



The Death Penalty in the OSCE Area

Background Paper 2020

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Special Focus: Is the death penalty inherently arbitrary?



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 2019*. 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 2019 to 31 March 2020.

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Introduction

1. Overview

OSCE participating States have made a number of commitments regarding the death penalty, including consideration of the question of capital punishment, exchange of information on the question of the abolition of the death penalty and the provision of information on the use of the death penalty to the public.¹ 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.²

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.³ The background paper is based on information gathered by ODIHR on the situation of the death penalty in all 57 OSCE participating States during the reporting period, incorporating information from international and regional human rights bodies, non-governmental organizations and media reports.

The thematic focus of this year's background paper, which covers developments from 1 April 2019 to 31 March 2020, is whether the death penalty constitutes an inherently arbitrary form of punishment. Since 2016, ODIHR has included such thematic

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

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

3 "The Death Penalty in the OSCE Area: Background Paper 2016", OSCE/ODIHR, 21 September 2016, "The Death Penalty in the OSCE Area: Background Paper 2017", OSCE/ODIHR, 19 September 2017, "The Death Penalty in the OSCE Area: Background Paper 2018", OSCE/ODIHR, 12 September 2018, "The Death Penalty in the OSCE Area: Background Paper 2019", OSCE/ODIHR, 17 September 2019.

discussions on various aspects of the death penalty in this annual background paper in an effort to further assist OSCE participating States in their exchange of information on the death penalty and the further consideration of its abolition.

The background paper covers the status of the death penalty in the OSCE region during the reporting period, including the thematic focus on the arbitrariness of the death penalty and positive developments, as well as the main areas of concern.

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

The Situation of the Death Penalty in the OSCE Area

1. The inherent arbitrariness of the death penalty

The death penalty is still a reality around the world: according to Amnesty International, at least 657 executions took place worldwide in 2019.⁴ In the OSCE region, both retentionist countries, Belarus and the United States, carried out executions during the reporting period. However, countries that still apply the death penalty are increasingly becoming exceptions in the international community, as there is an undeniable global trend towards abolition.

In its ground-breaking General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which was examined in depth in *The Death Penalty in the OSCE Area: Background Paper 2019*, the United Nations Human Rights Committee established that the death penalty cannot be reconciled with full respect for the right to life.⁵ The grounds under which the death penalty can be applied according to international human rights law have been shrinking, and the

4 This number does not include executions carried out in China, calculated to be in the thousands. For more see: “Amnesty International Global Report: Death sentences and executions 2019”, Amnesty International, 21 April 2020, p. 8.

5 The General Comment on Article 6 of ICCPR is relevant to 56 OSCE participating States that have ratified this core instrument of the human rights framework. Only the Holy See is not a state party to the ICCPR. See: “The Death Penalty in the OSCE Area: Background Paper 2019”, OSCE/ODIHR, 17 September 2019, p. 8. In his introductory essay to the Death Penalty in the OSCE Area: Background Paper 2019, Christof Heyns, the former Special Rapporteur on extrajudicial, summary or arbitrary executions insists that this concept must be informed by the objectives of progressive restriction with a view to eventual full abolition. General Comment no. 36 also touches upon this concept, saying it “must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing. Crimes not resulting directly and intentionally in death [...] although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty.”

standards that the state must meet when applying capital punishment have become increasingly stringent.⁶

Furthermore, deprivation of life is *a priori* arbitrary, unless it complies fully with domestic and international law. In this same General Comment it is further explored that “the notion of ‘arbitrariness’ is not to be fully equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality.”⁷ Where capital punishment is still allowed,⁸ international law clearly states that the death penalty must be reserved for the “most serious crimes.”⁹ The Inter-American Commission has emphasized that cases where the defendant might be condemned to the death penalty merit an especially high standard of reliability and consistency.¹⁰

The UN Economic and Social Council resolution 1984/50 first laid out the internationally recognized minimum standards that must be respected by those states that continue to impose capital punishment, in the form of nine safeguards. These nine safeguards encompass the following principles: it must be limited to the most serious crimes; non-retroactivity; juveniles, pregnant women and other categories of defendants are protected from the death penalty; presumption of innocence; fair trial guarantees; the right of appeal; pardon or commutation; the obligation to minimize suffering and the prohibition of carrying out an execution while there are outstanding legal challenges to it.¹¹

6 UN Human Rights Committee, “General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life”, UN Doc. CCPR/C/GC/36, 30 October 2018, paras 33-51.

7 *Ibid.*, para. 12.

8 All countries in Europe, except for Belarus, have abolished the death penalty. All 47 member states of the Council of Europe have ratified (or committed to ratify, in Russia’s case) Protocol No. 6 to the European Convention on Human Rights (ECHR), which is the first legally-binding instrument abolishing the death penalty in peacetime. All members of the European Union (EU) have to sign and ratify the ECHR, and the EU is often vocal on its opposition to the death penalty. For more information, see: Council of Europe “Death penalty: Factsheet” and European Parliament, “The death penalty and the EU’s fight against it”, February 2019.

9 UN General Assembly, *International Covenant on Civil and Political Rights*, Article 6, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

10 Inter-American Commission on Human Rights, Organization of American States, *Report N° 78/07 Case 12.265, Merits (Publication) Chad Roger Goodman Commonwealth of The Bahamas*, 15 October 2007, para. 34.

11 Report of the Secretary-General, *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, UN Doc E/2015/49, 13 April 2015.

In a 2012 report, the former Special Rapporteur on extrajudicial, summary or arbitrary executions elaborated on the requirements that must be in place so that the application of the death penalty does not become arbitrary:

“The requirement of non-arbitrariness in the context of the death penalty has a procedural component, centred on the requirements of legality and fair trial. It also has a substantive component that entails, among other requirements, imposition only for the most serious crimes, minimum standards of protection for vulnerable groups, and equality and consistency.”¹²

Often, these standards and requirements are not reflected in reality. During the reporting period, there were numerous reports that the executions carried out within the OSCE region were in some form arbitrary, either substantively or procedurally. For instance, many prisoners executed in the United States had a significant mental impairment, including mental illness, or an innocence claim pending.¹³

Although the executions carried out in the OSCE region during the reporting period only represent a very limited number of death penalty cases from a global perspective, they raise the important question about whether or not the death penalty can be considered a non-arbitrary form of punishment. Globally, many retentionist states fail to live up to the stringent conditions imposed on the death penalty by international law. Belarus, the other retentionist state in the OSCE region, has also been condemned on various occasions, including by the Special Rapporteur on the situation of human rights in Belarus¹⁴ and by the European Union (EU) for its application of the death penalty and the way in which it can be considered either procedurally or substantively arbitrary.¹⁵

It is possible that the death penalty, because of systemic and structural reasons, cannot be applied in a consistent and fair manner. This would mean it is inherently arbitrary and thus irreconcilable with a fair form of punishment and the prohibition of arbitrary deprivation of life, as enshrined in Article 6 of the ICCPR.

This proposition brings to mind the words of United States Supreme Court Justice Harry Blackmun in the 1993 case *Callins v. Collins*:

12 Christof Heyns, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions” UN Doc. A/67/275, 9 August 2012, para. 14.

13 Death Penalty Information Center, “The Death Penalty in 2019: Year End Report”, p. 2.

14 Anaïs Marin, “Report of the Special Rapporteur on the situation of human rights in Belarus,” UN Doc. A/HRC/41/52, 8 May 2019.

15 “EU Statement on death penalty in Belarus”, OSCE Permanent Council, 26 June 2019.

“From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored -indeed, I have struggled- [...] to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved [...] I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.”¹⁶

Using the internationally recognized safeguards established in ECOSOC resolution 1984/50, and the classification made by the former Special Rapporteur on extrajudicial, summary or arbitrary executions, the following section will examine whether it is possible to apply the death penalty in a consistent manner that respects the high threshold established by international law. There will be a specific focus on issues relevant for the two retentionist States in the OSCE, Belarus and the United States.

On the procedural side, there will be a focus on fair trial, transparency, and the granting of pardons and clemency. Regarding the substantive components, the focus will be on equality and consistency, especially concerning race, gender, mental or intellectual disabilities and past trauma.

1.1. Procedural components

1.1.1. Fair trial

A death sentence must be preceded by a fair trial in order to be considered non-arbitrary. General Comment no. 32 of the UN Human Rights Committee on Article 14 of the ICCPR, concerning right to equality before courts and tribunals and to a fair trial, says: “In cases of trials leading to the imposition of the death penalty, scrupulous respect of the guarantees of fair trial is particularly important.”¹⁷ The Economic and Social Council, in its resolution 1989/64, recommends “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

¹⁶ Justice Blackmun dissenting, *Callins v. Collins* on petition for writ of certiorari to the United States Court of Appeals for the fifth circuit, 22 February 1994.

¹⁷ UN Human Rights Committee, *General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights, on the right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 59.

counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.”¹⁸

And yet, many cases that end in the death penalty lack the basic elements for a fair trial as laid out by Article 14 of the ICCPR, like the presumption of innocence or effective defence counsel. In December 2012, the General Assembly adopted the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which explicitly recognized the right to legal aid for persons facing the death penalty at all stages of their criminal justice process.¹⁹

In the United States, the assistance of counsel “in all criminal prosecutions” is enshrined in the Sixth Amendment.²⁰ However, the Death Penalty Information Center reports that, although a good defence can often make the difference between a death penalty sentence and life imprisonment, most defendants cannot afford a lawyer and the quality of defence provided by states varies greatly, especially in terms of experience with trying death penalty cases.²¹

The presence of a lawyer does not preclude various highly concerning situations.²² Among the men executed in the United States during the reporting period, a defendant from Texas attempted a last-minute appeal alleging that his original lawyers “didn’t assert his claim of innocence to the jury;”²³ a defendant from Georgia had had his sentence overturned in 2011 because of improper representation by his lawyers;²⁴ the attorney of a defendant from Alabama “failed to offer evidence that the then-teenager was psychologically traumatized following years of physical and sexual abuse at the hands of his mother’s boyfriends;”²⁵ the attorneys of a defendant from Missouri took more than two decades to “conduct an investigation into his background, a

18 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).

19 UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, UN Doc. A/RES/ resolution 67/187, 28 March 2013, Annex, para. 20.

20 Sixth Amendment of the United States Constitution, Library of Congress.

21 Death Penalty Information Center, “Representation” and Equal Justice Initiative, “Death penalty: Inadequate counsel”.

22 An example of this is the 2002 Cockrell v. Burdine case, in which the court-appointed lawyer dozed off through a “not insubstantial” part of the proceedings. See: “ACLU praises Supreme Court refusal of ‘sleeping lawyer’ case as ‘acknowledgment and reminder’ of death penalty problems” American Civil Liberties Union, 3 June 2002.

23 Jolie McCullough, “Texas executes John William King in racist dragging death of James Byrd Jr.” *The Texas Tribune*, 24 April 2019.

24 Christian Boone, “Georgia executes Scotty Morrow for 1994 murders of 2 women” *AJC*, 3 May 2019.

25 Melissa Brown, “Alabama executes second man in two weeks” *Montgomery Adviser*, 18 December 2019.

constitutional obligation in death penalty cases”²⁶ and the attorney of another defendant from Alabama ignored indications of significant police misconduct.²⁷ Of the 24 men executed during the reporting period in the United States, 16 reportedly encountered some sort of fair trial issue.²⁸ The Inter-American Commission of Human Rights has remarked upon this worrying tendency, criticizing the public defender system in Texas – where more than a third of the executions during the reporting period were carried out – noting that lawyers lack “the expertise and resources necessary to properly defend their clients.”²⁹

Article 62 of the Constitution of Belarus and Article 45 of its Code of Criminal Procedure recognize the right to legal assistance, including a mandatory public defender.³⁰ In practice, the General Rapporteur on the abolition of the death penalty of the Council of Europe writes that “many death sentences are passed at the end of unfair trials during which proof of guilt is provided by ‘confessions’ drawn up after the use of torture or in the absence of any defence counsel.”³¹ Leading human rights organizations in Belarus have stated that “the right to be presumed innocent until proven guilty in court is often being curtailed in Belarusian courts and is systemic in death penalty cases.”³² Public officials have been known to make unambiguous statements about the guilt of a defendant ahead of verdicts, and people accused of crimes eligible for the death penalty are brought to trial handcuffed in a cage.³³

There are also concerns about the fact that most defendants sentenced to death in Belarus are represented by *ex officio* lawyers. A prominent local human rights organisation has noted “the poor quality of legal assistance provided by *ex officio* counsel and a systemic lack of necessary professional experience of lawyers appointed to defend individuals accused of death eligible crimes.”³⁴ A former convict reported that

26 Lauren Gill, “Missouri Executes Russell Bucklew Despite Threat of Botched Execution” *The Appeal*, 2 October 2019.

27 Lauren Gill, “Alabama prepares to execute a man whose case is haunted by claims of police misconduct” *The Appeal*, 24 February 2020.

28 Death Penalty Information Center, *op. cit.*, note 13, p. 17.

29 Inter-American Commission on Human Rights, Report No. 90/09, Case 12.644 (Medellín, Cárdenas and García v. United States), para. 139. <<https://www.cidh.oas.org/annualrep/2009eng/US12644eng.htm>>.

30 Constitution of the Republic of Belarus, Art. 62; Code of Criminal procedure of the Republic of Belarus, Art. 45 <https://www.legislationline.org/documents/id/21339>.

31 Titus Corlăţean, “Situation report of the general rapporteur on the abolition of the death penalty”, 11 December 2019, para. 38.

