitutional Commission stated that the discussions on constitutional reform included the issue of the death penalty;[136] but no common ground was found.[137] The Chairperson reportedly said that it would be necessary to hold a special referendum on the death penalty to determine its future.[138] "It has already been considered in a referendum in 1996. And for a special referendum, appropriate work is required, sociological surveys, an awareness campaign, and verification of the readiness of society to make such a responsible decision", he was reported as saying by the Belarusian state-run media.[139] As expected, the draft amendments to the Constitution, published in December 2021, made no reference to capital punishment.[140] Therefore, capital punishment was not part of the constitutional referendum held in February 2022.

Areas of Concern

The application of the death penalty by the Belarusian authorities during the reporting period raises several concerns. This section focuses on a set of narrow issues,

132 *Ibid.*

133 Belarus: Statement by the Spokesperson on a likely execution, European Union External Action Service, 17 June 2021.

134 Human Rights Watch, *op. cit.,* note 125, p. 86.

135 Supreme Court confirms death sentence for Viktar Skrundzik, Viasna, 4 May 2021.

136 "Proposal to hold referendum on death penalty in Belarus", Belta, 28 September 2021.

137 *Ibid.*

138 *Ibid.*

139 *Ibid.*.

140 President of the Republic of Belarus, "New Belarus Constitution draft published for national debate", 27 December 2021.

including lack of transparency in capital cases, fair trial rights, and the right to life. Other systemic issues, such as the conditions of detention for death row prisoners, are beyond the scope of this report.

Lack of Transparency

The process surrounding the application of the death penalty in Belarus remains secretive. The 2021 yearly supplement of the UN Secretary General to the quinquennial report on capital punishment repeatedly highlighted the lack of transparency surrounding death sentences and executions in Belarus.[141] The supplement pointed out that the Government of Belarus had "declined to disclose statistics on death sentences and executions on the grounds that it is a 'State secret'".[142] As noted in the report, this hinders both national and international insight into the death penalty in Belarus.[143]

This lack of transparency was notable in the two executions carried out in the reporting period. Viktar Paulau's execution in May 2021 was only confirmed and his family notified in August.[144] Nonetheless, his execution had been suspected since June, after his sister was denied permission to visit and his lawyer was told that his client was no longer in the detention centre.[145]

In June 2021, the EU called for an end to the secrecy in the Belarusian penal system.[146] In October 2021, the EU further stated that "the authorities have always provided scarce reporting on the executions, however, recently the procedure [sic] have become even more secretive".[147] This lack of transparency is also notable in the case of Viktar Skrundik. Belarusian state-run media reported his execution in September 2021, even though, at the time, his family still had not been informed. The same month, Viktar's sister confirmed her fear that he had already been executed, as the last time she received correspondence from him was on 19 August.[148]

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141 Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, focusing on the consequences of the lack of transparency in the application and imposition of the death penalty on the enjoyment of human rights, A/HRC/48/29, 15 September 2021, paras. 16, 28 and 43.

142 *Ibid.,* para. 16.

143 *Ibid.*, para. 56.

144 Amnesty International, *op. cit,* note 129, p. 38.

145 Belarus: Further Information: Viktar Paulau may have been executed, Amnesty International, 17 June 2021.

146 EU deplores likely execution of Viktar Paulau, Viasna, 17 June 2021.

147 EU urges Belarus to move towards death penalty abolition, Viasna, 10 October 2021.

148 Amnesty International, *op. cit.,* note 129, p. 38.

In her report of May 2021, the UN Special Rapporteur on the situation of human rights in Belarus expressed concerns over the lack of transparency surrounding executions in the following terms: "A matter of particular concern for the Special Rapporteur is the fact that information on the death penalty in Belarus continues to be classified as 'confidential' by the State. Neither the convicted person nor the person's relatives receive notice of the execution date or information about the place of burial after the execution".[149]

This secrecy violates the rights not only of the convicts in capital cases, but also of their relatives. In its Concluding Observations on the implementation of the International Covenant on Civil and Political Rights (ICCPR) in Belarus, the UN Human Rights Committee determined in 2018 that the country's practice of secrecy surrounding executions constitutes a violation of Article 7 of the ICCPR, both towards the inmates and their families.[150]

On 4 March 2022, the UN Human Rights Committee came to the same conclusion in *Tamara Selyun v. Belarus.151* In its views, the Committee recalled its General Comment No. 36, in which it found that failing to provide information to the families of individuals deprived of life could violate their rights under article 7, which prohibits inhuman or degrading treatment.[152] The Committee then concluded that the author of the complaint, the mother of a person who was executed in 2014, was denied her article 7 right due to "the complete secrecy surrounding the date of the execution and the location of the grave, as well as the refusal to hand over the body for burial".[153] The Committee underlined the "continued anguish and mental stress caused to … the mother of the condemned prisoner, by the persisting uncertainty of the circumstances surrounding his execution, as well as the location of his grave", and considered that these circumstances had "the effect of intimidating or punishing the family by intentionally leaving them in a state of uncertainty and mental distress."[154] Such

149 Report of the Special Rapporteur on the situation of human rights in Belarus, *op. cit.,* note 120.

150 UN Human Rights Committee, Concluding observations on the fifth periodic report of Belarus, CCPR/C/BLR/CO/5, 22 November 2018, para. 27 (b).

151 UN Human Rights Committee, *Selyun v. Belarus*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 2840/2016, UN Doc. CCPR/C/134/D/2840/2016 (4 March 2022/19 April).

152 *Ibid.*, para. 7.3. See also Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, para. 56.

153 Human Rights Committee, *op. cit.*, note 151, para. 7.3.

154 *Ibid.*

state action, the Committee concluded, amounted to inhuman treatment in violation of article 7 of the ICCPR.[155]

The lack of information on the application of the death penalty, in particular the secrecy about the time of the execution, not only severely harms family members but may also cause intense psychological suffering to those on death row. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has previously stated that the anxiety and trauma caused by the threat of death and that surrounding an execution may amount ill-treatment or even torture.[156]

Right to life and fair trial rights

The violation of the right to life and of the right to a fair trial in Belarus remained a key area of concern during the reporting period. In her 4 May 2021 report, the UN Special Rapporteur on the situation of human rights in Belarus underlined the continuous restriction of the independence of the judiciary, which undermines the right to a fair trial.[157] The Special Rapporteur recommended, amongst other measures, that Belarus develop a comprehensive reform of the judiciary "with a view to ensuring the independence of judicial power from any interference by the executive branch".[158]

During the reporting period, the UN Human Rights Committee also highlighted its concern for the disrespect of the right to a fair trial in Belarus. In July 2021, it recognized that Belarusian authorities had violated, among others, the principle of presumption of innocence, which is crucial to the protection of human rights and to a fair trial.[159] The Committee concluded that, in line with General Comments Nos. 32 and 36, the respect for the right to a fair trial was particularly important in capital trials resulting in death sentences.[160] Any such conviction, in the view of the Committee, would be arbitrary and therefore in violation of the convicted person's right to life under article 6 of the ICCPR.[161] The Committee also concluded that Belarus had violated

155 *Ibid.*

156 General Assembly, Interim report of the Special Rapporteur on Torture and other cruel, inhuman and degrading treatment or punishment, A/67/279, 9 August 2012. See also OHCHR, Death Penalty and the Victims, 2016, pp. 216-217 on the "death row phenomenon".

157 Report of the Special Rapporteur on the situation of human rights in Belarus, *op. cit.,* note 121, para. 53.

158 *Ibid.*

159 UN Human Rights Committee, *Mikhalenya v. Belarus*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 3105/2018, UN Doc. No. CCPR/C/132/D/3105/2018, 21 September 2021, para. 8.3.

160 *Ibid.* paras. 8.3, 8.6.

161 *Ibid.* para. 8.7.

its obligations under article 1 of the Optional Protocol, as it executed the petitioner's son, Aleksei Mikhalenya, before the Committee had concluded its views on the communication, in total disregard of its request for interim measures of protection.[162]

In March 2022, in the above-mentioned *Tamara Selyun v. Belarus* case, the Human Rights Committee concluded that Belarus had violated the right to a fair trial under article 14 (1) of ICCPR.[163] The Committee noted that the complainant claimed that the lack of any effective remedies allowing her to request information from domestic courts, about when her son was executed or where he was buried, constituted a violation of article 14(1) of the Covenant.[164] The Committee then went on to recall the conclusion in its General Comment 32 that "the failure of a State party to establish a competent tribunal to determine rights and obligations in a suit at law or to allow access to such a tribunal in specific cases would amount to a violation of article 14".[165] Given the facts presented by the complainant, and the failure of the Belarusian authorities to provide any explanation of the circumstances, the Committee found a violation of article 14.[166]

1.2. United States

Introduction

As of the end of the reporting period, 27 American states, the federal government, and the military still retained the death penalty by law.[167] Thirty-six (36) American states have either abolished capital punishment (23 states[168]) or not carried out an execution in at least ten years (another 13 states[169]). In three of these states, governors

162 *Ibid.* paras. 6.2, 6.4. ("It is incompatible with its obligations under article 1 of the Optional Protocol for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of communications and in the expression of its Views." *Ibid.* para. 6.2.)

