

# Why Europe Abolished Capital Punishment

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“Whatever may be the conclusion of this night of this House, no doubt arises that the punishment must pass away from our land, and that at no distant date capital punishment will no longer exist. It belongs to a much earlier day than ours, and it is no longer needed for the civilization of the age in which we live.”<sup>1</sup>

J.W. Pease, a member of the House of Commons, made this declaration in London in 1877.<sup>2</sup> Pease, an industrialist and a Quaker, was speaking in support of a bill he proposed to abolish capital punishment in the United Kingdom. Pease’s bill was voted down.<sup>3</sup> Consequently, capital punishment would remain in British law into the twentieth century.<sup>4</sup>

Pease’s sentiment, however, reflected what would be the consensus position in Europe a century later. Capital punishment would come to be seen as antithetical to the values of a civilized society. Europe’s path to that position, however, would be far from uniform. In the early nineteenth century, capital punishment was universal in Europe.<sup>5</sup> Later in the century, a few countries in Western Europe abolished it.<sup>6</sup>

The issue was part of a larger discussion about criminal law. A reaction against severity in the administration of justice had taken hold in Europe. Influential in European thinking was the work of an Italian lawyer who included capital

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<sup>1</sup> 234 Parl. Deb. H.C. (3d ser.) (1877) col. 1673 (UK).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 1715.

<sup>4</sup> Murder (Abolition of Death Penalty) Act 1965, c. 71 (Gr. Brit.) (abolishing capital punishment in the case of persons convicted in Great Britain of murder or convicted of murder or a corresponding offence by court-martial).

<sup>5</sup> With reference to these countries and hereafter, the concept “abolition” will be used to mean elimination of capital punishment in peacetime. Some of these countries retained capital punishment for war-related offenses, and during and after the two world wars executions were carried out in some of these countries. Only in the early twenty-first century was war-related capital punishment banned in Europe. ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 50 (5th ed. 2015).

<sup>6</sup> *Id.*

punishment in his analysis of severity in penal law.<sup>7</sup> In 1764, Cesare Beccaria, a young Italian who had studied law at the University of Pavia, wrote a book in which he challenged the use of torture in the investigation of crime.<sup>8</sup> Torture was common in the eighteenth century as a technique for establishing a suspect's guilt. Once a person was under suspicion of a criminal offense, the authorities used physical force to elicit a confession. Beccaria's *Dei delitti e delle pene* (On Crimes and Punishments) was a broadside attack on European penal law. In it, he questioned the state's right to carry out executions: "This vain profusion of punishment, which has never made men better, has moved me to inquire whether capital punishment is truly useful and just in a well-organized state. By what alleged right can men slaughter their fellows?"<sup>9</sup>

Beccaria noted the deterrence rationale but disputed it:

In order to be just, a penalty should have only the degree of intensity needed to deter other men from crime. Now there is no one who, on reflection, would choose the total and permanent loss of his own liberty, no matter how advantageous a crime might be. Therefore, the intensity of a sentence of servitude for life, substituted for the death penalty, has everything needed to deter the most determined spirit.<sup>10</sup>

Beyond challenging the deterrence rationale, Beccaria made a broader point:

Capital punishment is not useful because of the example of cruelty which it gives to men. If the passions or the necessity of war have taught people to shed human blood, the laws that moderate men's conduct ought not to augment the cruel example, which is all the more pernicious because judicial execution is carried out methodically and formally. It appears absurd to me that the laws, which are the expression of the public will and which detest and punish homicide, commit murder themselves, and, in order to dissuade citizens from assassination, command public assassination.<sup>11</sup>

Beccaria's tract had scant immediate impact. By the nineteenth century, however, it found a receptive audience. The French Revolution brought a line of analysis on capital punishment into the public sphere that mirrored Beccaria's.

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<sup>7</sup> JOHN D. BESSLER, *THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD* *passim* (2018).

<sup>8</sup> CESARE BECCARIA, *ON CRIMES AND PUNISHMENT* 48 (Aaron Thomas & Jeremy Parzen trans., Hackett Pub. Company, Inc. 1986).

<sup>9</sup> *Id.* at 48.

<sup>10</sup> *Id.* at 49–50.

<sup>11</sup> *Id.* at 51.