32 FIDH – HRC “Viasna”, “Death Penalty in Belarus: Murder on (Un)lawful Grounds”, October 2016, p. 44.

33 *Ibid.*

34 FIDH – HRC “Viasna”, *op. cit.*, note 32, p. 29.

“an attorney’s work comes down to advising his client to agree with everything the prosecution requests or to admit to everything in the accusation.”³⁵

The Special Rapporteur on the situation of human rights in Belarus has repeatedly voiced concern over the extensive control that the Ministry of Justice has over both judges and bar associations.³⁶ The Special Rapporteur has also criticized the fact that judges routinely and knowingly admit evidence in court hearings that was obtained through torture,³⁷ which is forbidden under international law.³⁸ Considering many of these elements, the former UN Special Rapporteur on the situation of human rights in Belarus noted that the death penalty sentences handed down in Belarus are highly disputable, due to the “lack of a fair trial and of the independence of the judiciary.”³⁹

1.1.2. Transparency

Transparency is considered a key component of a fair trial. In a 2006 report on transparency and the imposition of the death penalty, the former Special Rapporteur on extrajudicial, summary or arbitrary executions described transparency as “among the fundamental due process safeguards that prevent the arbitrary deprivation of life”⁴⁰ and the administration of justice, noting that in the Universal Declaration of Human Rights, the requirement of a public hearing follows that of a fair hearing. His successor said that transparency, and therefore accountability, are part and parcel of the right to life.⁴¹ Successive UN Secretary Generals have maintained that states have an obligation not to practice the death penalty cloaked in secrecy.⁴² The Human Rights Council has called on the UN Secretary General to pay special attention to the consequences of the lack of transparency in the application and imposition of the death

35 *Ibid.*

36 Anaïs Marin, *op. cit.*, note 15, paras. 52-54.

37 Anaïs Marin, *op. cit.*, note 14, para. 25.

38 United Nations Convention Against Torture (UNCAT), article 15. All OSCE participating States have ratified the UNCAT.

39 Miklós Haraszti, “UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Belarus” UN Doc., A/HRC/35/40, 21 April 2017, para. 102.

40 Philip Alston, “Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Transparency and the Imposition of the Death Penalty”, UN Doc. E/CN.4/2006/53/Add.3, 24 March 2006, p. 2.

41 Christof Heyns, *op. cit.*, note 12, para. 105.

42 Report of the Secretary-General, “Moratoriums on the use of the death penalty”, UN Doc. A/65/280, 11 August 2011, para. 72.

penalty on the enjoyment of human rights in the 2021 supplement to his quinquennial report on capital punishment.⁴³

Transparency concerning the application of the death penalty has three dimensions: towards the people immediately concerned, namely the defendant, his/her close relatives and the defence lawyers; to the general public of the state in question, to enable democratic accountability and public debate; and third, to the international community, which has “an interest in supervising the observance of the right to life everywhere.”⁴⁴

In order to ensure due process rights and guarantee the right to be free from cruel, inhuman or degrading treatment or punishment, the transparency requirement extends beyond the trial, to the post-conviction process. This makes the Special Rapporteur on extrajudicial, summary or arbitrary executions speak of a nearly absolute transparency obligation, “because it is never the case that a democratic society has an interest in concealing from the public even this final trace of the judicial process.”⁴⁵

In Belarus, the authorities do not release information about the number of executions carried out, prisoners and their relatives are not informed when an execution is due to take place, and the bodies of the executed are buried in unmarked graves in unknown locations.⁴⁶ The state considers this information “state secrets.”⁴⁷ However, the Special Rapporteur remarks that “even during a state of emergency, derogation from transparency rights is never permitted in death penalty cases.”⁴⁸

Moreover, as elaborated in the *Death Penalty in the OSCE Area: Background Paper 2019* and previous background papers, “the lack of transparency and secrecy surrounding executions in Belarus may constitute cruel, inhuman or degrading treatment, or even torture,”⁴⁹ not only for the death row inmates, who often find out about their execution immediately before the act, but also for their families, who in some cases

43 Human Rights Council, “The Question of the Death Penalty”, UN Doc. A/HRC/42/L.37, 23 September 2019, para. 7.

44 Christof Heyns, *op. cit.*, note 12, para. 103.

45 Philip Alston, *op. cit.*, note 40, para. 9.

46 Anaïs Marin, *op. cit.*, note 14, para. 22. See also Miklós Haraszti, *Report of the Special Rapporteur on the situation of human rights in Belarus*, UN Doc. A/HRC/32/48, 21 April 2016, para. 98. And FIDH – HRC “Viasna”, *op. cit.*, note 32, p. 22.

47 Report of the Secretary-General, “The Question of the Death Penalty”, UN Doc. A/HRC/39/19, 14 September 2018, para. 17.

48 Philip Alston, *op. cit.*, note 40, para. 11.

49 “The Death Penalty in the OSCE Area: Background Paper 2019”, OSCE/ODIHR, *op. cit.*, note 3, p. 40-41.

are not informed at all.⁵⁰ Norway, on behalf of a group of countries including Iceland, Liechtenstein, and Switzerland, has repeatedly condemned the lack of transparency about the death penalty in Belarus at the OSCE Permanent Council, most recently in January 2020.⁵¹

As was detailed in previous ODIHR death penalty background papers, in the United States a EU ban “on trade in goods that may be used for capital punishment or torture or other cruel, inhuman or degrading treatment or punishment” as well as “a growing refusal of pharmaceutical companies to sell their products to the United States for the purpose of executions,”⁵² have made it increasingly difficult for states to obtain the drugs they need for lethal injections.

Partly in response to this, thirteen states — including the seven states that carried out executions during the reporting period — have, since 2011, enacted new secrecy statutes that prevent public scrutiny of all aspects of the process, from the companies manufacturing the drugs to the qualifications of the executioner. This has allowed states to experiment with new combinations of drugs, or even to use untested ones, which has resulted in botched executions and allegations of torture or other ill-treatment.⁵³

In a 2018 report, the Death Penalty Information Center documented that states “have broken the law, deliberately induced contract breaches, lied to or misled drug suppliers, obtained drugs from questionable sources, and swapped drugs with each other,”⁵⁴ shielded from public scrutiny and accountability. In May 2019, the United States Department of Justice released a memo declaring that the Food and Drug Administration lacked the legal authority to regulate drugs used to carry out lethal injections,⁵⁵ removing one more layer of oversight. Troubling reports of misconduct by states reinforce the need for oversight and transparency. Withholding details of

50 For a more detailed discussion on this topic, please refer to the section on Belarus of this report.

51 “Statement on the death penalty in Belarus and the United States of America”, OSCE Permanent Council, 20 January 2020.

52 “The Death Penalty in the OSCE Area: Background Paper 2018”, OSCE/ODIHR, *op. cit.*, note 3, p. 17.

53 Death Penalty Information Center, “Behind the curtain: Secrecy and the Death Penalty in the United States” p. 14; For a more detailed discussion on this subject, please refer to the analysis of the *Bucklew v. Precythe* case in “The Death Penalty in the OSCE Area: ODIHR’s Background Paper 2019”, OSCE/ODIHR, *op. cit.*, note 3, p. 28-29.

54 Death Penalty Information Center, *op. cit.*, note 53, p. 13.

55 United States of America, Department of Justice, “Whether the Food and Drug Administration Has Jurisdiction over Articles Intended for Use in Lawful Executions” 3 May 2019.

lethal injection procedures forms part of “a perpetual effort by states to maintain secrecy about all aspects of the execution.”⁵⁶

1.1.3. Pardons and clemency

International human rights law is clear about the important role played by pardons and similar procedures in systems that still use the death penalty. Article 6, paragraph 4 of the ICCPR reads: “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”⁵⁷ In *Herrera v. Collins*, the United States Supreme Court called the possibility to grant pardons the “fail safe” of the criminal justice system.⁵⁸ The Human Rights Committee, however, has warned that the possibility to grant pardons cannot be an “adequate substitute for the need for judicial discretion in the application of the death penalty.”⁵⁹

General Comment no. 36 establishes that “no category of sentenced persons can be *a priori* excluded from such measures of relief, nor should the conditions for attainment of relief be ineffective, unnecessarily burdensome, discriminatory in nature or applied in an arbitrary manner.” To avoid this arbitrariness, certain essential guarantees must be provided, including “certainty about the processes followed and the substantive criteria applied.”⁶⁰ The Inter-American Commission on Human Rights acknowledges that the process for granting clemency can hardly be subject to “full due process protections,” but insists that it must be “subject to certain minimal fairness guarantees for condemned prisoners in order for the right to be effectively respected and enjoyed.”⁶¹

The prerogative to grant pardons is by definition vested in the executive branch. In *Alekperov v. Russian Federation* the Human Rights Committee concluded “that the discretionary power of commutation, which is specifically contemplated in relation to death sentences by Article 6, paragraph 4, of the Covenant, may be vested in a Head of State or other executive body without infringing Article 14.”⁶² However, death pen-

56 Deborah Denno, *Lethal Injection Chaos Post-Base*, 102 *Georgetown Law Journal* 1331, 1361 n.186 (2014).

57 UN General Assembly, *International Covenant on Civil and Political Rights*, Article 6 (4), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

58 *Herrera v. Collins*, 506 U.S. 390 (1993), Supreme Court of the United States, para. 391(c).

59 UN Human Rights Committee, “General Comment No. 36”, *op. cit.*, note 6, para. 37.

60 *Ibid.*

61 Inter-American Commission on Human Rights, Report No. 90/09, Case 12.644 (Medellín, Cárdenas and García, United States), para. 150.

62 *Alekperov v. Russian Federation* (CCPR/C/109/D/1764/2008, para. 9.5).

alty law expert James R. Acker has written that “an element of caprice inevitably accompanies executive clemency decisions”⁶³ and executive clemency decisions have been described as “standardless in procedure, discretionary in exercise, and unreviewable in result.”⁶⁴ The Death Penalty Information Center echoes this last point, calling executive clemency decisions “unpredictable and immune from review.”⁶⁵ The reality on the ground in the two OSCE retentionist states is particularly informative in considering whether such decisions are prone to arbitrariness.

Of the seven American states that carried out executions during the reporting period, only in Georgia does the governor not have the sole authority to grant pardons.⁶⁶ In Alabama, South Dakota, Tennessee and Missouri, the governor decides whether to grant clemency, and in the two latter states the governor is informed by a board that issues non-binding advice. In Florida and Texas, the governor can offer clemency upon recommendation of the board of pardons and paroles.⁶⁷ The Texas Board of Pardons and Paroles has been described as “an oxymoron, to put it mildly, since it virtually never recommends the commutation of death penalty cases.”⁶⁸

It is the nature of such political office that governors are subject to political pressure. The Death Penalty Information Center has written about how “even granting a single clemency can result in harsh attacks.”⁶⁹ During the reporting period, there were two humanitarian grants of clemency by outgoing Kentucky Governor Matt Bevin. One individual was sentenced to death in 1987 after the state struggled to find a suitable attorney and finally settled for two attorneys with no previous capital case experience, who “questioned no witnesses and essentially mounted no defense.”⁷⁰ The defendant’s conviction and death sentence were repeatedly held up on appeal, while “his co-defendant, who admitted to killing the victim herself, was eventually released from prison,” in what a judge called “one of the worst examples he had ever seen of

63 James R. Acker and Charles S. Lanier, “May God—or the governor—have mercy: executive clemency and executions in modern death-penalty systems” p. 201.

64 Hugo Adam Bedau, “The Decline of Executive Clemency in Capital Cases,” 18 *N.Y.U. Rev. Law & Social Change*, 1990-1991, p. 255; 257.

65 “Clemency” The Death Penalty Information Center.

66 It makes Georgia one of only four U.S. states where the governor does not have the sole authority to grant pardons although he/she retains significant influence by appointing the members of the State Board of Pardons and Paroles. The other three are Utah, Nevada and Nebraska. For more information, please refer to “Clemency procedures by state,” The Death Penalty Information Center.

67 “Clemency procedures by state” The Death Penalty Information Center.

68 Andrew Cohen, “The Death Penalty: Why We Fight for Equal Justice”, *The Atlantic*, 19 September 2011.

69 “Clemency” The Death Penalty Information Center.

70 American Bar Association, “Kentucky Governor Matt Bevin Grants Clemency to Two Death Row Prisoners” 1 December 2019.

the unfairness and abysmal lawyering that pervade capital trials.”⁷¹ In the second case, one individual was sentenced to death in 1983 but had since transformed his life in prison, earning two college degrees and serving as an adviser for younger inmates. Prison officials, faith leaders, and others joined in support of his clemency petition.⁷² However the Governor’s decision was criticized as arbitrary by local attorneys’ associations.⁷³ In addition to the cases mentioned above, Bevin pardoned 600 other convicts, 95 per cent of them white, and in some cases without a single consultation with prosecutors or the families of victims.⁷⁴

Considering the basic guarantees of fairness envisioned by General Comment no. 36, it is interesting to compare the two pardons in Kentucky with an execution that took place in neighbouring Tennessee, where a defendant’s exemplary transformation while on death row was not found to merit a pardon. The defendant, executed on 20 February 2020 after Governor Bill Lee declined to intervene, was directly credited for saving two lives while in prison and for caring for another inmate when he developed multiple sclerosis.⁷⁵ Family members of his victims and correctional officers supported his clemency petition. He became the fifth person to die in the state’s electric chair in the past two years.⁷⁶

In Belarus, concerns about transparency in application of the death penalty extend to the process for granting pardons. The authority rests with the President, as stipulated in Presidential Order No. 250 of 3 December 1994. A Pardon Commission automatically reviews all death penalty cases regardless of whether the convict submitted a clemency plea, but its decisions are not published. The decision not to grant a pardon “is kept secret from the death convict, his attorney, and his relatives until the very execution.”⁷⁷ There are conflicting reports about how many pardons have been granted by the current President, but the number is speculated to be only one, and the identity of the pardoned unknown.⁷⁸

71 *Ibid.*

72 *Ibid.*

73 Phillip M. Bailey, “Kentucky attorney general Daniel Cameron vague on investigating Matt Bevin’s pardons” *Courier Journal*, 17 December 2019.

74 Sarah Mervosh, Campbell Robertson and Mike Baker, “Victims’ Families Rage as Matt Bevin Defends Pardons” *The New York Times*, 20 December 2019.