163 Human Rights Committee, Communication No. 2840/2016, *op. cit.,* note 151, para. 7.4.

164 *Ibid.*

165 *Ibid.*

166 *Ibid.*

167 Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming. See Death Penalty Information Center, State and Federal Info, State by State.

168 Alaska, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Virginia, Washington, West Virginia, Wisconsin.

169 California, Oregon, Nevada, Utah, Kansas, South Carolina, North Carolina, Pennsylvania, Wyoming, Montana, Louisiana, Kentucky, Indiana.

have formally imposed moratoriums on executions, namely California, Oregon, and Pennsylvania. Although formally retaining the death penalty, Indiana, Idaho, Kansas, Kentucky, Louisiana, Montana, Nevada, North Carolina, South Carolina, Utah, and Wyoming have not carried out an execution for ten years or more.[170] Military authorities have not conducted an execution since 1961.[171]

The number of executions in the United States has declined consistently since 1999[172] and this continued during the reporting period. No executions took place at the federal level, while 11 executions were carried out by only five states; the lowest number of state executions since 1988.[173] By comparison, 15 executions took place during the previous reporting period (2020-2021).[174]

A poll conducted by Gallup in October 2021 across all 50 states found that 43% of Americans do not support the death penalty for a person convicted of murder, while 54% are in favour.[175] Alongside the 2020 poll, these results show the highest level of opposition to capital punishment since the 1960s.[176]

During the reporting period, the United States continued to defend the legality of the death penalty. At the OSCE Permanent Council, the US delegation repeatedly stated, "international law does not prohibit capital punishment, and each country, and in the case of the United States, each state in the union – as well as our federal government – may make its own choice on the matter".[177] However, the US Mission to the OSCE has also emphasized that President Biden has expressed his support for ending the death penalty at the federal level and for giving incentives to U.S. states to abolish it as well.[178]

President Biden expressed support for abolishing the death penalty during his election campaign, highlighting among others the risk of errors in capital cases. His election

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170 States with no recent executions, Death Penalty Information Center, last updated 22 May 2022.

171 Amnesty International, *op. cit.,* note 129, p. 19.

172 The Death Penalty in 2021: End of Year Report, Death Penalty Information Center, p. 12.

173 Execution Database, Death Penalty Information Center.

174 *Ibid.*

175 Survey on the death penalty, results as of 19 October 2021, Gallup. The remaining 3% stated they had no opinion.

176 *Ibid.*

177 Right of Reply to EU on Death Penalty, United States Mission to the OSCE, 7 October 2021; Right of Reply to EU on the Death Penalty, United States Mission to the OSCE, 4 November 2021; Right of Reply on the Death Penalty, United States Mission to the OSCE,16 December 2021.

178 *Ibid.* (all three statements).

signalled a change.[179] On 1 July 2021, Merrick Garland, the US Attorney General, issued a memorandum imposing a moratorium on federal executions to allow the Department of Justice to undertake a review of executive branch policies adopted in the last two years of the previous administration.[180] However, while the moratorium halts federal executions, it does not stop federal prosecutors from seeking the death penalty. Nor does it preclude a future administration from simply re-starting executions.[181] By the end of the reporting period, federal prosecutors were still defending death penalty cases[182] and the American president had not commuted the existing federal death sentences.[183]

In August 2021, 17 American Senators and four members of the House of Representatives wrote two separate letters calling on Attorney General Merrick Garland to stop seeking the death penalty in pending and future federal murder trials.[184] While commending the decision to impose a moratorium on federal executions, both letters urged the Attorney General to take further steps towards eliminating the federal death penalty.[185] Notably, the letter from the House stated, "The Biden-Harris Administration was elected on the promise of abolishing the federal death penalty, and we are committed to using every legislative tool to help fulfill it. However, it is critical that the Department of Justice moves with urgency like lives depend on it, because they quite literally do".[186] The White House has largely remained silent on the issue of the death penalty and has not undertaken any steps towards death penalty abolition.

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179 The Biden Plan for Strengthening America's Commitment to Justice, Biden-Harris, ("Because we cannot ensure we get death penalty cases right every time, Biden will work to pass legislation to eliminate the death penalty at the federal level, and incentivize states to follow the federal government's example").

180 Attorney General Merrick B. Garland Imposes a Moratorium on Federal Executions; Orders Review of Policies and Procedures, US Department of Justice, Office of Public Affairs, 1 July 2021.

181 DOJ Takes Disjointed Action on Federal Death Penalty, American Bar Association, 11 July 2021.

182 The Power of Example. Whither the Biden Death Penalty Promise?, Amnesty International USA, June 2022, p. 20.

183 Rachel Sharp, Joe Biden grants clemency to 78 people - but no federal death row inmates, *The Independent,* 26 April 2022.

184 Letter to Attorney General Garland from Several Members of the U.S. Senate, 9 August 2021; Letter to Attorney General Garland from Several Members of the U.S. House of Representatives, 9 August 2021

185 *Ibid*.

186 *Ibid.*

Newly imposed death sentences

Although it is difficult to find official statistics for the entire reporting period, at the end of 2021, 2,436 individuals remained on death row in 28 states, as well as in federal and military prisons.[187] As of 1 January 2022, the state with the largest death row population was California with 692 inmates, followed by Florida with 330 inmates.[188] California's moratorium on executions continues.

According to reports, 18 death sentences were issued by courts in the US in 2021, the same number as in 2020.[189] In both 2020 and 2021, the number of new capital sentences for the year was the lowest since 1972 when the Supreme Court struck down all existing capital punishments statutes in the United States in *Furman v. Georgia*. As in 2020, COVID-19 pandemic-related court closures and trial delays reportedly affected the number of death sentences imposed in 2021.[190] This was the seventh consecutive year with fewer than 30 executions and the second year with fewer than 20 new death sentences.

Executions between 1 April 2021 and 31 March 2022

Eleven executions took place in five states during the reporting period: four in Oklahoma, three in Texas, two in Alabama, one in Missouri, and one in Mississippi.[191] All executions were by lethal injection. The federal government did not execute anyone during this period, unlike the previous reporting period that saw an unusually large number of federal death row executions.[192]

187 Death Row, Death Penalty Information Center. Data on death row population and death sentences is only available up to 1 January 2022. For this reason, it is not possible to provide accurate figures as of 31 March 2022.

188 Death Sentences by Name, Race and County, Death Penalty Information Center, Sentencing Data,

189 Death sentences in the United States from 1977 by state and by year, Death Penalty Information Center.

190 Amnesty International, *op. cit.*, note 129, p.22.

191 Execution Database, Death Penalty Information Center, *op. cit.,* note 173. It was the first execution of Mississippi after a long hiatus since 2012. David Cox was put to death after waiving his appeals and "volunteering" to be executed. See Mississippi Readies for 1st Execution Since 2012 After Inmate Wins Right to Waive Appeal, *Newsweek,* 29 October 2021.