Leniency in penal philosophy came to be associated with democratic governments, while strictness was regarded as a tool of authoritarian governments.<sup>12</sup> The Declaration of the Rights and Duties of Man was issued in 1789 by a national assembly in France following the overthrow of the French monarchy.<sup>13</sup> This manifesto did not address capital punishment, but in a list of propositions about liberties and criminal procedure, it posited: “The law ought to decree only such penalties as are strictly necessary and proportionate to the offense.”<sup>14</sup>

Portugal abolished capital punishment in 1867, the first European country to do so, by a law adopted by Portugal’s parliament on July 1 of that year.<sup>15</sup> In the Netherlands, the government introduced a legislative proposal to abolish capital punishment in 1870.<sup>16</sup> That bill was enacted following a week’s debate in the two chambers of the Netherlands parliament, abolishing the death penalty in that country.<sup>17</sup> An effort in 1880 to re-introduce capital punishment in the Netherlands failed.<sup>18</sup> The Netherlands Minister of Justice at that time gave several reasons not to re-introduce it.<sup>19</sup> He claimed the death penalty could not be adapted to the degree of culpability of the actor.<sup>20</sup> Furthermore, an execution is irreparable<sup>21</sup>. As for deterrence, the Minister doubted the value because it is not certain that it will be applied, given that judges don’t like to impose it, witnesses are reluctant to see it imposed, and commutation to a lesser penalty was common.<sup>22</sup> He further said that crime is committed either pursuant to a plan arrived at calmly, or in the spur of the moment.<sup>23</sup> In the former case, deterrence depends more on whether the person anticipates punishment at all, not on the severity of the punishment.<sup>24</sup> In the latter case, concern about a possible death sentence is not likely to stop the person.<sup>25</sup>

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<sup>12</sup> See Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 1035 (2016).

<sup>13</sup> Déclaration des Droits de l’Homme et du Citoyen, art. 8, 1795, reprinted in MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 82 (U.C. Press, 2004).

<sup>14</sup> *Id.* at 82.

<sup>15</sup> Eduardo Correia, *La peine de mort: Réflexions sur sa problématique et sur le sens de son abolition au Portugal*, in I PENA DE MORTE: COLÓQUIO INTERNACIONAL COMEMORATIVO DO CENTENÁRIO DA ABOLIÇÃO DA PENA DE MORTE EM PORTUGAL 23 (1967).

<sup>16</sup> Willem-Joan Wintgens, *Introduction to CODE PÉNAL DES PAYS-BAS*, at 10 (1883).

<sup>17</sup> *Id.*

<sup>18</sup> Willem Cornelis van Binsbergen, *La peine capitale dans le cadre du droit penal Néerlandis*, in II PENA DE MORTE: COLÓQUIO INTERNACIONAL COMEMORATIVO DO CENTENÁRIO DA ABOLIÇÃO DA PENA DE MORTE EM PORTUGAL 163, 166-67 (1967).

<sup>19</sup> *Id.* at 168–69.

<sup>20</sup> *Id.* at 169.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Italy abolished capital punishment through a penal code adopted in 1889.<sup>26</sup> Norway abolished it in 1905.<sup>27</sup> Sweden, which had not executed anyone for many years, formally abolished it in 1921.<sup>28</sup> Most Western European countries, however, kept capital punishment into the mid-twentieth century, though implementation was not uniform.<sup>29</sup> In Belgium, capital punishment continued to be the law into the twentieth century under an 1867 Penal Code, but death sentences were routinely commuted.<sup>30</sup>

### I. POSTWAR MOVES TO ABOLISH

In the wake of World War II, the two major Axis powers in Europe, Italy and Germany, moved towards abolition of capital punishment.<sup>31</sup> The wartime experience provided the context. In both countries, capital punishment had been widely employed by their wartime governments. In Italy, capital punishment had been re-introduced in 1930 in a penal code adopted by a government headed by the authoritarian leader Benito Mussolini.<sup>32</sup> After Mussolini's removal from office in 1943, a newly formed government abolished capital punishment on the rationale that it was associated with the Fascist political philosophy.<sup>33</sup> In 1947 a new constitution was adopted for Italy, an article of which stated, "The death penalty is prohibited."<sup>34</sup>

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<sup>26</sup> MAURO CAPPELETTI ET AL., *THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION* 47 (Stanford Univ. Press 1967); *see also Introduction to THE ITALIAN PENAL CODE*, C.p. at xxiv (Edward M. Wise trans., 1978).