75 Travis Loller, “Tennessee governor won’t intervene in scheduled execution” *ABC News*, 19 February 2020.

76 *Ibid.*

77 FIDH – HRC “Viasna”, *op. cit.*, note 32, p. 54.

78 Belarussian Helsinki Committee, “Procedure of granting pardon”.

Executive clemency decisions can also be problematic under Article 7 of the ICCPR, the prohibition of torture and cruel, inhuman or degrading treatment or punishment.⁷⁹ Often, these decisions are made “in the last few days and even the frantic hours and minutes before a scheduled execution.”⁸⁰ On several tragic occasions, the pardon has arrived minutes too late. In any case, the psychological toll that this extreme uncertainty can take on convicted individuals and their families is likely to be severe.

The Inter-American Commission on Human Rights has established a series of rights of convicts hoping for pardon, including “a right to be informed of when the competent authority will consider the offender’s case, [...] and to receive a decision from that authority within a reasonable period of time prior to execution.”⁸¹ The former Special Rapporteur on extrajudicial, summary or arbitrary executions has written that “to conceal from someone the facts of their preordained fate will constitute inhuman or degrading treatment or punishment.”⁸²

1.2. Substantive components

1.2.1. Equality

Equality before the law is the cornerstone of the rule of law, and central to the protection of human rights under international human rights law. Article 26 of the ICCPR establishes that all persons are entitled to equal protection of the law without discrimination, and Article 14 establishes that all persons shall be equal before the courts and tribunals.⁸³ Punishment under the law must be consistently administered in a non-discriminatory way in order to not be arbitrary.

This is especially crucial concerning the death penalty, because of its gravity and irreversibility. The Human Rights Committee has been clear that the right to life must be respected without discrimination of any kind, and that “any deprivation of life based on discrimination in law or fact is *ipso facto* arbitrary in nature.”⁸⁴ In the landmark

79 Philip Alston, *op. cit.*, note 40, para. 26.

80 James R. Acker and Charles S. Lanier, “May God—or the governor—have mercy: executive clemency and executions in modern death-penalty systems” p. 201.

81 Inter-American Commission on Human Rights, Report No. 12/14, Case 12.231 (Cash, Commonwealth of the Bahamas), paras. 80 and 81.

82 Philip Alston, *op. cit.*, note 40, para. 26.

83 UN General Assembly, *International Covenant on Civil and Political Rights*, Articles 14 & 24, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

84 UN Human Rights Committee, “General Comment No. 36” *op. cit.*, note 6, para. 61.

United States Supreme Court ruling on the death penalty, *Furman v. Georgia*, Justice William O. Douglas considered “incontestable” that the death penalty would constitute a cruel and unusual punishment “if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.”⁸⁵ In the words of the former Special Rapporteur on extrajudicial, summary or arbitrary executions, “the equal protection of all lives is central to the international human rights system.”⁸⁶

And yet, the application of the death penalty appears to reflect and exacerbate social, racial and financial inequalities.⁸⁷ Death rows around the world are disproportionately populated by “the poor and economically vulnerable; members of ethnic minorities; people with psychosocial or intellectual disabilities; foreign nationals; indigenous persons; and other marginalized members of society [...] the people who society had decided were beyond rehabilitation and should be killed,”⁸⁸ as Michelle Bachelet, UN High Commissioner for Human Rights summarised recently.

Poverty compounds other underlying inequalities, and greatly increases the chances of being sentenced to the death penalty, for a variety of reasons including being an easier target for police and not being able to afford quality legal representation or appeals. On top of this, members of groups who are discriminated against often face bias from police officers, investigators and judges.⁸⁹

In the United States, 95 per cent of convicts on death row come from underprivileged backgrounds, and there is also a close correlation between social deprivation and the death penalty sentence in Belarus.⁹⁰ In 2017, the UN Office of the High Commissioner of Human Rights went as far as calling the death penalty a “class-based form of discrimination in most countries, thus making it the equivalent of an arbitrary killing.”⁹¹ In the following section, the way in which this structural inequality interacts with considerations of race and gender will be examined.

85 *Furman v. Georgia* <https://supreme.justia.com/cases/federal/us/408/238/#tab-opinion-1949839> p. 408.

86 Christof Heyns, *op. cit.*, note 12, para. 12.

87 For a more detailed discussion on this, please refer to “The Death Penalty in the OSCE Area: Background Paper 2006”, OSCE/ODIHR, 27 September 2006, p. 6-8.

88 UN Office of the High Commissioner for Human Rights, “High-level panel on the death penalty, in particular with respect to the rights to non-discrimination and equality”, 26 February 2019.

89 UN Office of the High Commissioner for Human Rights, “Death penalty disproportionately affects the poor, UN rights experts warn”, 10 October 2017.

90 Florence Bellivier and Dimitris Christopoulos, “The death penalty: a punishment for the poor?” *International Federation for Human Rights*, 10 October 2017.

91 UN Office of the High Commissioner for Human Rights, “Death penalty disproportionately affects the poor, UN rights experts warn”, 10 October 2017.

a. Race

Inequalities in the application of the death penalty in the United States were officially acknowledged first in a 1990 review of 28 studies of capital sentencing procedures by the non-partisan United States General Accounting Office, which found “a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty.”⁹² The Equal Justice Initiative has called the death penalty in the United States “a direct descendant of lynching.”⁹³ In recent years, attention has been drawn to this issue by the UN Human Rights Committee⁹⁴ and by the Committee on the Elimination of Racial Discrimination.⁹⁵

Worryingly, it seems that these racial inequalities are worsening. In a sweeping review of all cases of individuals sentenced to death since 1976 published in December 2019, it was reported that “rather than becoming more equitable over time as new death sentences become rarer across the country, the death penalty appears to be more racially biased than ever.”⁹⁶ The Equal Justice Initiative writes that “capital trials today remain proceedings with little racial diversity; the accused is often the only person of colour in the courtroom.”⁹⁷

The underlying racial inequalities are starkly revealed in statistics: while roughly half of homicide victims in the United States are Black, 75 per cent of defendants on death row subsequently executed were sentenced for the killings of white victims.⁹⁸ An analysis of the 1,394 executions that took place in the United States from 1976 to 2014 showed that for every 10,000 homicides, 65 executions were carried out when the victim was white, but only 14 when the victim was Black. Factoring in gender revealed an even more arbitrarily skewed procedure: for every 10,000 homicides, there were 123 executions when the victims were white women and only nine for Black men.⁹⁹ A paper published during the reporting period by the University of Denver

92 United States General Accounting Office, “Report to Senate and House Committees on the Judiciary”, February 1990, p. 5.

93 Equal Justice Initiative, “Death penalty”.

94 Human Rights Committee, “Concluding observations on the fourth periodic report of the United States of America” UN Doc. See CCPR/C/USA/CO/4, 23 April 2014, para. 8.

95 Human Rights Committee, “Concluding observations on the combined seventh to ninth periodic reports of the United States of America” UN Doc. See CERD/C/USA/CO/7-9, 25 September 2014, para. 20.

96 Liliana Segura and Jordan Smith, “Counting the condemned” *The Intercept*, 3 December 2019.

97 The Innocence Project, “US Death Penalty is rooted in lynching past” 20 February 2015.

98 Death Penalty Information Center, “Race and the Death Penalty by the Numbers”.

99 Frank Baumgartner et al., “Deadly Justice: A Statistical Portrait of the Death Penalty”, Oxford University Press, 2018.

showed that the execution rate in Georgia is roughly 17 times greater when the victim is white than when the victim is Black.¹⁰⁰ During the reporting period, only four out of the 24 executions did not involve a white victim.

The death penalty is also more likely to be imposed on non-white defendants. In a society in which 12.6 per cent of the population is Black, 42 per cent of death row inmates are Black.¹⁰¹ In 1976, people of colour¹⁰² made up 51 per cent of death row inmates in Texas. In the past ten years, this percentage has grown to 75 per cent. Using the same time frame, we see a jump from 52 per cent to 78 per cent in California, and from 40 per cent to 52 per cent in Florida. In Oklahoma, people of colour condemned to death climbed from 28 per cent of the total in 1976 to 80 per cent in the last ten years.¹⁰³

Racial bias also appears to be a factor in sentencing decisions in death penalty cases. It has been found that the death penalty was reduced to life sentences during plea bargains almost twice as often for white defendants as for people of colour.¹⁰⁴ Jurors also play a crucial role in adjudicating the death penalty. This is why reports of systematic efforts to purge Black people from juries, so-called “jury bleaching”, are especially troublesome. In a landmark report, the Equal Justice Initiative said that “there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries.”¹⁰⁵ On its mission to the United States in January 2016, the UN Working Group of Experts on People of African Descent identified the racial composition of juries as one of the main causes of racial bias in the application of the death penalty.¹⁰⁶

The Sentencing Project describes both a strong “white male dominance effect” and a “black male presence effect” in juries: “the presence of five or more white male jurors dramatically increased the likelihood of conviction and subsequent imposition of a death sentence in such cases, while the presence of one or more Black male

100 Scott Phillips and Justin F. Marceau, “Whom the State Kills”, U Denver Legal Studies Research Paper No. 19-16, 21 August 2019.

101 Death Penalty Information Center, “Ways that Race Can Affect Death Sentencing”.

102 “People of colour” is used to refer to not only Black people, but also Latinx and other ethnic minorities.

103 Liliana Segura and Jordan Smith, *op. cit.*, note 96.

104 American Civil Liberties Union, “The Persistent Problem of Racial Disparities in The Federal Death Penalty”.

105 Equal Justice Initiative, “Illegal Racial Discrimination in Jury Selection: A Continuing Legacy” August 2010, p. 4. For more information on this, please refer to the Death Penalty Information Center report, “The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides”.

106 Human Rights Council, “Report of the Working Group of Experts on People of African Descent on its mission to the United States of America”, UN Doc. See A/HRC/33/61/Add.2, 18 August 2016, para. 40.

jurors substantially reduced the probability of the same.”¹⁰⁷ Because only two states, Alabama and (since January 2020) Florida, allow judges to impose the death penalty upon a jury’s non-unanimous sentencing recommendation,¹⁰⁸ racial bias in the composition of juries could have had a disproportionate impact in the resolution of a death penalty case.

In August 2019, the Supreme Court of North Carolina heard the cases of four individuals condemned to death, one Native American woman and three Black men.¹⁰⁹ In 2010, their death sentences were commuted to life imprisonment without parole under the Racial Justice Act, since they proved severe racial bias in their cases, which involved jury bleaching. However, in 2013 a new legislature repealed the Racial Justice Act and sent them back to death row without new trials.¹¹⁰ By the end of the reporting period, the court had not reached a verdict.

In the cases referenced above, one of the prosecutors called a defendant a “big black bull,” while another referred in his notes to a Black juror as a “thug” and to another as a “blk wino.” Evidence emerged that prosecutors had been trained to exclude Black jurors with seemingly “race-neutral” explanations.¹¹¹

In 2014, out of the 2,437 elected state and local prosecutors across the country, 95 per cent were white, and 79 per cent were white men.¹¹² In the United States legal system, prosecutors have wide latitude to make decisions on issues such as whether to prosecute, whether to charge a misdemeanour or a felony, or whether to pursue the

107 The Sentencing Project, “Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System” August 2013, p. 11.

108 Death Penalty Information Center “Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital-Sentencing Proceedings” 17 January 2018.

109 Death Penalty Information Center “North Carolina Supreme Court Hears Argument on Retroactive Repeal of State’s Racial Justice Act” 3 September 2019.

110 American Civil Liberties Union, “Will North Carolina’s Supreme Court Allow Racism to Remain a Persistent Factor in its Death Penalty?” 23 August 2019.

111 *Ibid.*

112 The Reflective Democracy Campaign, “Justice for all?”

death penalty.¹¹³ Some prosecutors have faced retaliation for deciding to take a stand against the death penalty.¹¹⁴

b. Gender aspects of the death penalty

Gender inequalities concerning the application of the death penalty have been the subject of less research than racial inequalities, despite arguably being more complex. Whereas discrimination in the application of the death penalty on the grounds of race invariably harms minorities, gender discrimination can sometimes benefit women and sometimes be detrimental. Crucially, discrimination on grounds of gender in the application of the death penalty, as discrimination on any other ground, is always arbitrary. A landmark 2018 study by the Cornell University Center on the Death Penalty Worldwide entitled *Judged for more than her crime: A global overview of women facing the death penalty* revealed “significant patterns of arbitrariness and discrimination in the application of the death penalty.”¹¹⁵

In the OSCE region some of the most severe examples of gender inequalities concerning the death penalty are not relevant, such as its application on grounds of adultery or witchcraft. However, discrimination in sentencing, for instance, is an important factor also in the OSCE region.

Discrimination in sentencing

Whereas measures that reduce the number of individuals sentenced to death are positive, exempting women from death penalty sentences because of their gender appears arbitrary. In Belarus, women are in the same category as juveniles and persons over 65 years old as exempt from the death penalty.¹¹⁶ The penal codes of the Russian Federation and Tajikistan, considered *de facto* abolitionist, and Kazakhstan,

113 Jeffrey Toobin “The Milwaukee Experiment: What can one prosecutor do about the mass incarceration of African-Americans?” *The New Yorker*, 11 May 2015.

114 See Jordan Smith, “The power to kill” *The Intercept*, 3 December 2019: That was the experience of Aramis Ayala, state prosecuting attorney for Florida’s Orange and Osceola counties and Wesley Bell, state prosecuting attorney for Missouri’s St. Louis County. Both prosecutors, both Black, faced attempts by some of the highest-ranking members of their states’ governments (Florida Governor Rick Scott and Missouri State Representative Jim Murphy) to take their cases away from them when they announced they would no longer pursue the death penalty.