192 The Death Penalty in the OSCE Area: Background Paper 2020, OSCE/ODIHR, p.49.

Date of execution	Name	No. of years in death row[193]	Ethnic group	Age	Sex	State	Method
19 May 2021	Quintin Phillippe Jones	20	Black	41	Male	Texas	Lethal injection
30 Jun 2021	John William Hummel	10	White	45	Male	Texas	Lethal injection
28 Sep 2021	Rick Allan Rhoades	29	White	57	Male	Texas	Lethal injection
5 Oct 2021	Ernest Lee Johnson	26	Black	61	Male	Missouri	Lethal injection
21 Oct 2021	Willie B. Smith III	29	Black	52	Male	Alabama	Lethal injection
28 Oct 2021	John Marion Grant	21	Black	60	Male	Oklahoma	Lethal injection
17 Nov 2021	David Neal Cox Sr.	9	White	50	Male	Mississippi	Lethal injection
9 Dec 2021	Bigler Jobe Stouffer II	36	White	79	Male	Oklahoma	Lethal injection
27 Jan 2022	Donald Anthony Grant	21	Black	46	Male	Oklahoma	Lethal injection
27 Jan 2022	Matthew Reeves	24	Black	44	Male	Alabama	Lethal injection
17 Feb 2022	Gilbert Ray Postelle	14	White	35	Male	Oklahoma	Lethal injection

Promising developments

Federal developments

As mentioned above, in July 2021, Attorney General Merrick Garland issued a memorandum formally pausing federal executions to allow the Department of Justice to review the executive branch policies adopted in the last two years of the previous administration, including policies related to authorized methods of execution.[194]

The Department of Justice also took steps to withdraw previous notices of intent to seek the death penalty. As of 27 December 2021, the Department had withdrawn 12 different notices filed under the Trump administration.[195] In addition, in February 2022, 56 elected prosecutors from across the United States issued a joint statement calling for systemic changes to the death penalty and pledging not to seek the death penalty against individuals with "cognitive impairments or otherwise diminished culpability".[196]

193 The figures have been ascertained from news reports and other open source information.

194 See US Department of Justice, *op. cit.,* note 180.

195 Gabrielle Banks, "Merrick Garland withdrew the death penalty in 12 cases. Does it signal a trend?", *Houston Chronicle,* 27 December 2021.

196 Joint statement from elected prosecutors pledging to work towards the elimination of the death penalty, Fair and Just Prosecution, February 2022.

On 24 March 2022, the United States Supreme Court reversed an order by a Texas court that denied the request of a death-row prisoner, John Henry Ramirez, to have his pastor touch and pray over him during his execution.[197]

Exonerations and clemencies

Only one prisoner was exonerated during the reporting period. In August 2021, 26 years after his sentencing, Sherwood Brown was exonerated for a triple murder in Mississippi. His conviction and death sentence were mostly based on false expert testimony and the perjured testimony of a prison informant.[198]

In November 2021, two prisoners who had presented strong evidence supporting their innocence, Julius Darius Jones (Oklahoma) and Pervis Payne (Tennessee), were removed from death row and received life sentences instead.[199] On 18 November 2021, following intense domestic and international pressure questioning the validity of Jones' conviction, the Oklahoma Governor commuted his sentence to life without parole.[200]

On 23 November 2021, a Tennessee judge lifted Pervis Payne's two death sentences, after determining that he had an intellectual disability.[201] In January 2022, the Texas Court of Criminal Appeals lifted Clifton Young's conviction and death sentence nearly 20 years after he was found guilty of double murder.[202] The court based its decision on the "shocking prosecutorial misconduct that destroyed any semblance of a fair trial" in Young's case. This was an undeclared conflict of interest—one of the prosecutors in Young's case was also working as a law clerk for the judge who presided

197 Supreme Court rules that Texas must allow death row prisoner's pastor to touch and pray over him during execution, Death Penalty Information Center, 25 March 2021.

198 Sherwood Brown Exonerated in Mississippi, 186th Death-Row Exoneration since 1973, Death Penalty Information Center, 30 September 2021. The most recent data from the National Registry of Exonerations states that the most prevalent causes of wrongful convictions in death penalty cases are official misconduct and perjury or false accusation. The Registry provides detailed information about every known exoneration in the United States since 1989—cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence.

199 Oklahoma Governor Grants Clemency to Julius Jones, Death Penalty Information Center, 18 November 2021; Khaleda Rahman, Who is Pervis Payne? Tennessee inmate freed from death row due to intellectual disability, *Newsweek*, 24 November 2021.

200 Oklahoma Governor Grants Clemency to Julius Jones, Death Penalty Information Center, *op. cit.,* note 199.

201 Newsweek, *op. cit.,* note 199.

202 Texas Appeals Court Vacates Conviction of Death-Row Prisoner Clinton Young, Whose Prosecutor was Secretly on the Payroll of the Judge Who Tried Him, Death Penalty Information Center, 23 September 2021.

over the trial and decided issues in his appeal.[203] The prosecutor, in his clerking role, had conducted legal research and made recommendations to the court on the prosecution's own filings.[204]

On 24 March 2022, Texas State Representative Jeff Leach announced that more than 80 House members had signed a letter advocating for clemency for Melissa Lucio, a survivor of gender-based violence who had been sentenced to death for the murder of her two-year-old daughter.[205] At the end of March, nearly 90 members of the Texas House of Representatives issued a bipartisan call for the Texas Board of Pardons and Paroles and Governor Greg Abbott to grant her clemency.[206] At the end of the reporting period, Melissa Lucio was still scheduled to be executed on 27 April 2022.[207] However, two days before this date, the Texas Court of Criminal Appeals halted her execution, allowing a lower court to review the case.[208]

Significant Rulings

On 31 August 2021, the Governor of the state of Virginia granted seven Black men (the Martinsville Seven") posthumous pardon 70 years after being wrongfully convicted and executed for the rape of a white woman.[209] The defendants were interrogated by police without legal counsel, threatened with release to a lynch mob, and convicted by an all-white, all-male jury.[210] In granting the posthumous pardon, the Governor of the state of Virginia admitted that they were denied due process rights because of their race.[211] The Martinsville Seven's execution in 1951 was the largest mass execution for rape in the history of the United States.[212]

On 8 October 2021, the Oregon Supreme Court ruled that the death sentence handed out to David Ray Bartol in 2016 violated the constitutional prohibition of

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203 *Ibid.*

204 *Ibid.*

205 Bipartisan majority of Texas House of Representative calls for clemency for Melissa Lucio facing execution for likely accidental death of disabled daughter, Death Penalty Information Center, 28 March 2022.

206 *Ibid.*

207 Melissa Lucio's Daughter Death May Have Been Accidental. Texas Has Scheduled Her Execution for April 27, Death Penalty Information Center, 4 February 2022.

208 Texas court halts execution of Melissa Lucio, set to die in 2 days, NBC News, 25 April 2022.

209 'Martinsville 7' Granted Posthumous Pardons 70 Years After Their Executions, Death Penalty Information Center, 3 September 2021.

210 *Ibid.*

211 *Ibid.*

212 *Ibid.*

"disproportionate punishment", as his offence (first-degree murder) was re-classified as non-capital by 2019 legislation.[213] Under this legislation, the death penalty may only be imposed in terrorism cases resulting in the deaths of two or more people, premeditated murders of children under fourteen, prison murders committed by those serving a sentence for aggravated murder, or premeditated murders of police or correctional officers.[214]

In Florida on 2 April 2021, a court lifted the death sentence of Sonny Boy Oats (on death row for over 40 years) and imposed a life sentence, accepting a stipulation of the defence and prosecution that Oats was ineligible for execution due to intellectual disability.[215]

On 31 August 2021, Stanley Davis, a California death row inmate convicted of double murder in 1989, was re-sentenced to life imprisonment without parole after prosecutors agreed that he had an intellectual disability.[216] In a statement related to the decision, the Los Angeles District Attorney justified his support for the sentencing change, saying "[t]he death penalty has been shown to not deter crime, has a history of racial bias and is fiscally irresponsible."[217]

Legislative developments

In April 2021, the Tennessee state legislature voted overwhelmingly to advance legislation that would allow prisoners on death row to challenge their capital sentences on the grounds of intellectual disability.[218] At the end of the reporting period, the Governor had not signed the legislation into law. Its introduction was inspired by the case of Pervis Payne, described above. Payne was a death-row prisoner in Tennessee who presented strong evidence of intellectual disability but was unable to file a claim due to a loophole in Tennessee law that prevented such claims by individuals whose

213 Oregon Supreme Court Overturns Death Sentence in Decision that Could Clear the State's Entire Death Row, Death Penalty Information Center, 8 October 2021.

214 *Ibid*.

215 Sonny Boy Oats Found Ineligible for the Death Penalty After 40 Years on Florida's Death Row, Death Penalty Information Center, 13 April 2021.

216 California death row inmate resentenced to life in prison, AP News, 2 Sept. 2021.

217 August 31, 2021: Death Row Inmate with Intellectual Disability Resentenced to LWOP, Los Angeles County District Attorney's Office.