<sup>27</sup> Johs. Andenaes, *Introduction to NORWEGIAN PENAL CODE*, at 8 (1961).

<sup>28</sup> Ivar Strahl, *Introduction to BROTTSBALKEN [BRB][PENAL CODE]* Introduction, at 7 (SWED.).

<sup>29</sup> ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 49–50 (5th ed. 2015).

<sup>30</sup> P. Cornil, *La peine de mort en Belgique*, in 1 *PENA DE MORTE: COLÓQUIO INTERNACIONAL COMEMORATIVO DO CENTENÁRIO DA ABOLIÇÃO DA PENA DE MORTE EM PORTUGAL* 143–44 (1967); Raymond Screvens, *La peine de mort en Belgique*, in 1 *PENA DE MORTE: COLÓQUIO INTERNACIONAL COMEMORATIVO DO CENTENÁRIO DA ABOLIÇÃO DA PENA DE MORTE EM PORTUGAL* 233–34 (1967); JOS MONBALLYU, *SIX CENTURIES OF CRIMINAL LAW: HISTORY OF CRIMINAL LAW IN THE SOUTHERN NETHERLANDS AND BELGIUM (1400–2000)* 199 (2014); Philippe Toussaint, *The Death Penalty and the "Fairy Ring"*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 29–30 (1999).

<sup>31</sup> Wise, *supra* note 26, at xli; RICHARD J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600–1987*, 779–81 (1996).

<sup>32</sup> ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 49 (5th ed. 2015); *See also* Wise, *supra* note 26, at xxx, xxxv.

<sup>33</sup> Wise, *supra* note 26, at xli; A. GRIECO & C. CANTARANO, *CODICE PENALE COMMENTATO, ARTICOLO PER ARTICOLO, CON LE DISPOSIZIONI CORRELATIVE, LA BIBLIOGRAFIA E LE MASSIME GIURISPRUDENZIALI* 31 (1964) (indicating repeal of the provision allowing capital punishment on August 10, 1944, in Article 17).

<sup>34</sup> EMILIO CROSA ET AL., *LA CONSTITUTION ITALIENNE DE 1948* 249 (1950) (eliminating the death penalty under art. 27 of the Italian Constitution (1948)).

In Germany, a penal code dating from 1871 remained in force, and it provided for capital punishment.<sup>35</sup> Unlike the disposition in Italy, Germany's government was displaced by the World War II allies, who controlled it in four zones of occupation held respectively by France, the United Kingdom, the United States, and the Soviet Union. In the zones controlled by France, the United Kingdom, and the United States, a government structure was formed for a country that would be called the Federal Republic of Germany. The draft of a Basic Law for this entity was under consideration.<sup>36</sup> The new Germany was made up of a number of constituent states, hence the term "federal" in the title. The initiative in drafting the Basic Law was in the hands of these states.<sup>37</sup> The draft was prepared by a group of experts appointed by the governments of these states and was presented to them in September 1948; it addressed capital punishment and provided for its retention in German law.<sup>38</sup>

That draft was forwarded to an assembly made up of delegates who were members of the legislatures of the constituent German states.<sup>39</sup> These delegates were from across the political spectrum.<sup>40</sup> Those on the Left were from parties that had long advocated abolition of capital punishment. Those on the Right had traditionally favored retention. However, as discussion continued, key figures on the political Right spoke up for abolition.<sup>41</sup> This change of position was related to death sentences pronounced by the occupation authorities on former officials of the Third Reich government.<sup>42</sup> Law No. 10 of the Allied Control Commission set the norms to be applied by courts run by the allies in their zones of occupation, and provided for the death penalty.<sup>43</sup> Politicians on the Right opposed death sentences that had been imposed by the Allies on Nazi functionaries.<sup>44</sup> These Rightist politicians argued that the Nazis were capable of changing their thinking and therefore should not be executed.<sup>45</sup>

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<sup>35</sup> VLADIMIR GSOVSKI, *THE STATUTORY CRIMINAL LAW OF GERMANY* at 14–16 (1947) (citing different ways to administer the death penalty under §13 of the German Criminal Code (1871)).