115 The Cornell Center On The Death Penalty Worldwide, “Judged for more than her crime” September 2018, p. 6.

116 Criminal Code of the Republic of Belarus, Art. 59.2(2).

abolitionist for ordinary crimes only, also do not consider women eligible for the death penalty.¹¹⁷

The reason why Belarus' 1999 Criminal Code excludes women from capital punishment is not clear. Data from Death Penalty Worldwide shows that no women have been executed in Belarus since 1953.¹¹⁸

Although the United States does not have any such distinction enshrined in law, it has only executed 16 women since 1976,¹¹⁹ as opposed to 24 men during this reporting period alone. All 16 women reportedly came from underprivileged backgrounds and lacked appropriate legal representation.¹²⁰ As of January 2020, there were 53 women on death row, out of the approximately 2,620 death row prisoners in total.¹²¹

The complex interplay of biases that might work to the detriment of or in favour of women capital defendants is closely interrelated to gender expectations, rooted in what has been described as the tendency “of the criminal justice system to see women as victims and survivors rather than as perpetrators of the crime.”¹²² In the words of Death Penalty Information Center executive director Richard Dieter, “there’s just less enforcement of the death penalty at almost every stage for females.”¹²³ While women perceived as conforming to gender stereotypes like the “caring mother,” the “naïve girl,” or the “hysterical woman” might receive lesser sentences, those depicted as deviating from those roles - the “femme fatale,” the “child murderer,” or the “witch” are likely to receive harsher ones.¹²⁴ The way in which women are perceived when they kill a man is particularly negative, as this may be seen as a “threat to the social order because they were able to exert power over a man.”¹²⁵

117 Hands Off Cain, “The Death Penalty on Women” 1 February 2018. See also World Coalition Against the Death Penalty, “Kazakhstan Penal Code reform runs counter to abolitionist trend” 22 July 2014.

118 The Cornell Center On The Death Penalty Worldwide, *op. cit.*, note 115, p. 6.

119 Death Penalty Information Center, “Executions of women”.

120 The Cornell Center On The Death Penalty Worldwide, *op. cit.*, note 115, p. 32.

121 Death Penalty Information Center, “Women”.

122 The Cornell Center On The Death Penalty Worldwide, *op. cit.*, note 115, p. 6.

123 Christina Sterbenz, “Why the death penalty in America is sexist” *Business Insider*, 13 April 2015.

124 The Cornell Center On The Death Penalty Worldwide, *op. cit.*, note 115, p. 6.

125 Death Penalty Information Center, “Podcast: Women and the Death Penalty with Professor Mary Welek Atwell”, 24 March 2017, min. 32:00.

Executing pregnant women is specifically prohibited under Article 6 of the ICCPR.¹²⁶ Although no OSCE participating State forbids the execution of women with young children specifically, this is a common measure in many countries, with no equivalent provision for fathers. While these limitations stem from the fundamental principle of prioritizing the best interests of the child, and reflect the reality that the mother is often the primary caregiver, they implicitly put women without children in an unequal position to their counterparts who are mothers.

Women on death row share a common set of characteristics, often coming from environments scarred by abuse, violence, economic dependency and fears of losing child custody.¹²⁷ An ODIHR/DCAF/UN Women joint tool related to gender and security on places of deprivation of liberty and gender addresses the way in which the initial routes to crime and recidivism for women tend to differ from those for men, which is not always acknowledged in the judicial system nor in places of deprivation of liberty, such as death row facilities.¹²⁸

The fact that many of these women have experienced previous abuse, often sexual and gender based, tends to be ignored by courts.¹²⁹ As the Special Rapporteur on extrajudicial, summary or arbitrary executions has argued, failure to take into account essential facts of a capital defendant's case, including treating domestic abuse as a mitigating factor, amounts to an arbitrary killing.¹³⁰ In the United States, however, courts have rejected attempts by survivors of domestic violence to invoke "stand your ground" laws, which allow individuals to use force when threatened, to justify their use of force when defending themselves from long-time abusers.¹³¹

Gender inequality can compound other vulnerabilities for women facing execution, like the higher likelihood of women being tortured or suffering cruel, inhuman or degrading treatment or punishment, including sexual and gender-based violence, while on death row.¹³² These issues however fall beyond the scope of this report.

126 UN General Assembly, *International Covenant on Civil and Political Rights*, Article 6, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

127 Agnes Callamard, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings" UN Doc. A/HRC/35/23, 6 June 2017, para. 42.

128 OSCE-ODIHR, "Gender and security toolkit: Places of Deprivation of Liberty and Gender", 2019, p. 8.

129 The Cornell Center On The Death Penalty Worldwide, *op. cit.*, note 115, p. 8.

130 Agnes Callamard, *op. cit.*, note 127, para. 32.

131 The Cornell Center On The Death Penalty Worldwide, *op. cit.*, note 115, p. 11.

132 For more information on this, please refer to OSCE-ODIHR, "Gender and security toolkit: Places of Deprivation of Liberty and Gender", 2019.

Gender identity and sexual orientation

Gender identity and sexual orientation can also influence the application of the death penalty.¹³³ Although none of the twelve countries where LGBTI individuals can be sentenced to death because of their status as gender or sexual minorities are OSCE participating States,¹³⁴ underlying discrimination in OSCE participating States can exacerbate the vulnerabilities of LGBTI people and impact their sentencing and execution. OSCE participating States have committed themselves to ensuring human rights to everyone without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹³⁵ General Comment no. 36 on the right to life is clear that “the duty to protect the right to life requires States parties to take special measures of protection towards persons in situations of vulnerability whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence [...] (including) lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.”¹³⁶

In April 2019, the United States Supreme Court declined to review the case of a gay man in South Dakota condemned to death because, in the words of the jury, sending him to an all-male prison would be “sending him where he wants to go.”¹³⁷ The defendant argued that this and other instances of homophobic bias deprived him of his right to a fair trial.¹³⁸

No case in Belarus during the reporting period appeared to concern LGBTI individuals. However, the Special Rapporteur on the situation of human rights in Belarus has

133 The non-binding Yogyakarta Principles, which outline principles on the application of international human rights law in relation to sexual orientation and gender identity and expression, state that “the death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.” The Yogyakarta Principles emphasize that “[e]veryone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity.” The Principles were developed and adopted by a group of international human rights experts, including eight UN Special Rapporteurs of the Human Rights Council, and thus provide useful guidance. “The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity”, Principle 4, p. 12.

134 Human Dignity Trust, “Map of Countries that Criminalise LGBT People”.

135 Vienna Document 1989, Copenhagen Document 1990, *op. cit.*, note 1; As regards the ICCPR, the Human Rights Committee has interpreted the non-discrimination provisions in Articles 2 and 26 of the Covenant to include discrimination on the basis of sexual orientation as part of the reference to “sex” as a prohibited ground of discrimination, UN Human Rights Committee Views, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, para. 8.7.

136 UN Human Rights Committee, “General Comment No. 36” *op. cit.*, note 6, para. 23.

137 Death Penalty Information Center, “Supreme Court Denies Review in Case of Death Sentence Tainted by Anti-Gay Bias” 16 April 2019.

138 *Ibid.*

documented numerous instances of homophobic and transphobic statements and actions by state officials and incitement of discrimination against the lesbian, gay, bisexual, transgender and intersex community.¹³⁹

c. “Special categories” Persons with mental or intellectual disabilities, or severe trauma

Wherever it is still applied, the death penalty disproportionately affects people with psychosocial and intellectual disabilities, often a result of severe trauma and abuse in their past.¹⁴⁰ This is in spite of them being entitled to “specific measures of protection so as to ensure their effective enjoyment of the right to life on equal basis with others.”¹⁴¹

Special protection measures can include limiting certain rights of the defendant in the interest of a fair trial, such as the right of self-representation. The Inter-American Commission on Human Rights has ruled that states that do not apply a “heightened and rigorous scrutiny” to determine whether an individual can defend himself or herself without jeopardizing his or her own right to a fair trial will be breaching their own obligations. This is especially important in death penalty cases.¹⁴²

In its General Comment no. 36, the Human Rights Committee enumerates certain special categories of individuals which states must refrain from executing, including “persons whose serious psycho-social and intellectual disabilities impeded their effective defence, and on persons that have limited moral culpability. They should also refrain from executing persons that have diminished ability to understand the reasons for their sentence, [...] and individuals who have suffered in the past serious human rights violations.”¹⁴³ The Special Rapporteur on extrajudicial, summary or arbitrary executions likewise considers the execution of “individuals suffering from psychosocial disabilities” a violation of death penalty safeguards.¹⁴⁴

139 Anaïs Marin, *op. cit.*, note 14, para. 65.

140 Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, “Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty” UN Doc. A/HRC/42/28, 28 August 2019, para. 32.

141 UN Human Rights Committee, “General Comment No. 36” *op. cit.*, note 6, para. 24.

142 IACHR, Report No. 27/20. Case 12.754. *mertis* (Publication). *Nwtohiyada Idehesdi Sequoyah*. United States of America. 22 April 2020, para. 43-49.

143 UN Human Rights Committee, “General Comment No. 36” *op. cit.*, note 6, para. 49.

144 UN Office of the High Commissioner for Human Rights, “Death row: UN expert urges US authorities to stop execution of two persons with psychosocial disabilities”, 17 July 2012.

The Human Rights Committee has called on states to refrain from executing those “who have suffered in the past serious human rights violations,”¹⁴⁵ which reinforces its previous call that, in cases concerning the death penalty, “the personal circumstances of the offender [...] including its specific attenuating elements must be considered by the sentencing court.”¹⁴⁶

Moreover, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has deemed the execution of persons with mental disabilities as particularly cruel, inhuman and degrading, and therefore in violation of Article 7 of the ICCPR and Articles 1 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁴⁷

What qualifies as a mental disability can be a contentious issue. In Belarus, Article 92 of the Criminal Code establishes that a convict diagnosed with a mental disorder is relieved from serving a sentence; and according to Article 176 of the Criminal Law Enforcement Code, after detection of signs of a mental disorder in a convict, the detention facility should arrange for a commission of three doctors to diagnose him or her. The death penalty shall not be enforced if “a mental disorder (illness) is diagnosed and deprives a convict of his ability to understand the implications of his actions.”¹⁴⁸

According to a local human rights organization, the mental health of convicts is rarely properly examined, even in cases where human rights defenders presented reports and medical documents to the authorities, or in a case in which a convict was known to roll on the floor of his cell and sing.¹⁴⁹ Successive Special Rapporteurs on the situation of human rights in Belarus have expressed broader reservations about the treatment of persons with mental disabilities by the government, including “a lack of political will to put an end to discriminatory laws and behaviours,”¹⁵⁰ disenfranchisement and deprivation of legal capacity.¹⁵¹

The 2002 United States Supreme Court ruling in *Atkins v. Virginia* established that “mentally retarded defendants” could not be executed but gave states significant

145 UN Human Rights Committee, “General Comment No. 36” *op. cit.*, note 6, para. 49.

146 *Ibid.* para. 37.

147 Juan E. Méndez, “Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment”, UN Doc. A/67/279, 9 August 2011, para. 58.

148 FIDH – HRC “Viasna”, *op. cit.*, note 32, p. 57.

149 *Ibid.*

150 Miklós Haraszti, “Situation of human rights in Belarus”, UN Doc A/73/380, 13 September 2018, para. 98.

151 Anaïs Marin, *op. cit.*, note 14, paras. 61-62.

leeway to determine how to measure their disability.¹⁵² In *Hall v. Florida*, in 2014, the Supreme Court rejected the use of IQ test results as a sole method for determining intellectual disability.¹⁵³ The American Psychiatric Association and the American Bar Association have joined other organizations in calling for an extension of the ban on executing those with intellectual disabilities to those with severe mental illnesses.¹⁵⁴

In January 2020, the Virginia Senate adopted a bill which would exempt defendants with severe mental illnesses at the time of the offence from the death penalty;¹⁵⁵ and similar bills were introduced in the Arizona and Kentucky Senates.¹⁵⁶ In February, a bill failed in the South Dakota Senate that specified circumstances in which an individual could not be sentenced to death, including “if the defendant had a severe mental illness, age at the time of the crime, the influence of drug or alcohol, absence of a prior criminal record, presence of abuse as a child.” Among the opponents of the bill was South Dakota’s Attorney General, who argued that it “would severely undercut the state’s ability to carry out the death penalty.”¹⁵⁷

At least 18 of the 24 individuals executed in the United States during the reporting period had a severe mental illness, including dementia, paranoia and psychosis and/or a past history marred by trauma and abuse, most often physical, sexual and/or emotional abuse at the hands of parents or guardians at an early age.¹⁵⁸ It is not possible to ascertain information on the backgrounds of the three individuals executed in Belarus during the reporting period.

1.2.2. Consistency

The former Special Rapporteur on extrajudicial, summary or arbitrary executions singles out consistency as one of the key substantive requirements to avoid arbitrariness in the context of the death penalty. And yet, the application of the death penalty in both retentionist states in the OSCE region is often inconsistent, when one considers what might distinguish the small (and shrinking) number of convicted murderers

152 Death Penalty Information Center, “Intellectual Disability Supreme Court Cases”.

153 *Ibid.*

154 Death Penalty Information Center, “Mental illness”.

155 American Bar Association “Several States Consider Repealing or Reforming Death Penalty Laws” 11 March 2020.

156 Death Penalty Information Center, “Twenty-One Virginia Prosecutors Sign Letter Urging Repeal of Death Penalty” 4 February 2020.

157 Danielle Ferguson, “Senate judiciary kills bill to prohibit death penalty for the mentally ill” *Argus Leader*, 20 February 2020.

158 Death Penalty Information Center, *op. cit.*, note 13, p. 16.

on death row from the many others who are sentenced to prison. Scholar Rob Warden has said that “the distinction between capital and non-capital cases often is nothing more than an accident of time and geography.”¹⁵⁹

The Inter-American Commission on Human Rights held that an applicant in the United States must be allowed to avail himself of a review mechanism that had benefited one group of persons who had also been sentenced to death. The state had maintained that the applicant was ineligible because of the procedural stage his case was in. The Commission rebuked this justification, saying “that justifications that might be legitimate in matters of another kind are not allowable when the imposition and application of the death penalty are involved.”¹⁶⁰

This chapter has sought to present arguments to establish that the death penalty is applied in an inconsistent, and therefore arbitrary, manner. These include the systematic way in which death penalty trials fall short of the stringent standards required by the gravity of this punishment; states’ reluctance to embrace transparency in all aspects of the death penalty; the inherent arbitrariness of pardon processes; systemic inequalities based on race and gender; and the disproportionate targeting of the poor, the traumatized, or people with mental or intellectual disabilities and other vulnerabilities. Taken together, these factors illustrate the systemic arbitrariness of the death penalty.