218 Tennessee Legislature Passes Bill to Provide Death Row Prisoners Court Review of Intellectual Disability Claims, Death Penalty Information Center, 27 April 2021.

death sentences had been upheld on appeal prior to the 2002 Supreme Court ruling prohibiting the death penalty against individuals with intellectual disability.[219]

In February 2022, Senate Bill 159, which would exempt individuals with severe mental illness from death sentences, passed in the South Dakota state Senate, but was rejected by the state House of Representatives.[220] The bill proposes prohibiting the use of the death penalty for individuals with schizophrenia, major depression, bipolar disorder, post-traumatic stress disorder, or schizoaffective disorder.[221]

In Kentucky, House Bill 269 passed the House of Representatives on 9 February 2022 and the Senate on 25 March 2022.[222] The legislation prohibits the use of the death penalty against defendants diagnosed with four types of mental illness, namely schizophrenia, schizoaffective disorder, bipolar disorder and delusional disorder. [223]

Areas of concern

The executions carried out during this reporting period raise multiple concerns. While broader systematic issues, such as the conditions of detention of death row prisoners, go beyond the scope of this report, this section will focus on the discriminatory application of the death penalty, the methods of execution, and the secrecy surrounding executions.

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219 *Ibid.*

220 Senate Bill 159: "exempt any person suffering from a severe mental illness from capital punishment" (legislative history), South Dakota Legislature; see also Kentucky and South Dakota Advance Bills to Bar Death Penalty for People with Severe Mental Illness, Death Penalty Information Center, 23 February 2022.

221 Senate Bill 159 (full text of bill), South Dakota Legislature.

222 Kentucky Legislature Passes Bill Prohibiting Execution of People with Serious Mental Illness, Death Penalty Information Center, 29 March 2022.

223 *Ibid.* The Kentucky governor signed the bill into law just after the end of the reporting period and it became legally binding on 14 April 2022, after the end of the reporting period. Kentucky Becomes Second State to Bar Imposing Death Penalty on Those Diagnosed as Seriously Mentally Ill, Death Penalty Information Center, 14 April 2022.

The discriminatory application of the death penalty

People suffering from intellectual disability and/or mental illness

International human rights law calls for specific protection measures to ensure the effective enjoyment of the right to life by people with disabilities, including psychosocial or intellectual disabilities, on an equal basis with others.[224] In its General Comment no. 36, the UN Human Rights Committee called on States parties to "refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious psychosocial or intellectual disabilities impede their effective defence, and on persons who have limited moral culpability."[225] The Committee also noted that States should "refrain from executing persons who have a diminished ability to understand the reasons for their sentence, and persons whose execution would be exceptionally cruel or would lead to exceptionally harsh results for them and their families, such as persons of advanced age, parents of very young or dependent children, and individuals who have suffered serious human rights violations in the past."[226]

In the United States, the Supreme Court has held that executing people with intellectual disabilities amounts to cruel and unusual punishment, which is prohibited by the American Constitution; however, the decision gave states significant discretion in determining how such disabilities are defined.[227] At least nine of the 11 people executed during the reporting period claimed to suffer from intellectual disability and/or mental illness[228]

On 19 May 2021, Quintin Philippe Jones was executed.[229] Jones, who presented evidence of an intellectual disability, had alleged that his lawyer failed to develop the issue beforehand due to the highly restrictive definition of intellectual disability applied by Texas courts.[230]

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224 UN Convention on the Rights of Persons with Disabilities, Article 10 – right to life; UN Human Rights Committee, General comment No. 36*, op. cit.*, note 152, para. 24

225 UN Human Rights Committee, General comment No. 36, *op. cit.,* note 152, para. 49.

226 *Ibid*.

227 Atkins v. Virginia, Supreme Court of the United States, 536 U.S. 304 (2002).

228 State by State, Death Penalty Information Center, Last accessed: 02 September 2022.

229 Citing 'Inexperience' and 'Miscommunication', Texas Conducts Execution Without Media Witnesses, Death Penalty Information Center, 24 May 2021.

230 Victims Family Seeks Clemency for Quintin Jones Facing May 19 Execution in Texas, Death Penalty Information Center, 18 May 2021.

In Georgia, the law requires that a death row defendant seeking to overturn their death sentence on the basis of intellectual disability must prove their condition "beyond a reasonable doubt", the most onerous standard in the country.[231] On 1 June 2021, the Georgia Supreme Court ruled in *Young v. the State of Georgia*, upholding the death sentence of Rodney Young despite his asserted intellectual disability.[232] On 22 November 2021, the American Civil Liberties Union filed a petition for review by the United States Supreme Court on behalf of Rodney Young stating, "Nowhere else in all of constitutional law does a state require an individual asserting *any* constitutional right to prove their factual entitlement to the right by such a severe burden."[233] The petition was denied on 28 February 2022.[234]

On 30 June 2021, Texas executed John William Hummel.[235] Hummel was an honourably discharged former Marine who experienced service-related trauma. At the sentencing, a psychologist attested to the likelihood of Hummel suffering from a personality disorder. However, his lawyer failed to present evidence about Hummel's mental health at the trial.[236]

On 28 September 2021, Texas executed Rick Allan Rhoades.[237] Rhoades suffered from childhood trauma that caused brain damage, impairing his impulse control and judgement.[238]

David Cox was executed in Mississippi on 17 November 2021 after waiving his appeals and "volunteering" for execution, although his erratic filings, and the statements of his appeals' lawyers, made clear that he was suffering from depression.[239] On 9 December 2021, Oklahoma executed Bigler Jobe Stouffer I, who had been diagnosed by a clinical and forensic psychologist as suffering from an atypical personality

231 ACLU Asks Supreme Court to Review Georgia Law Permitting Executions of Persons with Intellectual Disability, ACLU, 22 November 2021.

232 ACLU Statement on Georgia Supreme Court's Decision in Rodney Young Case, ACLU, 1 June 2021.

233 ACLU asks Supreme Court to review Georgia law permitting executions of persons with intellectual disability, ACLU, 22 November 2021.

234 *Rodney Renia Young vs. Georgia,* Supreme Court of the United States.

235 Texas Executes John Hummel, Former- Marine with Service-Relate Trauma Whose Trial Lawyer Now works for Prosecutor who is Trying to Execute Him, Death Penalty Information Center, 30 June 2021.

236 *Ibid.*

237 Texas Executes Rick Rhoades, the First Execution from Harris County in Two Years, Death Penalty Information Center, 27 September 2021.

238 *Ibid.*

239 Execution 'Volunteer' First to be Put to Death in Mississippi in Nine Years, Death Penalty Information Center, 16 November 2021.

disorder.[240] Nevertheless, Governor Kevin Stitt rejected a pardon and parole board recommendation to commute his sentence to life without parole.[241] At the OSCE Permanent Council, concerns regarding his botched execution were raised in a number of statements, in particular from the EU and a group of nations represented by Norway.[242] In response, the United States reiterated that the death penalty does not contradict their international obligations and argued that it is a matter for individual states to decide.[243]

On 1 November 2021, the Supreme Court declined to review the case of federal death-row prisoner, Wesley Coonce, although prosecutors and defence lawyers had agreed on his ineligibility for the death penalty due to an intellectual disability caused by a traumatic brain injury.[244]

In October 2021, the states of Missouri and Alabama proceeded with the executions of Ernest Johnson and Willie B. Smith III, respectively, despite strong evidence of intellectual disability.[245] On 5 October 2021, Johnson was executed after presenting clear evidence of an intellectual disability.[246] At the OSCE Permanent Council, the EU stated that it was "disturbed" by his execution despite reports of him being mentally impaired, emphasizing that the execution contradicted international human rights norms and minimum standards.[247] According to the Death Penalty Information Center, Missouri's high court relied on "the opinion of a prosecution expert who was never called to testify and whose test results contradicted key opinions expressed in

240 Oklahoma Executes Bigler Stouffer after Governor Rejects Board Recommendation for Clemency, Federal Courts Deny Stay, Death Penalty Information Center, 7 December 2021.

241 *Ibid.*

242 EU on execution of Bigler Stouffer in the US State of Oklahoma, OSCE Permanent Council, 16 December 2021; Joint statement on the execution of Bigler Stouffer in the US, OSCE Permanent Council, 16 December 2021.

243 Right to Reply: Regarding the Death Penalty, OSCE Permanent Council, 16 December 2021.

244 Supreme Court Declines to Review Death Sentence in Case in which Federal Prosecutors and Defense Agree Defendant's Intellectual Disability Makes Him Ineligible for the Death Penalty, Death penalty Information Center, 4 November 2021.

245 Death Penalty Information Center, "Missouri moves to execute intellectually disabled death-row prisoner, as former governor, court justice, and faith and rights leaders seek mercy", 1 October 2021; . Death Penalty Focus, Alabama Executes Willie B. Smith, 8 November 2021.