<sup>36</sup> RICHARD J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600–1987*, 779–780 (1996).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> EDMUND SPEVACK, *ALLIED CONTROL AND GERMAN FREEDOM: AMERICAN POLITICAL AND IDEOLOGICAL INFLUENCES ON THE FRAMING OF THE WEST GERMAN BASIC LAW (GRUNDGESETZ)* 342 (2001).

<sup>40</sup> *Id.* at 357.

<sup>41</sup> EVANS, *supra* note 36, at 781.

<sup>42</sup> *Id.*

<sup>43</sup> Berlin Allied Secretariat, *Control Council Law No. 10*, OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY, 50–51 (Dec. 20, 1945).

<sup>44</sup> EVANS, *supra* note 36, at 781–83.

<sup>45</sup> *Id.*

Delegates on the Left voiced their traditional arguments against capital punishment, calling it a barbarity.<sup>46</sup> Some of them argued that capital punishment is not an effective deterrent to crime.<sup>47</sup> The debate ended with a decision to eliminate capital punishment. Adopted in 1949, the Basic Law declared, "Every person shall have the right to life . . . ."<sup>48</sup> Another clause stated, "Capital punishment is abolished."<sup>49</sup> A brief period of uncertainty ensued because it was not obvious that the Basic Law would override the penal code or the constitutions of the constituent German states, some of which called for capital punishment.<sup>50</sup> That uncertainty was resolved within a few months in favor of the Basic Law's provision on capital punishment.<sup>51</sup> Executions under convictions entered by the courts of the Allies continued into 1951, but the constitutional provision ended capital punishment in the German courts.<sup>52</sup>

## II. LIFE AS A RIGHT—WITH AN EXCEPTION

Just at this time, Europe was organizing itself. An inter-governmental group called the Council of Europe was in process of being formed, with the aim of fostering reconciliation among the countries that had been at war with each other.<sup>53</sup> A major project of the new organization was to draft a human rights treaty.

As they elaborated this treaty, the European countries took their inspiration from a document recently adopted at the United Nations. The UN General Assembly decided in 1948 to ask the countries of the world to commit to certain standards in the treatment of individuals. To that end, it adopted a resolution titled "Universal Declaration of Human Rights"<sup>54</sup>. One standard related to protection of the life of a person. The language written into that document read, "Everyone has the right to life . . . ."<sup>55</sup> Nothing more specific was stated within it, however, to say how governments were to ensure the right to life. Nothing was written about death as a punishment for crime.

Acknowledging the Universal Declaration, the drafters of the European treaty began with a preamble clause reading:

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<sup>46</sup> EVANS, *supra* note 36, at 782.

<sup>47</sup> EVANS, *supra* note 36, at 784.

<sup>48</sup> GRUNDGESETZ [GG] [BASIC LAW] May 23, 1949, art. 2.

<sup>49</sup> *Id.* at art. 102.

<sup>50</sup> EVANS, *supra* note 36, at 779–81.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Hans Christian Krüger, *Protocol No. 6 to the European Convention on Human Rights*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 69 (1999).

<sup>54</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>55</sup> *Id.*, art. 3.

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.<sup>56</sup>

The European drafters wanted to protect the right to life, but a provision like that in the Universal Declaration would leave open the question of whether a government might lawfully deprive a person of life as punishment for crime. The drafters thought they could not avoid mention of capital punishment.

While some countries of Western Europe would have accepted a prohibition against capital punishment, others would have balked. The issue was discussed, and divergence was so sharp as to threaten the prospects for a human rights treaty.<sup>57</sup> Drafters struggled to formulate a provision on capital punishment.<sup>58</sup>

In the end, a treaty was adopted, titled the “Convention for the Protection of Human Rights and Fundamental Freedoms.” A right to life was included, but with an exception for capital punishment:

Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.<sup>59</sup>

The provision left it open to use capital punishment for whichever crimes might be deemed capital in nature by an individual country, so long as the crime was defined by law and so long as death was prescribed by law as a penalty for its commission.<sup>60</sup> Another Convention provision, applicable to all criminal prosecutions, called for a series of protections to ensure fair trials.<sup>61</sup> The text of the Convention was finalized in 1950.<sup>62</sup> Within several years the treaty gained adherence from most of Western Europe and entered into legal force in 1953.<sup>63</sup>

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<sup>56</sup> European Convention on Human Rights, preamble, Nov. 4, 1950, E.T.S. No. 005.