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

2.1. Retentionist participating states

2.1.1. United States

At the end of the reporting period (31 March 2020), 25 American states still retain the death penalty, as well as the federal government and the military. Military authorities have not conducted an execution since 1961.¹⁶¹ On 25 July 2019, the Department of Justice announced plans to resume federal executions after a 16-year hiatus.¹⁶² A

159 Rob Warden, “Reflections on Capital Punishment” *Northwestern Journal of Law & Social Policy*, Vol. 4, Issue 2, Fall 2009, p. 350-351.

160 *Landrigan v. United States*, Report No. 81/11, Case 12.776 (IACmHR, Jul. 21, 2011) para. 52.

161 Amnesty International, *op. cit.*, note 4, p. 16.

162 ODIHR’s director expressed her deep disappointment at the decision, calling federal executions “a cruel, inhuman and degrading punishment,” 26 July 2019.

federal judge blocked this move in November.¹⁶³ The Department of Justice appealed to the Supreme Court, but it declined to intervene, effectively temporarily suspending the five executions that had been planned.¹⁶⁴

The attempt to resume executions at the federal level attracted considerable criticism in the OSCE Permanent Council, including from the European Union,¹⁶⁵ the Russian Federation,¹⁶⁶ and a group of nations represented by Norway.¹⁶⁷ The PACE General Rapporteur on Abolition of the Death Penalty also expressed his disappointment and said it went against the trend towards abolition.¹⁶⁸

In the United States, 22 states have abolished the death penalty, and three (California, Oregon, and Pennsylvania) have gubernatorial moratoria on its use.¹⁶⁹ New Hampshire in May 2019 and Colorado in March 2020 became the two most recent states to abolish the death penalty, pushing the United States past two historical thresholds: half of all states now have either abolished the death penalty or imposed a moratorium on its use; and just above half of the United States population lives in those states.¹⁷⁰ Indiana, Kansas, Kentucky, Montana, Nevada, North Carolina, and Wyoming, while retentionist, have not carried out an execution for ten years or more.¹⁷¹

163 Death Penalty Information Center, “Department of Justice Lawyers Ask the U.S. Supreme Court to Intervene After Federal Appeals Court Refuses to Lift Injunction Against Federal Executions”, 3 December 2019.

164 Death Penalty Information Center, *op. cit.*, note 13, p. 7. Eventually the U.S. Court of Appeals for the District of Columbia Circuit overturned the suspension on 7 April 2020 and, after the Supreme Court again declined to intervene, the U.S. Federal Government carried out five executions on the 14, 16, 17 of July and 26, 28 August 2020. For more information on this, please read: Death Penalty Information Center, “Federal execution updates.”

165 “EU statement on the occasion of the European and World Day against the Death Penalty”, OSCE Permanent Council, 11 October 2019.

166 “Statement by the Permanent Representative of the Russian Federation to the OSCE at the 1239th meeting of the OSCE Permanent Council”, OSCE Permanent Council, 5 September 2019; “Statement by Mr. Vladimir Zheglov, Deputy Permanent Representative of the Russian Federation in connection with World Day Against the Death Penalty” OSCE Permanent Council, 10 October 2019: The Russian Federation expressed serious concern about the situation of the death penalty in the United States, the possibility that the methods of execution could cause suffering amounting to torture, and racial bias and anti-Semitism, in sentencing decisions in the United States.

167 On matters of the death penalty, Norway often speaks in the OSCE Permanent Council on behalf of a group of states made up of Iceland, Liechtenstein, Switzerland, and Norway. See “Statement on the death penalty in Belarus and the United States of America”, OSCE Permanent Council, 9 September 2019.

168 Titus Corlăţean, *op. cit.*, note 31, para. 10.

169 Death Penalty Information Center, “State by state”.

170 Death Penalty Information Center, *op. cit.*, note 13, p. 4.

171 Amnesty International, *op. cit.*, note 4, p. 16.

During 2019, 91 per cent of all executions happened in states in the south of the country, with 41 per cent taking place in Texas.¹⁷² Fewer than two per cent of counties in the United States are responsible for more than half of the nation's death row population.¹⁷³ Such disparities raise serious concerns about the unequal and arbitrary application of the death penalty.

A poll in October 2019 found that 60 per cent of Americans believe that life imprisonment without parole is a better punishment than the death penalty, an increase of 15 per cent since 2014 and the first time a majority has supported an alternative to the death penalty in such polls.¹⁷⁴

The United States continued to defend its stance on the death penalty during the reporting period, emphasising at the OSCE Permanent Council the legality of the death penalty when imposed, that it is carried out in a manner consistent with a state's international obligations, while maintaining that it is a matter for individual countries to decide.¹⁷⁵

Death sentences between 1 April 2019 and 31 March 2020

As of January 2020, 2,620 individuals, including 53 women, remain on death row in thirty states, as well as in federal and military prisons.¹⁷⁶ The state with the largest death row population is California, with 725 inmates, followed by Florida with 347. As noted, California currently has a moratorium on executions.

In the United States, 34 death sentences were reportedly handed down in 2019,¹⁷⁷ a 20.9 per cent decline from the 43 new death sentences imposed in 2018, and the second fewest in any year since the landmark 1972 Supreme Court ruling of *Furman v. Georgia*.¹⁷⁸ The year 2019 was the fifth consecutive year with fewer than 30 executions and fewer than 50 new death sentences.¹⁷⁹

172 Death Penalty Information Center, *op. cit.*, note 13, p. 9.

173 Death Penalty Information Center, "The 2% Death Penalty: The Geographic Arbitrariness of Capital Punishment in the United States".

174 Jeffrey M. Jones, "Americans Now Support Life in Prison Over Death Penalty" *GALLUP*, 25 November 2019.

175 "Right of Reply: Regarding the Death Penalty" OSCE Permanent Council, 16 January 2020.

176 Death Penalty Information Center, "Death row".

177 This refers to the calendar year. "Execution list 2019", Death Penalty Information Center.

178 Death Penalty Information Center, "Recent Death Sentences by Name, Race, County, and Year".

179 Death Penalty Information Center, *op. cit.*, note 13, p. 8.

Between January 2020 and then end of the reporting period, at least four more death sentences were imposed, two in Texas¹⁸⁰ and two in Tennessee.¹⁸¹

Executions between 1 April 2019 and 31 March 2020

During the reporting period, 24 executions were carried out, a slight increase from the 21 executions that took place during the previous reporting period. However, the overall number of executions in calendar year 2019 (22) decreased from 2018 (25).¹⁸²

Executions were carried out in seven states during the reporting period: nine in Texas, four in both Tennessee and Georgia, three in Alabama, two in Florida and one each in Missouri and South Dakota. All executions were carried out by lethal injection except three in Tennessee, which were performed by means of electrocution, a method the state has used five times since 2018.¹⁸³ Ohio would have been the eighth state in this list, but after a federal court in February 2019 likened Ohio's three-drug lethal injection protocol to "a combination of waterboarding and chemical fire"¹⁸⁴, Governor Mike DeWine granted reprieves of six execution dates over the course of the year, ensuring that no execution took place in Ohio in 2019. The governor stated that "as long as the status quo remains, where we don't have a protocol that has been found to be OK, we certainly cannot have any executions in Ohio."¹⁸⁵

180 Texas Coalition Against the Death penalty (TDCAP) "Texas Death Penalty Facts".

181 Adam Tamburin, "Tennessee Supreme Court sets two new execution dates for 2020" *Tennessean*, 24 February 2020.

182 Death Penalty Information Center, "Execution Database".

183 Travis Dorman, Natalie Allison and Adam Tamburin, "Tennessee execution: Nicholas Todd Sutton executed by electric chair" *Tennessean*, 21 February 2020.

184 Death Penalty Information Center, "Ohio Governor Halts 'Cruel and Unusual' Lethal-Injection Executions" 21 February 2019. For a detailed analysis of the use of lethal injections as a method of execution and how this can lead to a violation of the prohibition against torture or other cruel, inhuman or degrading punishment, please refer to "The Death Penalty in the OSCE Area: ODIHR Background Paper 2018", OSCE/ODIHR, 12 September 2018.

185 *Ibid.*

The Death Penalty in the OSCE Area—Background Paper 2020

Date of execution	Name	No. of years in death row¹⁸⁶	Ethnic group	Sex	State	Method
24/04/2019	John William King	20	White	Male	Texas	Lethal injection
02/05/2019	Scotty Garnell Morrow	19	Black	Male	Georgia	Lethal injection
16/05/2019	Michael Samra	21	White	Male	Alabama	Lethal injection
16/05/2019	Donnie Edward Johnson	34	White	Male	Tennessee	Lethal injection
23/5/2019	Bobby Joe Long	34	White	Male	Florida	Lethal injection
30/05/2019	Christopher Price	17	White	Male	Alabama	Lethal injection
20/06/2019	Marion Wilson	21	Black	Male	Georgia	Lethal injection
15/08/2019	Stephen Michael West	32	White	Male	Tennessee	Electrocution
21/08/2019	Larry Swearingen	19	White	Male	Texas	Lethal injection
22/08/2019	Gary Ray Bowles	23	White	Male	Florida	Lethal injection
04/09/2019	Billy Crutsinger	16	White	Male	Texas	Lethal injection
10/09/2019	Mark Soliz	7	Latino	Male	Texas	Lethal injection
25/09/2019	Robert Sparks	10	Black	Male	Texas	Lethal injection
01/10/2019	Russell Bucklew	22	White	Male	Missouri	Lethal injection
04/11/2019	Charles Rhines	16	White	Male	South Dakota	Lethal injection
06/11/2019	Justen Hall	14	White	Male	Texas	Lethal injection
13/11/2019	Ray Chromartie	22	Black	Male	Georgia	Lethal injection
05/12/2019	Lee Hall Jr.	27	White	Male	Tennessee	Electrocution
11/12/2019	Travis Runnels	14	Black	Male	Texas	Lethal injection
15/01/2020	John Gardner	13	White	Male	Texas	Lethal injection
29/01/2020	Donnie Lance	21	White	Male	Georgia	Lethal injection
06/02/2020	Abel Ochoa	17	Latino	Male	Texas	Lethal injection
20/02/2020	Nicholas Todd Sutton	34	White	Male	Tennessee	Electrocution
05/03/2020	Nathaniel Woods	14	Black	Male	Alabama	Lethal injection

Promising developments

As mentioned above, there were two major shifts concerning the state of the death penalty in the United States: for the first time, over half of the United States population live in states where the death penalty has been abolished or suspended by moratorium, and 60 per cent of Americans prefer an alternative (life imprisonment without parole) to capital punishment.¹⁸⁷

Among other positive developments, New Hampshire abolished the death penalty on 30 May 2019, when the legislature amassed enough votes to override Governor Chris

¹⁸⁶ The figures have been ascertained from news reports and other open source information.

¹⁸⁷ Jeffrey M. Jones, "Americans Now Support Life in Prison Over Death Penalty" *GALLUP*, 25 November 2019.

Sununu's veto.¹⁸⁸ Similar attempts had failed in 2000 and 2018, despite New Hampshire having the most restrictive death penalty in the country and not having executed anyone since 1939.¹⁸⁹ On 23 March 2020, Governor Jared Polis of Colorado signed the repeal of the death penalty into law for his state, and commuted the sentences of the three men on death row to life imprisonment without possibility of parole.¹⁹⁰ Numerous statements in the OSCE Permanent Council welcomed both developments: the EU said it hoped it would encourage other states to follow suit,¹⁹¹ while Norway, on behalf of a group of countries, called it a welcome step towards abolition.¹⁹²

On 3 February 2020, Virginia lawmakers introduced legislation on the abolition of the death penalty, but consideration of it was delayed until the 2021 legislative session.¹⁹³ A group of 21 former and current state prosecutors signed a letter supporting the proposed measure and calling the death penalty "a failed government program."¹⁹⁴ Previously, on 30 January 2020, the Virginia Senate overwhelmingly passed a bill prohibiting the death penalty for defendants with severe mental illness.¹⁹⁵

The Wyoming state legislature, which in February 2019 saw an unprecedented, bipartisan and ultimately failed push towards abolition of capital punishment, reintroduced legislation on abolition in February 2020.¹⁹⁶ Louisiana, which in January 2020 reached ten years without executions, saw a constitutional amendment on abolition fail to pass in the Senate on 6 May 2019.¹⁹⁷ The bill was reintroduced in February

188 Death Penalty Information Center, "New Hampshire Becomes 21st State to Abolish Death Penalty", 30 May 2019.

189 *Ibid.*

190 Death Penalty Information Center, "Colorado Becomes 22nd State to Abolish Death Penalty", 24 March 2020.

191 "EU Statement on Abolition of Death Penalty in the US State of New Hampshire", OSCE Permanent Council, 11 June 2019.

192 See also "Statement on the death penalty in Belarus and the United States of America", OSCE Permanent Council, 9 September 2019. On matters of the death penalty, Norway often speaks in the OSCE Permanent Council on behalf of a group of states made up of Iceland, Liechtenstein, Switzerland, and Norway. And "Statement on the death penalty in the United States of America", OSCE Permanent Council, 15 May 2020.

193 Death Penalty Information Center, "Twenty-One Virginia Prosecutors Sign Letter Urging Repeal of Death Penalty", 4 February 2020.

194 *Ibid.*

195 *Ibid.*

196 Death Penalty Information Center, "Bill to Abolish Wyoming's Death Penalty Introduced with Bipartisan Support", 23 January 2020. See also American Bar Association "Several States Consider Repealing or Reforming Death Penalty Laws", 11 March 2020.