246 Death Penalty Information Center, "Missouri moves to execute intellectually disabled death-row prisoner, as former governor, court justice, and faith and rights leaders seek mercy", 1 October 2021.

247 OSCE Permanent Council, "EU on the execution of Ernest Johnson in the US State of Missouri", 7 October 2021. In response to the statement, the United States reiterated that the death penalty does not contradict its international obligations. See: OSCE Permanent Council, "Right to Reply: Regarding the Death Penalty", 7 October 2021.

his own expert report".[248] In the lead-up to Ernest Johnson's execution, Pope Francis and two Democratic members of the Missouri congressional delegation had issued calls for his sentence to be set aside.[249]

On 21 October 2021, Alabama executed Willie B. Smith despite the fact that a federal appeals court had previously agreed he qualified as having an intellectual disability under "accepted clinical definitions of the disorder".[250] Smith had received a form in 2018 giving him the choice between lethal injection and nitrogen hypoxia as methods of execution, the former being the default method. Executions by nitrogen hypoxia require prisoners to complete a form. However, due to "significant cognitive deficiencies", he could not understand the content of the form and did not complete it.[251] Smith did not receive any help with understanding what was asked of him.[252] His lawyers claimed that the state violated his rights under the Americans with Disabilities Act as no reasonable accommodation for his disability was provided in the execution election process; the courts rejected this argument.[253]

In January 2022, deciding on a similar case, the United States Supreme Court issued a ruling that overturned an injunction issued by a federal district court and allowed for the execution in Alabama of Matthew Reeves, a death-row prisoner with an intellectual disability.[254] Reeves, like Smith, received a form giving him the option to elect for nitrogen hypoxia but, due to his intellectual disability, he was unable to complete the form.[255] His lawyers argued that Alabama's failure to offer him accommodations for his disability violated his rights under the Americans with Disabilities Act.[256] In her dissent, joined by two other justices, Justice Elena Kagan wrote, "the Court today disregards the well-supported findings made [by two lower courts], consigning

248 Death Penalty Information Center, Missouri Moves to Execute Intellectually Disabled Death-Row Prisoner, As Former Governor, Court Justice, and Faith and Rights Leaders Seek Mercy, 1 October 2021.

249 *Ibid.*

250 Death Penalty Information Center, Alabama Executes intellectually Disabled Death-Row Prisoner, 21 October 2021.

251 Death Penalty Information Center, Intellectually Disabled Alabama Death-Row Prisoner Appeals Denial of Stay of Execution, Arguing Designation of Lethal Injection Violated Americans with Disabilities Act, 19 October 2021.

252 *Ibid.*

253 Amnesty International, Global Report, Death Sentences and Executions 2021, p. 23.

254 Divided Supreme Court Vacates Injunction, Permits Alabama to Execute Intellectually Disabled Prisoner, Death Penalty Information Center, 28 January 2022.

255 *Ibid.*

256 *Ibid.*

Reeves to a method of execution he would not have chosen if properly informed of the alternatives".[257]

On 27 January 2022, Donald Anthony Grant was executed in Oklahoma, despite the fact that he had been diagnosed with schizophrenia and brain damage.[258] On 18 February 2022, the same state executed Gilbert Ray Postelle who was intellectually impaired.[259]

In February 2022, the EU stated, "the execution of persons with a mental health condition or psychosocial disability is particularly regrettable. It is contrary to widely accepted human rights norms and the minimum standards set forth in international human rights instruments".[260] As of 31 March 2022, Ohio was the only state that forbids capital punishment for individuals with certain mental illnesses.[261] As noted above, on 25 March 2022, the State of Kentucky's Senate gave final legislative approval to a bill exempting severely mentally ill defendants from the death penalty.[262]

Racial bias

The issue of race in the American criminal justice system is of continuing concern.[263] Of the 11 people executed during the reporting period, six were Black men.[264] As described above, on 18 November 2021, Julius Jones' death sentence was commuted just hours before his planned execution.[265] In urging the Governor to grant clemency, the National Association for the Advancement of Coloured People (NAACP) Legal Defense and Educational Fund team pointed to the overt racism of a juror in Jones' trial who had referred to Jones by a racial epithet and stated he should be lynched.[266]

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257 *Ibid.*

258 Oklahoma Executes Donald Grant: First U.S. Execution of 2022 is 43rd from County with Most Executions Outside Texas, Death Penalty Information Center, 27 January 2022.

259 Oklahoma County becomes nation's most prolific county executioner as State puts intellectually impaired teen offender to death, Death Penalty Information Center, 18 February 2022.

260 EU statement on executions in the US States of Alabama and Oklahoma, European Union External Action, 9 February 2022.

261 Ohio Bill Exempts People with Serious Illness from Death Penalty, *University of Cincinnati Law Review,* 29 September 2021.

262 Kentucky Legislature Passes Bill Prohibiting Execution of People with Serious Mental Illness, *Death* Penalty Information Center, 29 March 2020.

263 Death Penalty Information Center, "Enduring Injustice: the Persistence of Racial Discrimination in the U.S. Death Penalty", 15 September 2020.

264 Execution Database, Death Penalty Information Center.

265 Oklahoma Governor J. Kevin Stitt, Governor Stitt Commutes Julius Jones' Sentence to Life Without Possibility of Parole, 18 November 2021.

266 Letter to Governor J. Kevin Stitt, NAACP Legal Defense and Education Fund, 2 November 2021.

The Inter-American Commission on Human Rights had also issued precautionary measures on Julius Jones' behalf, asking for consideration of violations of his right to a fair trial, due process of law, equality before the law, and non-discrimination.[267]

In June 2021, as reported earlier, the Governor of Virginia granted *post mortem* pardons to seven young Black men convicted of raping a white woman by an all-white jury in light of the "disturbing lack of due process in their trials and convictions" leading to their executions.[268]

The execution of Rick Rhoades in September 2021, also reported above, took place amid attempts by his appeals' lawyers to obtain information on the jury selection at his trial, suspecting that some jurors may have been struck on the unconstitutional basis of race.[269] Nevertheless, Texas courts rejected the request for a stay of execution to allow the investigation to proceed.[270] Rhoades then filed a civil rights complaint in federal court seeking a stay, which was also denied.[271] Rhoades' attorneys finally petitioned for a stay of execution in the United States Supreme Court pending filing of a jury discrimination claim; the court rejected the application, allowing the execution to proceed although the juror records had not been produced. [272]

ODIHR has been drawing attention to the issue of racial bias on death penalty cases in the United States for years.[273]

Execution procedure and methods of execution

As repeatedly raised in ODIHR's reporting, certain methods of execution can constitute cruel, inhuman and degrading treatment or punishment.[274]

In June 2021, the Death Penalty Information Center published information regarding the renovation of Arizona's gas chamber and the purchase of cyanide gas to execute

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267 Inter-American Commission on Human Rights Resolution 90/2021, OAS, as cited in Amnesty International, *op. cit.,* note 129, p. 25.

268 Former Virginia Governor Ralph S. Northam, Governor Northam Grants Posthumous Pardons for 'Martinsville Seven' 70 Years After Unjust Executions, 31 August 2021.

269 Texas Executes Rick Rhoades, the First Execution from Harris County in Two Years, Death Penalty Information Center, 27 September 2021.

270 *Ibid.*

271 *Ibid.*

272 Rhoades v. Martinez, Justia Dockets & Filings.

273 Background Papers on the Death Penalty in the OSCE Area, 2015–2021 ODIHR.

274 *Ibid.*

prisoners — a gas used by the Nazis during the Holocaust.[275] In February 2022, members of the Arizona Jewish community filed a suit to block the execution of people on death row using this method.[276] As stated by the Death Penalty Information Center's Executive Director, "You have to wonder what Arizona was thinking in believing that in 2021 it is acceptable to execute people in a gas chamber with cyanide gas."[277] Currently, Arizona requires prisoners awaiting execution to choose between the gas chamber and lethal injection.[278]

During the reporting period, at least three of the 11 people executed chose an alternative method to lethal injection.[279] The state of Oklahoma resumed executions in October 2021, while federal litigation was ongoing on the constitutionality of the lethal injection protocol and following a six-year hiatus due to the botched executions of Clayton Lockett and Charles Warner in 2014 and 2015, respectively.[280] Despite promises by Oklahoma's former Attorney General to halt executions until the constitutionality issue was resolved, the new Attorney General John O'Connor declined to honour this promise.[281] The state of Oklahoma scheduled seven executions over a five-month period from October 2021 to March 2022;[282] four of which were carried out.[283]

On 28 October 2021, Oklahoma botched John Marion Grant's execution, which took place in spite of the pendency of a federal trial on the very lethal injection protocol

275 Arizona Prepares for Executions with Gas Used in Holocaust Death Camps, Death Penalty Information Center, 2 June 2021.