<sup>57</sup> Christof Heyns et al., *The Right to Life and the Progressive Abolition of the Death Penalty*, in ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS 118 (Margaret M. deGuzman & Diane Marie Amann eds., 2018).

<sup>58</sup> WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 262–63 (2002).

<sup>59</sup> European Convention on Human Rights, art. 2, Nov. 4, 1950, E.T.S. No. 005.

<sup>60</sup> *Id.*

<sup>61</sup> European Convention on Human Rights, art. 6, Nov. 4, 1950, E.T.S. No. 005.

<sup>62</sup> European Convention on Human Rights, Nov. 4, 1950, E.T.S. No. 005.

<sup>63</sup> *Id.*

## III. UNITED KINGDOM

In Britain, capital punishment remained the law. It was debated in 1930, when the Government appointed what it called a “Select Committee” on the subject.<sup>64</sup> The Select Committee filed a report in which it concluded, “[C]apital Punishment may be abolished in this country without endangering life or property, or impairing the security of Society.”<sup>65</sup> The Select Committee recommended to the House of Commons “that a Bill be introduced and passed into law during the present Session, providing for the Abolition of the Death Penalty for an experimental period of five years in cases tried by Civil Courts in time of peace.”<sup>66</sup>

Parliament did not take up the Select Committee’s recommendation, but a five-year suspension of capital punishment was proposed by members in the House of Commons in a criminal justice bill then under consideration.<sup>67</sup> John Paton, a Labour Party member who argued for abolition, called capital punishment a policy of authoritarian governments. “It was no accident,” he told his colleagues, “that the chief exponents of violence and severity in the treatment of criminals in modern times were the Nazi and Fascist states.”<sup>68</sup> Another member, Sydney Silverman, argued that the death penalty does not deter criminal behavior.<sup>69</sup> Silverman, who had campaigned publicly against capital punishment, referred to the widespread deaths of the World War and stated that, “now is the time to restore the sense of the ultimate value of every human being . . . .”<sup>70</sup>

The House of Commons voted for a five-year suspension, but the House of Lords demurred.<sup>71</sup> The Criminal Justice Bill, as adopted in 1948, restricted capital punishment but did not eliminate it.<sup>72</sup> The issue remained high in public discourse. Public debate was fueled by the execution of a man whose guilt was later doubted. In 1949, Timothy Evans was charged in London for the murder of his wife and child. He was tried for the murder of his child only, and a neighbor served as the chief prosecution witness. At the trial, Evans accused this neighbor of the crime, but was ultimately convicted and hanged. Three years later, the neighbor confessed to killing Evans’ wife.<sup>73</sup> In light of that confession, the conviction of Evans for murdering his child was widely thought to have been an error, and the case generated public

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<sup>64</sup> SELECT COMMITTEE ON CAPITAL PUNISHMENT, REPORT, at xcvi (1929–30).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at c.

<sup>67</sup> ELIZABETH ORMAN TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN 62 (1961).

<sup>68</sup> 449 Parl Deb HC (5th ser.) (1948) col. 1015.

<sup>69</sup> *Id.* at col. 982.

<sup>70</sup> *Id.* at col. 987.

<sup>71</sup> TUTTLE, *supra* note 67 at 67.

<sup>72</sup> *Id.* at 82.

<sup>73</sup> TUTTLE, *supra* note 67 at 91.

concern over the death penalty.<sup>74</sup> Silverman brought the *Evans* case into the debate in Parliament.<sup>75</sup>

The issue was politically divisive, as it had been for years in England. Labour Party members of Parliament generally supported abolition, while Conservative Party members generally opposed it. With that political split in full view, a 1955 effort at a five-year suspension was defeated in the House of Commons.<sup>76</sup> In 1956, a bill was introduced in the House of Commons which aimed to suspend executions for a five-year period. As in 1948, the House of Commons approved it, but the House of Lords did not.<sup>77</sup>

In 1965, Parliament finally approved an abolition bill. A Government representing the Labour Party backed the bill titled “Murder (Abolition of Death Penalty) Act,” and it was enacted into law.<sup>78</sup> By its terms, the Act would expire after five years, but was made permanent in 1969.<sup>79</sup> Capital punishment for a few offenses other than murder remained on the books until later in the century in the United Kingdom, but those provisions led to no executions.