197 Death Penalty Information Center, "Louisiana Reaches Ten Years Without an Execution" 7 January 2020. See also: Death Penalty Information Center, "Study Finds Louisiana Spends An Extra \$15 Million Per Year on Death Penalty", 10 May 2019.

2020.¹⁹⁸ Representatives in Oklahoma introduced legislation on death penalty abolition in 2020 as well.¹⁹⁹

On 18 March 2020, before Delaware's legislation session was postponed indefinitely because of the COVID-19 pandemic, legislators had been asked to consider two competing bills: one to amend the state constitution in order to enshrine the existing ban on capital punishment; and one to re-establish the death penalty, which the state Supreme Court declared unconstitutional in 2016.²⁰⁰

Oregon passed a law on 1 August 2019 significantly narrowing the definition of aggravated murder, the only crime eligible for the death penalty in the state.²⁰¹ On 11 December 2019, Arizona passed a law eliminating three possible aggravating factors, narrowing the cases for which the death penalty can be imposed.²⁰²

The United States Congress has seen a renewed push towards abolition. House bill H.R. 4052,²⁰³ introduced in 27 July 2019 by Representative Ayanna Pressley, and Senate bill S. 2390,²⁰⁴ introduced four days later by Senator Dick Durbin, seek to prohibit the imposition of the death penalty for a violation of a federal law, and establish that individuals sentenced to death before the enactment of the laws must be resentenced.

In other promising developments, there were two exonerations during the reporting period, those of an inmate convicted in 1976 and an inmate convicted in 1993. Both cases involved official misconduct and perjury or false accusations.²⁰⁵ These exonerations, on 28 March 2019 and 14 June 2019, bring the total number of former death-row prisoners exonerated in the United States since 1973 to 167.²⁰⁶

198 American Bar Association "Several States Consider Repealing or Reforming Death Penalty Laws", 11 March 2020.

199 *Ibid.*

200 Radall Chase, "Delaware lawmakers face competing death penalty bills" *Associated Press*, 19 March 2020.

201 Death Penalty Information Center, "Oregon Governor Signs Bill Narrowing Use of the Death Penalty" 2 August 2019.

202 Death Penalty Information Center, *op. cit.*, note 13, p. 5.

203 116th Congress, *H.R.4052 - To prohibit the imposition of the death penalty for any violation of Federal law, and for other purposes* <<https://www.congress.gov/bill/116th-congress/house-bill/4052>>.

204 116th Congress, *S.2390 - A bill to prohibit the imposition of the death penalty for any violation of Federal law, and for other purposes* <<https://www.congress.gov/bill/116th-congress/senate-bill/2390>>.

205 Death Penalty Information Center, "Innocence Database".

206 Death Penalty Information Center, *op. cit.*, note 13, p. 12.

In the reporting period, three other individuals were released from prison after being wrongfully sentenced to the death penalty, but without full exoneration. An inmate convicted in Nevada in 1986²⁰⁷ and one convicted in Louisiana in 1977²⁰⁸ were released on 21 August 2019 and on 15 October 2019, respectively, and a third (convicted in Florida in 1985)²⁰⁹ was released on 9 March 2020. These five cases of individuals who were unjustly placed in death row, some of them for decades, continue to cast doubt on the possibility of applying the death penalty with certainty and in a non-arbitrary way. In the OSCE Permanent Council, the EU described one of the cases as “the clear demonstration of a major argument against the death penalty – the possibility of error.”²¹⁰

As mentioned in the previous section, two death row inmates in Kentucky were granted clemency as part of Governor Matt Bevin’s multiple pardons on his way out of office.²¹¹ Another inmate was pardoned on 16 January 2020 by the Georgia Board of Pardons and Paroles, six hours before his scheduled execution.²¹²

In October 2019, the Texas Court of Criminal Appeals stayed the execution of an inmate a week before it was set to take place, as the judge who had sentenced him was accused of racial bias and of having used anti-Semitic slurs against the defendant shortly after the trial.²¹³ The Russian Federation called in the OSCE Permanent Council for this case to be brought to the attention of the Special Representative of the OSCE Chairperson-in-Office on Combating Anti-Semitism.²¹⁴

On 28 June 2019, almost a decade after the abolition of the death penalty in New Mexico, the state’s Supreme Court vacated the death sentences of the two remaining

207 Death Penalty Information Center, “Nevada Man Convicted by Prosecutorial Misconduct and ‘Woefully Inadequate’ Defense Counsel Released After 33 Years on Death Row”, 6 September 2019.

208 Death Penalty Information Center, “Louisiana Man Freed 42 Years After Wrongful Conviction in Death-Penalty Trial”, 23 October 2019.

209 The Innocence Project, “Paul Hildwin Set Free After 35-Year Struggle for Justice” 9 March 2020.

210 “EU Statement on Death Penalty in the United States of America”, OSCE Permanent Council, 18 May 2020.

211 Sarah Mervosh, Campbell Robertson and Mike Baker, “Victims’ Families Rage as Matt Bevin Defends Pardons” *The New York Times*, 20 December 2019.

212 “Georgia Board Spares Prisoner’s Life Hours Before Execution” *US News*, 16 January 2020.

213 Death Penalty Information Center, “Coalition of Jewish Organizations Seeks New Trial for Jewish Death-Row Prisoner in Texas Tried by Anti-Semitic Judge”, 9 September 2019.

214 “Statement by Mr. Vladimir Zheglov, Deputy Permanent Representative of the Russian Federation in connection with World Day Against the Death Penalty” OSCE Permanent Council, 10 October 2019.

individuals on its death row, considering that the death penalty did not fulfil the requirement of proportionality, and redirecting the two defendants to life in prison.²¹⁵

Areas of concern

Although there were several high-profile exonerations, a number of executions took place where there were serious questions about the guilt of the defendant.

In September 2019, the Tennessee attorney general asked the state Supreme Court to set execution dates for nine death row inmates, in an unprecedented move which the state's Office of the Federal Public Defender described as a "mass execution."²¹⁶ Similarly, Texas set 13 executions for the last five months of 2019, many of them described by the Death Penalty Information Center as "the embodiment of unfair legal process."²¹⁷ Six of them were eventually stayed, and the warrant for one was withdrawn.²¹⁸

Cuyahoga County (Cleveland) in Ohio handed down three death sentences in 2019 and five in the last two years, more than in any other county in the country.²¹⁹ In January 2020, the Florida Supreme Court repudiated a previous ruling from 2016 and reinstated non-unanimous death sentencing, making Florida an outlier among death penalty states.²²⁰

In September 2019, Missouri pushed ahead with the execution of Russell Bucklew, who had a condition called cavernous haemangioma, which caused blood-filled tumours to grow in his head, neck, and throat. The Inter-American Commission on Human Rights and the American Civil Liberties Union had warned that because of this, a lethal injection could burst his tumours and violate his right to be free from

215 Death Penalty Information Center, "New Mexico Supreme Court Ruling Removes Final Prisoners from State's Death Row", 2 July 2019.

216 Death Penalty Information Center, "Tennessee Attorney General Asks State Supreme Court to Schedule Nine Executions and Undo Plea Deal that Took a Tenth Prisoner off Death Row", 27 September 2019.

217 Death Penalty Information Center, *op. cit.*, note 13, p. 20.

218 Death Penalty Information Center, "Texas Schedules Thirteen Executions in Last Five Months of 2019", 30 August 2019.

219 Death Penalty Information Center, *op. cit.*, note 13, p. 10.

220 Death Penalty Information Center, "Florida Supreme Court Retracts Jury Unanimity Requirement, Reinstates Non-Unanimous Death Sentence", 24 January 2020. In April 2020, the US Supreme Court did however ban non-unanimous jury verdicts in cases involving serious crimes.

cruel and inhuman punishment and torture.²²¹ This case was examined more in detail in the *Death Penalty in the OSCE Area: Background Paper 2019*.²²² At the time of execution, the Russian Federation made a statement in the OSCE Permanent Council calling on the United States “to respect its international obligations to eliminate the torture and cruel treatment and punishment of prisoners and to remember the value of human life.”²²³

The last execution of the reporting period happened in Alabama on 5 March 2020. The individual, Nathaniel Woods, was a Black man convicted, partly because of inadequate representation, of capital murder of three white victims, in spite of it having been established that he was not the gunman.²²⁴ The man who shot the gun remains on death row. Nathaniel Woods was convicted by a non-unanimous jury in which prosecutors allegedly excluded all but two qualified black prospective jurors, in a majority black county.²²⁵ Alabama, unlike most other states, does not require a unanimous jury to impose the death penalty.²²⁶ Nor does it have a state-funded scheme to provide lawyers to death row prisoners,²²⁷ and since Nathaniel Woods could not afford one, he was not able to obtain legal assistance at crucial stages of his process. His appointed lawyer abandoned him with no notice in the middle of the case, and he did not find out about an important deadline to file appeals until months after it had already passed.²²⁸ Governor Kay Ivey declined his request for clemency because, in her words, “justice must be served.”²²⁹

Another issue of continuing concern is the number of years that inmates spend on death row between their initial conviction and their execution. While defenders of

221 Organization of American States, “IACHR Urges the United States to Stay the Execution of Russell Bucklew”, 23 August 2019. See also: American Civil Liberties Union “ACLU statement regarding the unlawful execution of Russell Bucklew”, 1 October 2019.

222 “The Death Penalty in the OSCE Area: Background Paper 2019”, OSCE/ODIHR, *op. cit.*, note 3, p. 28-30.

223 “Statement by Vladimir Zheglov, Deputy Permanent Representative of the Russian Federation in connection with World Day Against the Death Penalty” OSCE Permanent Council, 10 October 2019

224 Death Penalty Information Center, “Alabama Set to Execute Nathaniel Woods Despite Claims of Innocence, Police Misconduct”, 28 February 2020.

225 The Equal Justice Initiative, “Nathaniel Woods Execution Reveals Disturbing Bias in Alabama”, 5 March 2020.

226 Death Penalty Information Center, “Alabama”.

227 The Equal Justice Initiative, “Alabama’s Death Penalty System Generates Growing Criticism”, 30 May 2016.

228 Death Penalty Information Center, “Alabama Set to Execute Nathaniel Woods Despite Claims of Innocence, Police Misconduct”, 28 February 2020.

229 Rick Rojas, “2 Jurors Voted to Spare Nathaniel Woods’s Life. Alabama Executed Him.” *The New York Times*, 5 March 2020. See also: Kenya Evelyn, “Alabama executes Nathaniel Woods despite outcry from activists nationwide” *The Guardian*, 6 March 2020.

the death penalty argue that this is the unavoidable result of a robust system of appeals and safeguards, life on death row can have a devastating impact on an inmate's mental health. Conditions of detention on death row are often markedly worse than for the general prison population, and often fall short of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).²³⁰ As cited in the *Death Penalty in the OSCE Area: Background Paper 2019*,²³¹ the European Court of Human Rights determined in *Soering v. United Kingdom* that the conditions on death row in the state of Virginia in the United States breached the prohibition of cruel, inhuman and degrading treatment.²³²

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has described death row syndrome as “the anxiety created by the threat of death and the other circumstances surrounding an execution, (which) inflicts great psychological pressure and trauma on persons sentenced to death.”²³³

The Human Rights Committee has ruled that detention on death row for 13 years caused “psychological distress” and was indicative of a failure by the state to resolve the case within a reasonable period, which taken together constituted a breach of Article 7 under the ICCPR.²³⁴ In another case, the Committee said that living on death row for more than eight years in very poor conditions of detention pending determination of an appeal “affected the physical and mental health of the applicant.”²³⁵

According to the Death Penalty Information Center, death-row prisoners in the United States typically spend more than a decade awaiting execution.²³⁶ For the prisoners executed during the reporting period, the average time spent on death row was 20 years.²³⁷ In three cases, the individuals had each spent 34 years on death row.

230 Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, “Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty”, UN Doc. A/HRC/42/28, 28 August 2019, para. 38.

231 “The Death Penalty in the OSCE Area: Background Paper 2019”, *op. cit.*, note 3.

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

233 Juan E. Méndez, *op. cit.*, note 147, para. 78.

234 *Kamoyo v. Zambia* (CCPR/C/104/D/1859/2009, para. 6.5).

235 *Mwamba v. Zambia* (CCPR/C/98/D/1520/2006, para. 6.8).

236 Death Penalty Information Center, “Time on Death Row”.

237 See chart above.

The impact of the COVID-19 pandemic

The COVID-19 pandemic has had a highly disruptive effect on criminal justice systems across the OSCE region,²³⁸ which has also affected some cases involving the death penalty in the United States. An appeals court in Texas pushed back two executions scheduled for 18 and 25 March 2020, “in light of the current health crisis and the enormous resources needed to address that emergency.”²³⁹ Outside the reporting period, several other executions scheduled for May and June 2020 face legal challenges from defendants, due to the impossibility of preparing and investigating cases, or because of the risk of gathering for an execution in the midst of a pandemic.²⁴⁰

At the end of the reporting period, there were requests from anaesthesiologists, pharmacists and medical academics in the United States that states release their stockpiles of drugs used for executions - mainly sedatives and paralytics - to address the nationwide shortages caused by COVID-19.²⁴¹ It is not possible for scientists to fully assess the impact these stockpiles could have in helping treat patients with COVID-19 due to states’ secretive practices surrounding the death penalty.²⁴²

2.1.2. Belarus

Belarus continues to be the only country in Europe that still applies the death penalty. Article 24 of the Constitution of the Republic of Belarus provides that the death penalty represents an exceptional measure of punishment for some especially serious crimes.²⁴³ The Criminal Code of Belarus forbids imposing the death penalty on women, and people who committed a crime when they were under 18 years of age, or are older than 65 at the time of the sentencing.²⁴⁴ In accordance with Article 175 of

238 See OSCE/ODIHR, OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic, 17 July 2020.

239 The Marshall Project, “How Coronavirus is Disrupting the Death Penalty”, 23 March 2020.

240 *Ibid.*

241 “Open Letter From Doctors Pharmacists and Health Experts Lethal Injection and COVID-19”.