276 Arizona Jewish Community Sues to Bar State from Executing Prisoners with Gas Nazis Used in Holocaust, Death Penalty Information Center, 22 February 2022.

277 Arizona 'refurbishes' its gas chambers to prepare for executions, documents reveal, *The Guardian*, 28 May 2021.

278 Arizona Prepares for Executions with Gas Used in Holocaust Death Camps, Death Penalty Information Center, 2 June 2021.

279 Willie B. Smith III (The Death Penalty in 2021: End of Year Report, Death Penalty Information Center, *op. cit.,* note 172. p.28), Donald Anthony Grant (Oklahoma executes Donald Grant: First U.S. executions of 2022 is 43rd from County with most executions outside Texas, Death Penalty Information Center, 27 January 2022) and Matthew Reeves III (Alabama Court Issues Injunction Against Executing Matthew Reeves by Any Method but Nitrogen Hypoxia, Death Penalty Information Center, 10 January 222).

280 State and Federal Info – Oklahoma, Death Penalty Information Center.

281 Oklahoma Executes John Grant After Supreme Court Vacates Stay; Execution Proceeds Despite Pending Trial on Constitutionality of State's Lethal-Injection Process, Death Penalty Information Center, 28 October 2021. For the relevant transcripts where the state's commitments were made, see Transcript of motion hearing before the Honourable Stephen P. Friot United States District Judge, United States District Court for the Western District of Oklahoma, 5 May 2022; Motion and brief in support for preliminary injunction on behalf of plaintiffs Donald Grant, John Grant, Julius Jones and Gilbert Postelle, United States District Court for the Western District of Oklahoma, 20 October 2021.

282 State and Federal Info – Oklahoma, Death Penalty Information Center.

283 Execution Database, Death Penalty Information Center, *op. cit.,* note 173.

used to kill him.[284] Oklahoma's three-drug execution protocol uses a combination of midazolam and the paralytic drug vecuronium bromide, followed by the drug potassium chloride to stop the person's heart.[285] Medical experts have criticized the use of midazolam in lethal injection procedures due to the sensation of drowning and asphyxia it may provoke.[286] According to journalists who observed Grant's execution, following injection of this substance, he experienced full-body convulsions and vomiting for nearly 15 minutes.[287] Oklahoma's Department of Corrections said the execution occurred "without complication".[288] Grant's autopsy, nevertheless, showed that he suffered "pulmonary edema and intramuscular haemorrhaging, and aspirated on his vomit as a result of the lethal injection".[289]

On 4 November 2021, the EU issued a statement at the OSCE Permanent Council on the resumption of executions in Oklahoma.[290] Its statement expressed that it was "deeply disturbed by eyewitness reports indicating that Mr. John Marion Grant died in great distress, reportedly due to his reaction to the drug combination used in his execution. This method had previously resulted in the controversial executions of Clayton Locket in April 2014 and Charles Warner in January 2015, leading to a de facto moratorium and ongoing court proceedings over whether Oklahoma's execution protocol violates the American Constitution's eighth amendment protection against cruel and unusual punishment."[291]

A six-day federal trial on the constitutionality of Oklahoma's lethal injection protocol occurred in the first week of March 2022, where evidence was presented demonstrating that Oklahoma's execution team filled out paperwork indicating the state had used an unauthorized chemical.[292] The state's chief corrections official denied there had been any errors, describing the appearance of the wrong chemical in state execution records as a transcription error.[293] During the trial, testimony was given as to

284 Autopsy Shows John Grant Suffered Pulmonary Edema and Intramuscular Hemorrhage and Aspirated Vomit During Oklahoma Execution, Death Penalty Information Center, 14 February 2022.

285 *Ibid.*

286 *Ibid.*

287 *Ibid.*

288 *Ibid.*

289 *Ibid.*

290 EU Statement on the resumption of executions in the US State of Oklahoma at the OSCE Permanent Council No. 1343, Vienna, 4 November 2021.

291 *Ibid.*

292 Evidence of 'Torturous' Fluid in the Lungs, Drug Mislabeling Highlight Federal Trial on Constitutionality of Oklahoma Lethal-Injection Protocol, Death Penalty Information Center, 10 March 2022.

293 *Ibid.*

the inadequacy of midazolam in preventing extremely painful sensations caused by the other drugs in the lethal injection cocktail.[294] A pathologist described the sensations of pulmonary oedema as "doom, panic, drowning, and asphyxiation," and stated that oedemas like this were caused by midazolam.[295] He also testified that John Grant and Bigler Jobe Stouffer I, executed in December 2021, had experienced pulmonary oedema. Both autopsy reports noted that their lungs were full of fluid and weighed significantly more than an average male's should.[296]

In May 2021, South Carolina adopted legislation that made the state's default execution method the electric chair, with death by firing squad as an alternative.[297] In March 2022, the South Carolina Department of Corrections of South Carolina announced it was ready to start executions by firing squad following preparations.[298] Although South Carolina has not carried out any executions since 2011, these new developments eliminated major obstacles in the state's efforts to resume carrying out death sentences.[299]

Secrecy surrounding executions

During the reporting period, the legislatures of two states, Idaho and Florida, introduced bills to undermine transparency and increase secrecy in the conduct of executions. In Florida, House Bill 873 and Senate Bill 1204 both passed in the House and the Senate in March 2022.[300] The bills, later signed into law by the governor, absolve the Department of Corrections from publicly revealing the names of companies that deliver lethal injection drugs and of those who administer them.[301]

In Idaho, House Bill 658 proposed to conceal the supplier of the drugs used for executions, provide anonymity for the medical staff and team involved in executions, and prevent disciplinary actions against medical professionals because of

294 Evidence of 'Torturous' Fluid in the Lungs, Drug Mislabeling Highlight Federal Trial on Constitutionality of Oklahoma Lethal-Injection Protocol, Death Penalty Information Center 10 March 2022.

295 *Ibid.*

296 *Ibid.*

297 South Carolina Completes Preparations for Firing Squad Executions, Death Penalty Information Center, 21 March 2022.

298 *Ibid.*

299 *Ibid.*

300 See: SB 1204: Public Records/Information or Records/Executions, Florida Senate, passed on 4 March 2022, and HB 873: Pub. Rec./Execution Information, approved by the Governor May 12, 2022.

301 *Ibid;* Execution Secrecy Bill Passes in Florida, Fails in Idaho, Death Penalty Information Center, 11 March 2022.

their participation in executions.[302] While this bill initially failed to pass in the Senate Committee on 9 March 2022 (on a tie 4-4 vote), the Senate Judiciary and Rules Committee chairperson determined, in an unprecedented procedural decision that departed from previous practice, that the tied vote was not determinative and that the bill could be reconsidered by the Committee.[303] On reconsideration, the bill passed the Committee with an additional vote from a previously absent member and advanced to the Senate, where it passed on 18 March 2022 by a 21 – 24 vote, and was subsequently signed into law on 25 March 2022.[304]

Other issues of concern relating to executions

In Alabama, trial courts remain able to impose the death penalty based on a recommendation from a non-unanimous jury.[305] In 2021 alone, there was not a single death sentence that was a unanimous decision.[306] According to the Equal Justice Initiative, of the 168 people on Alabama's death row in October 2021, 80% would not have qualified for death sentences in any other American state because they did not have unanimous jury verdicts.[307] On 9 February 2022, at a meeting of the Committee of Ministers of the Council of Europe, the EU highlighted that Matthew Reeves' death sentence was based on a non-unanimous jury decision in Alabama.[308] At the OSCE Permanent Council, the EU also regretted Reeves' execution and reiterated that it contradicts international human rights norms and minimum standards.[309]

Quintin Jones' May 2021 execution in Texas took place without media witnesses present, raising concerns about the lack of transparency.[310]

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302 House Bill 658, State of Idaho; see also Idaho Expands Execution Secrecy After Senate Committee Reconsiders Failed Vote, Death Penalty Information Center, 30 March 2022

303 Idaho Expands Execution Secrecy After Senate Committee Reconsiders Failed Vote, Death Penalty Information Center, 30 March 2022.

304 *Ibid.* The bill was passed into law in July 2022. Idaho Statutes, Idaho Legislature official website, Title 19 "Criminal Procedure", Chapter 27 "Executions".