242 Death Penalty Information Center, “Medical Professionals Ask Death-Penalty States to Turn Over Execution Drugs Needed for Coronavirus Treatment”, 13 April 2020.

243 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”.

244 Criminal Code of the Republic of Belarus, Art. 59.2(2).

the Criminal Law Enforcement Code, the death penalty is “carried out by firing squad with no members of the public present. The execution of the death penalty shall be carried out separately for each convict and without other death convicts present.”²⁴⁵

Belarus has repeatedly defended its use of the death penalty on the grounds that it is not forbidden by any international human rights instrument to which Belarus is a party, that it is popular among the population, and that its use is on a temporary basis, until its abolition. However the Human Rights Committee has determined that its practice of secrecy surrounding the executions, both towards the inmates and towards the families, constitutes a violation of Article 7 of the ICCPR.²⁴⁶

Death sentences between 1 April 2019 and 31 March 2020

Belarus handed down five new death sentences during the reporting period, an increase from the one death sentence during the previous reporting period.²⁴⁷ Viktor Paulau was convicted on 30 July 2019 by the Viciebsk Regional Court on charges of double murder, and on 12 November 2019 the Supreme Court confirmed the verdict.²⁴⁸ On 25 October 2019, the Brest Regional Court found Viktor Serhil guilty of murdering an eight-month old girl and condemned him to death. The Supreme Court confirmed the verdict on 31 January 2020.²⁴⁹ His co-defendant, the mother of the child, was condemned to a 25-year prison sentence.²⁵⁰ On 10 January 2020, the Mohilev regional court sentenced two brothers, Stanislau (age 19) and Illia Kostseu, to death for the murder of a neighbour,²⁵¹ which prompted the EU to express its concern in the OSCE Permanent Council.²⁵² On 6 March 2020, the Minsk Regional Court sentenced Viktor Skrundzik to death for a double murder.²⁵³

Executions between 1 April 2019 and 31 March 2020

At least three executions were carried out during the reporting period in Belarus, although as noted by the UN Special Rapporteur on the situation of human rights in

245 FIDH - HRC “Viasna”, *op. cit.*, note 32, p. 64.

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

247 “The Death Penalty in the OSCE Area: Background Paper 2019”, OSCE/ODIHR, *op. cit.*, note 3, p. 34.

248 “Supreme Court confirms death penalty for Viktor Paulau” Viasna, 12 November 2019.

249 Amnesty International, “Belarus Must Not Execute Viktor Serhil” 19 February 2020.

250 *Ibid.*

251 Amnesty International, “Two young brothers on death row”, 9 April 2020.

252 “EU Statement on death penalty in the OSCE area” OSCE Permanent Council, 20 January 2020.

253 Viasna, “Man sentenced to death in Sluck on double murder charge”, 6 March 2020.

Belarus, statistics on executions are not openly accessible due to continued secrecy surrounding the death penalty.²⁵⁴

Date of execution	Name	Sex	Method
13/06/2019 (not confirmed)	Alyaksandr Zhylnikau	Male	Firing squad
13/06/2019 (not confirmed)	Vyachaslau Sukharka	Male	Firing squad
17/12/19	Aliaksandr Asipovich	Male	Firing squad

On 13 June 2019, Alyaksandr Zhylnikau’s lawyer visited the prison to meet with his client, only to be informed that he had “served his sentence.” His family had not been notified, and the UN Human Rights Committee had asked for his execution to be stayed while they considered his case, which alleged that he was tortured in detention, denied access to legal assistance and subject to an unfair trial.²⁵⁵ Alyaksandr Zhylnikau is the 14th documented instance in which Belarus has executed a person with a pending case before the Human Rights Committee, going against its legal obligations.²⁵⁶ The execution was strongly condemned in a joint statement by the Human Rights Committee, the UN Special Rapporteur on the situation of human rights in Belarus and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions. They stated that “the only thing that distinguishes capital punishment from arbitrary execution is full respect for stringent due process guarantees.”²⁵⁷

The fate of Vyachaslau Sukharka, Alyaksandr Zhylnikau’s co-defendant and fellow death row prisoner, remains unknown. It is, however, common practice in Belarus to execute co-defendants at the same time and therefore Vyachaslau Sukharka is presumed dead.²⁵⁸ The execution, and presumed execution, were condemned by the European Union, both in a statement by the European External Action Service²⁵⁹ and

254 Anaïs Marin, *op. cit.*, note 14, para 19.

255 Amnesty International, “Belarus: Amnesty International condemns another death sentence execution”, 14 June 2019.

256 UN Human Rights Council “Belarus: UN human rights experts denounce execution”, 1 July 2019.

257 *Ibid.*

258 Amnesty International, *op. cit.*, note 255.

259 European External Action Service “Statement by the Spokesperson on two executions in Belarus”, 14 June 2019.

in the OSCE Permanent Council²⁶⁰ and by PACE's General Rapporteur on the abolition of the death penalty.²⁶¹

The Mahiliou Regional Prosecutor's Office confirmed the execution of Aliaksandr Asipovich on 17 December 2019,²⁶² after the Supreme Court upheld the decision on his sentencing in May.²⁶³ Reportedly, at the time of his execution Aliaksandr Asipovich was still working on his defence, preparing a supervisory appeal and an individual communication to the UN Human Rights Committee. He had also written a personal appeal to President Lukashenko, which was dismissed.²⁶⁴ The execution was met with condemnation from the European Union, the Council of Europe and its Parliamentary Assembly, which renewed calls for a moratorium on executions in Belarus.²⁶⁵

Promising developments

Belarus has remained engaged with international partners on discussions about the eventual abolition of the death penalty, although these have not yet led to changes in legislation nor other visible changes on the ground.

In July 2019, the Council of Europe, jointly with the Belarusian authorities, released its Action Plan for Belarus 2019-2021, agreeing to continue dialogue on the death penalty and on a moratorium as a possible first step towards abolition.²⁶⁶

In August 2019, the Belarussian Parliamentary working group on the abolition of the death penalty, whose work has previously been praised by the Special Rapporteur on the situation of human rights in Belarus²⁶⁷ and by PACE's General Rapporteur on the abolition of the death penalty,²⁶⁸ convened jointly with the Council of Europe a conference focused on how to work with public opinion with an aim to inform public views on the death penalty and the necessity for its abolition.²⁶⁹ Conference participants

260 EU Statement on death penalty in Belarus, OSCE Permanent Council No. 1233 Vienna, 20 May 2019.

261 Parliamentary Assembly of the Council of Europe, "PACE rapporteur condemns execution in Belarus" 17 June 2019.

262 Amnesty International, *op. cit.*, note 4, p. 32.

263 "Supreme Court confirms death sentence for Aliaksandr Asipovich", *Viasna*, 14 May 2019.

264 *Viasna*, "Human Rights Situation in Belarus in 2019", p. 8.

265 "EU, CoE, PACE call for moratorium in response to new execution in Belarus", *Viasna*, 23 December 2019.

266 Council of Europe, "Action Plan for Belarus 2019-2021", p. 9.

267 Anaïs Marin, *op. cit.*, note 14, para. 23.

268 Titus Corlăţean, *op. cit.*, note 31, para. 40.

269 Council of Europe, "Newsroom Strengthening the right to a fair trial in Belarusian criminal justice", 27 August 2019.

decided that a roadmap towards abolition would be agreed upon after the November 2019 parliamentary elections and recommended that authorities refrain from carrying out more executions before then.²⁷⁰

At a meeting with the Council of Europe Committee on Legal Affairs and Human Rights in October 2019, Maxim Misko, Deputy Chairman of the Standing Committee on Law of the House of Representatives of Belarus stated that “authorities were studying new initiatives on how to influence public opinion on the abolition of the death penalty issue before organising a new referendum.”²⁷¹

A week of activities calling for the abolition of the death penalty in Belarus, co-ordinated by human rights activists, culminated on 10 October 2019, on the occasion of World and European Day Against the Death Penalty. Ambassadors representing France, Sweden, Switzerland and the United Kingdom, joined their voices in speaking out against capital punishment, with the latter noting the way in which political decisions can change public opinion, as happened with the death penalty in the United Kingdom.²⁷² The EU High Representative for Foreign Affairs and Security Policy, Federica Mogherini, and Council of Europe Secretary General, Marija Pejčinović Burić, issued a joint statement calling for Belarus to “join the community of nations that have chosen to replace vengeance with human dignity.”²⁷³

In January 2020, the Council of the House of Representatives decided to establish a new working group on studying abolition of the death penalty at the National Assembly, to be headed by the Chairman of the Human Rights, National Relations, and Mass Media Commission, Gennady Davydko.²⁷⁴ The Minister of Foreign Affairs stated that he was pleased with the formation of this working group because it would help curb “criticism aimed at Belarus and calls to impose a moratorium on death penalty or totally abolish this type of punishment.”²⁷⁵

It is, however, hard to gauge the real impact of Belarus’ continued engagement in the possible abolition of capital punishment. On 18 June 2019, five days after the execution of Alyaksandr Zhylnikau (and likely execution of Vyachaslau Sukharka) became public, the EU and Belarus held the sixth round of the bilateral Human Rights Dialogue. Although the EU reiterated its unequivocal opposition to the death penalty, Belarus

²⁷⁰ *Ibid.*

²⁷¹ Titus Corlăţean, *op. cit.*, note 31, para. 40.

²⁷² “Week against the Death Penalty” Viasna, 11 October 2019.

²⁷³ “Death Penalty Day: EU/Council of Europe joint statement”, 9 October 2019.

²⁷⁴ “Belarus parliament to look into death penalty abolition” *BELTA*, 30 January 2020.

²⁷⁵ *Ibid.*

was praised for its “recent openness to cooperation in promoting human rights.”²⁷⁶ In the eighth EU-Belarus Coordination Group meeting, on December 2019, the EU again expressed its opposition to the death penalty. It also agreed to move forward with Belarus on the Visa Facilitation and Readmission agreements.²⁷⁷

Areas of concern

Belarus’ failure to make the process surrounding the application of the death penalty more transparent is a continuing area of concern, which was addressed in detail in the *Death Penalty in the OSCE Area: Background Paper 2019*.²⁷⁸ When presenting her report to the Human Rights Council on 8 May 2019, the Special Rapporteur on the situation of human rights in Belarus focused her criticism concerning the death penalty on this issue, noting that “relatives are kept ignorant of the time and circumstances of the death of their close ones, bodies are not returned and no details of places of burial are given.”²⁷⁹ She echoed the Human Rights Committee in saying that it constitutes inhuman treatment in violation of Article 7 of the ICCPR protecting individuals from torture and cruel, inhuman or degrading treatment or punishment. She also highlighted the social stigma that relatives have to suffer long after the execution of their loved ones.²⁸⁰

On 11 December 2019 the General Rapporteur on the abolition of the death penalty of PACE released his own report, entitled “Abolition of the death penalty in Council of Europe member and observer states, Belarus and countries whose parliaments have co-operation status”.²⁸¹ He raised two main areas of concern in Belarus regarding the death penalty and international law: the issue of secrecy and the issue of unfair trials, marred by torture allegations, lack of effective counsel and no presumption of innocence.²⁸² He also raised concerns that “Belarusian authorities do not hesitate to

276 European External Action Service, “6th round of EU-Belarus Human Rights Dialogue takes place in Brussels”, 18 June 2019. It is interesting to note that barely a week after the June executions and the widespread round of condemnations, Minsk hosted the 2019 European Games, attended by athletes from 50 countries.

277 European External Action Service, “EU-Belarus Coordination Group meets in Brussels”, 19 December 2019.

278 “The Death Penalty in the OSCE Area: Background Paper 2019”, *op. cit.*, note 3, p. 40-42.

279 Anaïs Marin, *op. cit.*, note 14, para. 22.

280 *Ibid.*

281 Titus Corlăţean, *op. cit.*, note 31.

282 *Ibid.* para. 37-38.

carry out secret executions of death row inmates whose cases are being considered by the Human Rights Committee.”²⁸³

The government has maintained that there is overwhelming support for the death penalty among the population of Belarus, but experts agree that this is not enough to resist abolition. The Special Rapporteur on the situation of human rights in Belarus has argued that “it is up to the Government to lead the debate, provide balanced information on the issue and actively work to change mentalities in favour of abolition.”²⁸⁴ In his report of August 2019, the UN Secretary General states that often public support for the death penalty is based “on a misconception that the death penalty acts as a deterrent to serious crime” and that when information about discrimination in the application of the death penalty becomes available to the wider public, support for it tends to fall.²⁸⁵

A 2019 report by a leading local human rights organization stated that, “the state-controlled media do not promote public debate on the application of the death penalty.”²⁸⁶ President Lukashenko has made numerous public pronouncements in favour of the death penalty, saying in an interview in December 2019 that the death penalty “helps preserve stability and deal with ‘gangsterism’ as a warning to this scum.”²⁸⁷

The Special Rapporteur also underlined that a moratorium can be decided by the president, with no need for a referendum.²⁸⁸ President Lukashenko has disagreed openly with this assessment, saying that a decision taken by referendum could only be undone by referendum, and that he had no intention to impose any moratorium.²⁸⁹

2.2. Abolitionist participating states

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

283 *Ibid.* para. 38.

284 Anaïs Marin, *op. cit.*, note 14, para. 23.

285 Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, “Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty”, UN Doc. A/HRC/42/28, 28 August 2019, para. 31-32. For a more detailed discussion on the role of public support for the death penalty, please refer to OSCE-ODIHR “The Death Penalty into the OSCE Area:2019 ODIHR Background Paper 2019”, *op. cit.*, note 3, p. 16-18.

286 Viasna, “Human Rights Situation in Belarus in 2019”, p. 10.

287 Interview with President Lukashenko in Russian, quoted in p. 10 of the Viasna “Human Rights Situation in Belarus in 2019” report.

288 *Ibid.* para. 23.

289 Viasna, “Human Rights Situation in Belarus in 2019”, p. 10.

Bosnia and Herzegovina has been considered one of the abolitionist states in spite of the constitution of the Republika Srpska²⁹⁰ still providing for the death penalty, because it had never been applied.²⁹¹ This reality was made official on 4 October 2019, when the Constitutional Court of Bosnia and Herzegovina repealed Article 11 of the Constitution of the Republika Srpska, officially removing the death penalty as a form of punishment. The EU Office in Bosnia and Herzegovina and Council of Europe Office in Sarajevo welcomed the decision.²⁹²

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

Abolitionist OSCE participating states were active on the issue of the death penalty during the reporting period, in various forms and fora. This includes the United Nations system (all OSCE participating States are members of the UN) and regional bodies such as the Council of Europe (all 47 Council of Europe member states are also OSCE participating States)²⁹³ and the EU (all 28 EU members are also OSCE participating states).²⁹⁴

In June 2019, the UN General Assembly adopted the draft resolution “Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards” (document A/73/L.94)²⁹⁵ which focused on the prospect of adopting common international standards for the import, export and transfer of goods used for capital punishment and torture or other cruel, inhuman or degrading treatment or punishment. It called on the Secretary General to establish a group of governmental experts to study this possibility. The resolution was introduced by Romania on behalf of the EU and the Global Alliance for Torture-Free Trade, an initiative started by the European Union, Argentina and Mongolia with the purpose of restricting the trade in goods used to carry out torture and the death penalty. The alliance currently has 62 members.²⁹⁶

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

291 Mladen Dragojlovic, “Death penalty officially removed from Republika Srpska Constitution”, 4 November 2019.

292 *Ibid.*

293 OSCE, “The Council of Europe”.

294 OSCE, “The European Union”.

295 United Nations General Assembly, “Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards”, UN Doc. A/73/L.94 21 June 2019.

296 Alliance for Torture Free Trade.

The resolution passed with 81 states voting in favour to 20 against, with 44 abstentions. Forty-eight OSCE participating States voted in favour.²⁹⁷ From the OSCE region, only the United States voted against this resolution. A common criticism among the opponents of the resolution was that the document linked torture with capital punishment, which they defended as a legitimate and legal form of punishment. The United States delegation said that further restrictions on “material used for capital punishment” were inconsistent with international law.²⁹⁸

In December 2019, the Steering Committee for Human Rights (CDDH) of the Council of Europe discussed a feasibility study on a legal instrument concerning the trade in goods used for torture or other cruel, inhuman or degrading treatment or punishment and for the death penalty. They then transmitted it to the Committee of Ministers for information and possible follow-up decisions.²⁹⁹ The CDDH would like the Council of Europe to proceed rapidly to draft a non-binding legal instrument in the form of a Recommendation of the Committee of Ministers to member states on this issue.³⁰⁰

In August 2019, the UN Secretary General presented the yearly supplement to his quinquennial report on capital punishment, with a special focus on the impact of the resumption of the use of the death penalty on human rights.³⁰¹ He emphasized the worldwide trend towards abolition and warned that a resumption of the use of the death penalty after a long *de facto* moratorium would almost certainly constitute a breach of the object and purpose of Article 6 of the ICCPR, which prohibits arbitrary deprivation of life.³⁰²

In line with the thematic focus of this background paper, the report by the UN Secretary General also emphasised that capital punishment constitutes arbitrary deprivation of life unless all safeguards are duly respected, mentioning the presumption of innocence, taking into account individual circumstances, a functional court system and the rights to effective legal representation, to information and to appeal.³⁰³

297 United Nations Digital Library, United Nations General Assembly, “Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards”, UN Doc. A/73/L.94 21 June 2019.

298 United Nations, “General Assembly Adopts Texts on Torture-Free Trade”, 28 June 2019.

299 Council of Europe, Steering Committee for Human Rights (CDDH), “Report 92nd meeting”, para. 57.

300 *Ibid.*

301 Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, “Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty”, UN Doc. A/HRC/42/28, 28 August 2019, para. 31-32.

302 *Ibid.* para. 4.

303 *Ibid.* para. 18.

On 10 October 2019, World Day Against the Death Penalty was observed, with a focus on the rights of children whose parents have been sentenced to death or executed, a topic that was addressed in the *Death Penalty in the OSCE Area: Background Paper 2017*.³⁰⁴ The topic was chosen in light of the 30th anniversary of the Convention on the Rights of the Child.

The World Coalition Against the Death Penalty has highlighted the well-documented psychological and emotional trauma experienced by children when a parent is sentenced to death or executed.³⁰⁵ The repeated cycles of hope and disappointment during the process can have long-lasting and devastating effects on children, which has led OHCHR to call them “the hidden and indirect victims of capital punishment.”³⁰⁶ In their report on children as the unseen victims of the death penalty, the World Coalition Against the Death Penalty cited the testimonies of several people who were directly impacted by the execution of a parent, including the son of a man executed in Alabama, United States, and the wife of a man executed in Belarus, mother of a four-year-old. The stigma associated with the death penalty played a central role in their stories.³⁰⁷

When calling on Belarus to abolish the death penalty on the World Day Against the Death Penalty, the EU High Representative for Foreign Affairs and Security Policy and the Council of Europe Secretary General also called for all states to join the global Alliance for Torture-Free Trade. The EU echoed this statement in the OSCE Permanent Council.³⁰⁸ ODIHR Director Ingibjörg Sólrún Gísladóttir said on the same day that the death penalty denies the humanity of those convicted, treating them as objects to be eliminated by the state.³⁰⁹

In December 2019, the Committee on Legal Affairs and Human Rights of the Council of Europe published a situation report on the abolition of the death penalty in Council of Europe member and observer states, Belarus and countries whose parliaments have co-operation status. While noting the global trend towards abolition, the PACE

304 “The Death Penalty in the OSCE Area: Background Paper 2017”, OSCE/ODIHR, 19 September 2017.

305 World Coalition Against the Death Penalty, “The rights of children whose parents have been sentenced to death or executed, Detailed Factsheet” October 2019.

306 “‘Hidden’ victims: the children of parents on death row”, OHCHR, 10 October 2013.

307 World Coalition Against the Death Penalty, “Children: Unseen victims of the death penalty”, 1 October 2019.

308 “EU statement on the occasion of the European and World Day against the Death Penalty”, OSCE Permanent Council, 11 October 2019.

309 OSCE-ODIHR, “On World Day against the Death Penalty abolition should remain a priority, OSCE human rights head says” 10 October 2019.

General Rapporteur on the abolition of the death penalty stressed the need for those states that have not done so to abolish the death penalty, and for those states which have imposed a moratorium, like Russia, to abolish it *de jure* by signing and ratifying Protocols No. 6 (on the abolition of the death penalty) or No. 13 (banning the death penalty in all circumstances, including for crimes committed in times of war and imminent threat of war) to the European Convention on Human Rights.³¹⁰

After a quadruple hanging in India on 20 March 2020, UN Secretary General Antonio Guterres' spokesperson in a press briefing called on all states to abolish the death penalty, or at least put a moratorium on its use.³¹¹

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

At the OSCE 2019 Human Dimension Implementation Meeting, the question of the death penalty was addressed by participating States.³¹² Several recommendations came out of this discussion, including establishing a moratorium on all death sentences and executions with a view to the abolition of the death penalty and ratifying the Second Optional Protocol to ICCPR and Protocol 6 and 13 to ECHR, if they had not done so. Others called for supporting the World Day Against the Death Penalty; addressing the particular situation of foreign fighters and their families, including ensuring that the death penalty is not carried out; and fully implementing OSCE commitments and other international documents concerning the treatment of prisoners and the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. The United States noted that, while they respected differing opinions, "capital punishment is a legally available punishment under international law in appropriate cases and circumstances."³¹³

Several OSCE participating states made statements in the OSCE Permanent Council on the occasion of the World Day Against the Death Penalty. Norway, representing a group including Canada, Iceland, Liechtenstein and Switzerland, reflected on the

310 Titus Corlăţean, *op. cit.*, note 31, para. 8.

311 "United Nations asks nations to put a moratorium on capital punishment a day after the hanging of convicts in Nirbhaya case" *OpIndia*, 21 March 2020.

312 OSCE Permanent Council, "Decision No. 1340 Agenda for the 2019 Human Dimension Implementation Meeting", 26 July 2019, Working session 11: Rule of law II.

313 OSCE-ODIHR, Human Dimension Implementation Meeting 2019, "Statement by Ambassador James S. Gilmore III, Head of United States Delegation to the 2019 Human Dimension Implementation Meeting", 25 September 2019.

impact of the death penalty on children, calling them “unseen victims of a cruel form of punishment that should be banned throughout the world.”³¹⁴

2.3. De-facto abolitionist participating states

The Russian Federation and Tajikistan remain the only two *de facto* abolitionist states in the OSCE region, while Kazakhstan is abolitionist for ordinary crimes only. The Russian Federation and Tajikistan continued to observe the official moratoria they established in 1996 and 2004, respectively, although they both retain the death sentence for crimes committed in peacetime. Within the reporting period, neither the Russian Federation nor Tajikistan have ratified the Second Optional Protocol to the ICCPR, regarding abolition of the death penalty, nor has the Russian Federation, as a member State of the Council of Europe, ratified Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances. Neither state has otherwise made significant progress towards full abolition.

The Russian Federation introduced a moratorium on the death penalty in 1996, although executions were still carried out until 1999 in the Chechen Republic.³¹⁵ The moratorium was upheld by the Constitutional Court twice, in 1999 and 2009.³¹⁶ The Criminal Code of the Russian Federation provides for the death penalty as an exceptional measure for five types of offences: aggravated murder, assassination attempts against a state or public figure, attempts on the life of a person administering justice or preliminary investigations, attempts on the life of a law enforcement official and genocide. The Criminal Code further specifies that the death penalty is not imposed on women, or on offenders under the age of 18 or over 65 at the time of sentencing.³¹⁷ The Criminal Procedure Code of the Russian Federation also contains provisions on the death penalty.³¹⁸

The Russian Federation made several statements to the OSCE Permanent Council on the subject of the death penalty during the reporting period. On the occasion of the World Day Against the Death Penalty, 10 October 2019, the Russian Federation noted it had not carried out an execution for over 20 years, while stating that it does not support the legislative abolition of the death penalty being imposed on other countries

314 “Statement on the World Day Against the Death Penalty”, OSCE Permanent Council, 16 October 2019.

315 Amnesty International, *op. cit.*, note 4, p. 55.

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

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

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

without taking into account the cultural, historical, legal and other contexts of their development.³¹⁹

In October 2019, the debate about resumption of the death penalty in the Russian Federation resurfaced after the murder of a nine-year-old girl. The State Duma conducted an informal poll on its official page on the social network “VK” and on 11 October 2019,³²⁰ a deputy of the State Duma asked for the reintroduction of the death penalty.³²¹ On 7 November 2019, respected pollster Levada Center released the results of a survey that showed 49 per cent of respondents were in favour of the reintroduction of the death penalty, an increase from 44 per cent in 2017 but still significantly lower than the 68 per cent who favoured it in 2002.³²²

Tajikistan has not carried out an execution since 2004, but Article 18 of its Constitution states that: “No person may be deprived of life except by the verdict of a court for a very serious crime.”³²³ Its Criminal Code considers such crimes to be: aggravated murder, terrorism-related offenses resulting in death and not resulting in death, rape not resulting in death, war crimes, crimes against humanity and genocide.³²⁴ The following categories of individuals are considered non-eligible for the death penalty: women, persons with intellectual disabilities, the mentally ill and the elderly (understood as being over 63 at the time of the sentencing).³²⁵ In January 2020, the Chief Prosecutor declared being in favour of restoring the death penalty because some categories of persons committing grave crimes are “incorrigible,”³²⁶ but at the time of writing there had been no official move from the government in this direction.

319 “Statement by the Permanent Representative of the Russian Federation to the OSCE at the 1243rd meeting of the OSCE Permanent Council in connection with World Day Against the Death Penalty”, OSCE Permanent Council, 10 October 2019.

320 „Госдума после убийства в Саратове провела опрос в ВК о смертной казни“, [After a murder in Saratov, the State Duma conducted a poll on VKontakte about the death penalty], 12 October 2019, <https://ria.ru/20191012/1559696719.html> (link in Russian).

321 Titus Corlăţean, *op. cit.*, note 31, para. 8.

322 “Half of Russians Want the Death Penalty Back – Poll” *The Moscow Times*, 7 November 2019. For a more detailed discussion of other debates on the reintroduction of the death penalty, please refer to OSCE-ODIHR “The Death Penalty in the OSCE Area:Background Paper 2019”, 17 September 2019, p. 13-21.

323 Constitution of Tajikistan, UNESCO.

324 “Tajikistan”, Death Penalty Database.

325 *Ibid.*

326 “Tajik chief prosecutor Yusuf Rahmon declares for restoration of death penalty” *Asia Plus*, 28 January 2020.

2.3.1. Abolitionist for ordinary crimes only

Kazakhstan has been defined as *de facto* abolitionist in ODIHR background papers since 2010, and before that it was considered “partly abolitionist” because it retained the death penalty for crimes committed during wartime only. Since a death sentence was handed down in 2016, it has been referred to in ODIHR background papers as *abolitionist for ordinary crimes only*, a United Nations designation for countries whose laws retain the death penalty only for exceptional crimes, such as crimes in times of war or those committed against the state, such as treason, terrorism or armed insurrection.³²⁷ Following and reinforcing the worldwide trend towards complete abolition of the death penalty, in December 2019 President Kassym-Jomart Tokayev instructed the Ministry of Foreign Affairs to start procedures to join the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.³²⁸

327 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”, UN Doc E/2015/49, 13 April 2015, para. 10. See also OSCE-ODIHR “The Death Penalty in the OSCE Area: Background Paper 2019”, 17 September 2019, p. 8.

328 *Ibid.* p. 33, referencing “Kazakhstan intends to sign international protocol on death penalty abolition”, KAZINFORM, 20 December 2019.