305 The Death Penalty in 2021: End of Year Report, Death Penalty Information Center, *op. cit.*, note 172, p. 33.

306 *Ibid.*

307 Alabama Executes Willie Smith as Other States Retreat from Lethal Punishment, Equal Justice Initiative, 22 October 2021

308 EU Statement on executions in the US States of Alabama and Oklahoma, European Union External Action, 9 February 2022.

309 "EU on the Execution of Matthew Reeves in the US State of Alabama" OSCE Permanent Council No. 1353, Vienna, 3 February 2022.

310 Citing 'Inexperience' and 'Miscommunication', Texas Conducts Execution Without Media Witnesses, Death Penalty Information Center, 24 May 2021.

2. Abolitionist participating States

2.1. New developments at international and regional levels on the abolition of the death penalty

Kyrgyzstan formally prohibited the death penalty in its new Constitution adopted in May 2021. Although the death penalty had already been suspended in 1998 and later abolished in 2007, Article 25 of the new Constitution clearly states, "The death penalty is prohibited."

Other abolitionist OSCE participating States continue to advocate for the end of the death penalty, including through engagement at global and regional levels. This advocacy took place in various forums including the United Nations, the Council of Europe and the EU. These efforts highlight the growing trend towards universal abolition of the death penalty and its discriminatory application, as well as the death penalty's failure as a criminal justice tool, including its lack of deterrent effect.

On 31 March 2021, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2021)2 on measures against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment.[311] In April 2021, the Committee asked Member States to take steps to ensure that their domestic law and practices do not contribute to trade in items that are "inherently abusive", as well as any goods that could be used for the death penalty, torture or other ill treatment.[312] In May, the German Chair of the Committee, in cooperation with Amnesty International, the Omega Research Foundation and the Steering Committee for Human Rights, held a webinar that sought to provide support to national authorities and civil society in implementing Recommendation CM/Rec(2021)2 at the domestic level.[313]

In April and October 2021, during its 1401st and 1413th meetings respectively, the Committee underlined its unambiguous opposition to the death penalty and repeated its firm calls for abolition.[314] During the first meeting, the EU welcomed the

311 Recommendation CM/Rec(2021)2 and Explanatory Memorandum to the Recommendation, Council of Europe, 16 April 2021.

312 What measures should be taken against the trade in goods used for the purpose of executions or torture?, Council of Europe, Newsroom, 6 April 2021.

313 Webinar on trade in goods used for the death penalty, torture and cruel, inhuman or degrading treatment or punishment, Council of Europe, Newsroom, 17 May 2021.

314 EU Statement on the Death Penalty, European Union External Action, 14 April 2021; EU Statement on the Death Penalty, European Union External Action,7 October 2021.

Committee's adoption of Recommendation CM/Rec(2021)2 and called on Member States of the Council of Europe to make full use of it.[315]

2.2. Participating States' engagement in national or international activities relevant to the issue of the death penalty

On 4 May 2021, the Portuguese Presidency of the Council of the EU and the Permanent Representation of Portugal to the OSCE held an online International Conference on the Death Penalty. This included keynote speeches by the Director of ODIHR, the EU Special Representative on Human Rights and the Director-General of Human Rights and Rule of Law of the Council of Europe.

In his keynote speech, ODIHR's Director noted "a growing international consensus viewing the death penalty as a form of punishment that cannot be fully reconciled with the right to life" and that both from a medical and human rights standpoint it was "practically impossible to carry out executions without violating the prohibition of torture or other ill-treatment."

The Director-General of Human Rights and Rule of Law at the Council of Europe said, "[T]he arguments against the death penalty are well-known. It is cruel. Irreversible. Discriminatory. It has no restorative effect on victims of crime. It is not dissuasive. It is ineffective, incompatible with fundamental rights. Socially unnecessary and morally unacceptable. A state cannot claim to be delivering justice if it annihilates human dignity by using violence."

In August 2021, the UN Office of the High Commissioner for Human Rights published a report on the High-level Panel Discussion on the Question of The Death Penalty. In it, the High Commissioner also highlighted the absence of evidence showing the death penalty deterred crime more effectively than any other punishment. The report also highlighted the discriminatory application of capital punishment and reiterated that the death penalty often disproportionately affects those who are most vulnerable.

In September 2021, the UN Secretary-General issued the yearly supplement to his quinquennial report on capital punishment, in which he focused on the lack of transparency in the imposition and application of the death penalty. He drew attention to the importance of clear information on death penalty processes for convicted people and their families in order to prevent the infliction of torture or other cruel, inhuman or degrading treatment. He also stressed that the failure to provide information exacerbates the discrimination that vulnerable or marginalized groups face. He called

315 European Union External Action, 14 April 2021, *op. cit.,* note 314.

for transparency in the assessment of and decision about clemency petitions, and referred to the pointed failure of Belarus in this regard.

In the supplement, the Secretary General emphasized that retentionist states should impose the death penalty only for the "most serious crimes", while also urging all states to establish a moratorium on executions with the ultimate goal of its abolition. He highlighted that, in countries where there is public support for the death penalty, it is commonly based on a misconception that this punishment acts as a disincentive to serious crimes. The report welcomed the positive steps taken by various countries towards the abolition of the death penalty and also called on countries to comply fully with the prohibition of cruel, inhuman or degrading treatment.

The 19th World Day Against the Death Penalty, in October 2021, was dedicated to the impact of the death penalty on women. As in previous years, various organizations used the Day to reiterate their dedication to the abolition of death penalty. The High Representative, on behalf of the EU, and the Secretary-General, on behalf of the Council of Europe, issued a Joint Statement, reaffirming their strong opposition to the death penalty and calling for its abolition. The joint statement emphasized the existence of gender-based discrimination in capital criminal proceedings and gender imbalances for offences related to sexual morality, such as adultery, where death penalty rates are higher for women. The statement also welcomed the fact that the number of countries imposing capital punishment continued to decline, and stressed the need to end the trade in goods used for the death penalty in order to hasten the demise of this form of punishment.

In its own annual statement to mark World Day Against the Death Penalty, ODIHR underlined that "working towards an OSCE region free from capital punishment should be a priority for all OSCE countries". In the statement, the Director of ODIHR affirmed that the change of public attitudes, the de-politicization of the death penalty and the achievement of full abolition across the OSCE area would be necessary to consolidate positive trends on this topic.

Several OSCE participating States delivered statements at the 1340th Plenary Meeting of the OSCE Permanent Council upon the World Day Against the Death Penalty in October 2021. The representative of Switzerland, speaking also on behalf of Canada, Iceland, Liechtenstein, and Norway, welcomed the global trend, visible in the OSCE region, towards the abolition of capital punishment, emphasizing that it has no

deterrent effect on crime and is discriminatory in nature.[316] The statement also referred to repeated instances of botched lethal injections and emphasized that not only capital punishment but also the extended time that the condemned await execution constitute torture or cruel, inhuman, or degrading treatment or punishment.[317]

In its statement, the United Kingdom reaffirmed its longstanding policy to oppose the death penalty in all circumstances and assured its continuous dedication to assist in the abolition of this punishment around the world.[318] At this same meeting, the EU delegation delivered a statement welcoming the constant steps taken towards the global abolition of capital punishment and underlining its profound concern about the lack of transparency and secrecy in the death penalty system in Belarus.[319] It also called on the two retentionist participating States to put in place a moratorium on executions with the ultimate goal of abolition.[320]

On 4 November 2021, the United States exercised its right to reply, reiterating its understanding that international law does not prohibit the death penalty, while also emphasizing that federal executions were on hold and stressing that it was a priority for the current US administration to review the federal death penalty.[321]

On 10 December 2021, to celebrate the 73rd anniversary of the adoption of the Universal Declaration of Human Rights, the Death Penalty Project called for the universal abolition of the death penalty on the basis that capital punishment violates the most fundamental human right, the right to life, as well as the prohibitions on torture or cruel, inhuman or degrading punishment.

3. De-facto abolitionist participating States

Within the OSCE region and during the reporting period, the Russian Federation and Tajikistan continued to observe the official moratoriums they established in 1996 and 2004 respectively, making them de facto abolitionist states, although their law still provides for capital punishment. In addition, neither has shown their intention

316 Joint Statement on World Day Against the Death Penalty, Norwegian Permanent Delegation to the OSCE delivered by the Permanent Mission of Switzerland to the OSCE, at the 1340th Permanent Council of the OSCE, 21 October 2021.

317 *Ibid.*

318 World Day Against the Death Penalty 2021: UK Statement, UK Government, Speech, 21 October 2021.

319 Statement by the Slovenian EU Presidency on the European and World Day against the Death Penalty, OSCE, 21 October 2021.

320 *Ibid.*

321 United States Mission to the OSCE, *op. cit.,* note 178.

to abolish it by ratifying the Second Optional Protocol to the ICCPR.[322] As a member State of the Council of Europe until early 2022, the Russian Federation also did not ratify 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.[323]

Russia's Criminal Code contains a number of capital crimes, including 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.[324] The law prohibits capital punishment for women and for offenders under the age of 18 or over 65 at the time of sentencing.[325] However, as of the end of the reporting period, the country had in place a moratorium on the death penalty imposed by the Constitutional Court in 1996 that has twice been upheld by it.[326]

During the reporting period, debates about the resumption of the death penalty in the Russian Federation reignited. In December 2021, the Head of the Constitutional Court wrote that the moratorium on the death penalty had been a surrender to values that were "alien to the Russian national sense of justice".[327] After Russia's suspension from its rights of representation, both in the Committee and in the Parliamentary Assembly of the Council of Europe on 25 February 2022, Dmitry Medvedev, the country's former prime minister and president and current Deputy Chair of its Security Council, was quoted by the state-owned media as calling the suspension a "good opportunity to restore a number of important instruments to prevent especially serious crimes, such as the death penalty for the most dangerous criminals."[328] The deputy head of the Duma's legal committee, in response to the suspension, argued that the moratorium

322 Status of ratification interactive dashboard, OHCHR.

323 Chart of signatures and ratifications of Treaty 187, Council of Europe, 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 (ETS No. 187). After 26 years of membership, the Committee of Ministers decided that, in the context of the procedure launched under Article 8 of the Statute of the Council of Europe, the Russian Federation would cease to be a member of the Council of Europe. See European Union External Action, Delegation of the European Union to the Council of Europe, Committee of Ministers decides Russia ceases to be a member of the Council of Europe, 17 March 2022.

324 Criminal Code of the Russian Federation (amended 25 Mar. 2022), Articles 105.2, 277, 295, 317 and 357.

325 *Ibid.,* Article. 59, para. 2.

326 Reuters, "Russian court extends moratorium on death penalty", 19 November 2009. See also BBC News, "Russia to decide on death penalty moratorium", 10 November 2009.

327 Russia's dark path towards the death penalty, The Spectator 15 April 2022.

328 Dmitry Medvedev vows to reintroduce death penalty", The Barents Observer, 26 February 2022 (quoting from RIA Novosti's Telegram channel).

no longer applied and that the Russian Federation could immediately resume executions given the political will to do so.[329] He further added that death penalty should be used as a last resort to punish serial killers, serial paedophiles and terrorists.[330]

On 25 March 2022, following Russia's formal departure from the Council of Europe, Medvedev followed up on his earlier comments and stated that there were no longer any barriers to reintroducing the death penalty, since the moratorium could be lifted depending on circumstances in the country.[331] State-operated media also reported that the Chairman of the Russian president's Council for the Development of Civil Society and Human Rights stated that the reinstatement of the death penalty "could arise" in relation to the investigation of war crimes.[332] On the same day, however, the Representative of the Federation Council in the Constitutional Court denied the possibility of reintroducing the death penalty, stating it would require amendments to the Constitution.[333]

In Tajikistan, the Constitution allows for capital punishment, stipulating that "[n]o person may be deprived of life except by the verdict of a court for a very serious crime,"[334] which the criminal law provides as aggravated murder, terrorism-related offences resulting in death and not resulting in death, rape not resulting in death, war crimes, crimes against humanity and genocide.[335] The law excludes women, people with intellectual disabilities, the mentally ill and the elderly.[336] The last executions in Tajikistan took place in 2004, making it a de facto abolitionist state.[337]

Following the 2021 Universal Periodic Review (UPR) by the UN Human Rights Council, Tajikistan agreed to several *recommendations* concerning the ratification of the Second Optional Protocol to the ICCPR and the complete abolition of the death penalty.[338] During the consideration of the outcomes of the UPR, the Permanent Representative

329 Госдума: смертную казнь можно применять уже сейчас, Vesti.ru, 26 February 2022.

330 *Ibid.*

331 Medvedev assessed the likelihood of the return of the death penalty, RIA Novosti, 25 March 2022.

332 *Ibid.*

333 Казнить можно помиловать: всё о смертной казни в России, News.ru, 24 May 2022.

334 Constitution of the Republic of Tajikistan, Article 18, Ministry of Foreign Affairs of the Republic of Tajikistan.

335 See "Tajikistan", Cornell Center on Death Penalty Worldwide, Death Penalty Database.

336 *Ibid.*

337 See Tajikistan, World Coalition Against the Death Penalty.

338 Report of the Working Group on the Universal Periodic Review – Tajikistan – Addendum, A/HRC/49/12/Add,1, UN Human Rights Council, 29 December 2021. Read in conjunction with Report of the Working Group on the Universal Period Review – Tajikistan, A/HRC/49/12, UN Human Rights Council,6 January 2022.

of Tajikistan to the UN Office in Geneva stated that Tajikistan had always sought to build a democratic society in which human rights are "of the highest value".[339] He also stressed Tajikistan's commitment to "fulfilling its international human rights obligations in good faith" and its readiness for further cooperation to do so.[340]

3.1. Abolitionist for ordinary crimes only

Kazakhstan abolished the death penalty for all crimes during the reporting period. For several years, Kazakhstan had been defined as de facto abolitionist in ODIHR Background Papers on the Death Penalty in the OSCE Area.[341] It was later referred to as "abolitionist for ordinary crimes only", a United Nations designation indicating that the country reserved capital punishment for certain categories of exceptional crimes including those taking place during war, treason, terrorism or armed insurrection.[342]

After passing a bill authorizing the ratification of the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, on 29 December 2021, the President of Kazakhstan signed into law a bill eradicating the death penalty from the list of applicable penalties for offences in the Criminal Code and other relevant legislative acts.[343] This provided for the commutation of the last remaining death sentence.[344] On 10 January 2022, the EU welcomed the abolition of capital punishment in the country, stating, "The complete exclusion of capital punishment from Kazakhstan's criminal code, following last year's ratification of the UN second Optional Protocol to the International Covenant on Civil and Political Rights, is an important and encouraging step".[345]

On 16 March 2022, during his State of the Nation Address to the People of Kazakhstan entitled "New Kazakhstan: the Path of Renewal and Modernization", the President of Kazakhstan stated that the Constitution required amendment to formally abolish the

339 Human Rights Council Adopts Outcomes of Universal Periodic Review of Saint Vincent and the Grenadines, Papua New Guinea, Tajikistan and Tanzania, United Nations, Human Rights Council Press Release, 23 March 2022.

340 *Ibid.*

341 Background Papers on the Death Penalty in the OSCE Area, 2019-2021, ODIHR, *op. cit.,* note 274.

342 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", E/2015/49, 13 April 2015, para. 10.

343 Amnesty International, *op. cit.,* note 129, p.39.

344 *Ibid.*

345 Statement by the French EU Presidency in response to the address by Deputy Prime Minister and Minister of Foreign Affairs of Kazakhstan, H.E. Mr. Mukhtar Tileuberdi, OSCE Permanent Council, 20 January 2022

death penalty.[346] The International Commission against Death Penalty emphatically welcomed this development.[347]

On 24 March 2022, Kazakhstan deposited the instruments of ratification of the Second Optional Protocol to the ICCPR with the UN Secretary General, enabling the Protocol to enter into force in the country on 24 June 2022.[348] Kazakhstan's obligations now include the prohibition of executions and the adoption of all domestic measures aiming formally to repeal the death penalty.[349] The Director of the International Commission against the Death Penalty congratulated the country for the ratification, calling it "an international reaffirmation of [Kazakhstan's] commitment to the total abolition of the death penalty".[350]

346 Kazakhstan completes accession to major international instrument on abolition of death penalty, Kazinform, 25 March 2022.

347 Kazakhstan became the 90th State to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, International Commission Against Death Penalty, 30 March 2022.

348 Kazakhstan ratifies the Second Optional Protocol to the ICCPR, World Coalition Against the Death Penalty, 1 April 2022.

349 On 8 June 2022, following the end of the reporting period, amendments to the Kazakhstan Constitution came into force as a result of people's referendum. The death penalty is now fully prohibited in the Constitution.

350 International Commission Against Death Penalty, *op. cit.,* note 347.