#### IV. SPAIN

Whereas in Britain the end of capital punishment came only after lengthy Parliamentary debates involving consideration of the positives and negatives, the end came suddenly in Spain. In 1975, Spain’s government, headed by General Francisco Franco, adopted a law calling for mandatory execution of persons convicted of terrorism. One month later, five militant opponents of the government were executed under the new law after being convicted of killing police officers.<sup>80</sup> Their trial, in a military court, was widely regarded as having been conducted unfairly. These executions generated a strong public reaction all over Europe, and a number of European governments withdrew their ambassadors in protest. In Spain, public protests involving tens of thousands of people broke out, with abolition

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<sup>74</sup> *Id.* at 91.

<sup>75</sup> *Id.* at 91–92.

<sup>76</sup> *Id.* at 98.

<sup>77</sup> *Id.* at 115–19.

<sup>78</sup> Murder (Abolition of Death Penalty) Act 1965, c. 71 (“An Act to abolish capital punishment in the case of persons convicted in Great Britain of murder or convicted of murder or a corresponding offence by court-martial . . .”).

<sup>79</sup> Thomas Brown, *Murder (Abolition of Death Penalty) Act 1965: 50 Years*, HOUSE OF LORDS IN FOCUS (Nov. 9, 2015), [researchbriefings.files.parliament.uk/documents/LIF-2015-0044/LIF-2015-0044.pdf](https://researchbriefings.files.parliament.uk/documents/LIF-2015-0044/LIF-2015-0044.pdf).

<sup>80</sup> Henry Giniger, *5 Are Executed in Spain Despite Pleas in Europe*, N.Y. TIMES (Sept. 28, 1975), <https://www.nytimes.com/1975/09/28/archives/5-are-executed-in-spain-despite-pleas-in-europe-spain-executes-five.html>.

of capital punishment being advocated.<sup>81</sup> In Madrid, persons attending a mass for the five men left the cathedral shouting opposition to the death penalty.<sup>82</sup>

Shortly after these executions, General Franco died. Elections were held for a new Cortes (parliament).<sup>83</sup> A new constitution was drafted, and abolitionist sentiment carried over from the protests. Rightist representatives favored retention of capital punishment, while Leftist representatives sought its abolition.<sup>84</sup> The latter group prevailed, resulting in a constitutional provision on the “right to life” followed by the phrase, “The death penalty is hereby abolished, except as provided for by military criminal law in times of war.”<sup>85</sup>

## V. FRANCE

Abolition in France came a few years later, and the process resembled the British more than the Spanish. A Leftist government came into office in 1981 and put an abolition bill before the French parliament.<sup>86</sup> It set out a series of rationales. The irrevocability of capital punishment was one: “A freedom-loving country cannot in its laws preserve the death penalty. It is an imperative for freedom not to give anyone an absolute power so that the consequences of a decision are irremediable.”<sup>87</sup>

Another rationale was that capital punishment reflects badly on a society, showing that it cannot resolve issues of violence by other means. “The death penalty confirms a weakness in society; its abolition responds to an ethical principle.”<sup>88</sup>

Still another was the impact of abolition elsewhere in Europe. “The time has come for France, which so often has been in the forefront of freedom and of progress in the law, to rectify the delay it has shown in this regard in relation to the countries of Europe.”<sup>89</sup>

And yet another was public opinion: “The French people have several times gone for candidates who advocated abolition. It is necessary to draw conclusions

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<sup>81</sup> Walter Schwarz, *Spain Erupts into Fury*, THE GUARDIAN (Sept. 29, 1975, 7:43), <https://www.theguardian.com/world/1975/sep/29/spain.walterschwarz>.

<sup>82</sup> *Id.*

<sup>83</sup> LAURA DESFOR EDLES, *SYMBOL AND RITUAL IN THE NEW SPAIN* 63 (1998).

<sup>84</sup> ANDREA BONIME-BLANC, *SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING* 95–96 (1987).

<sup>85</sup> CONSTITUCIÓN ESPAÑOLA §15, Dec. 27, 1978 (Spain).

<sup>86</sup> Michel Forst, *The Abolition of the Death Penalty in France*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 105, 113 (Council of Europe Pub., 1999).

<sup>87</sup> Robert Badinter, French Keeper of the Seals, French Minister of Justice, *Explanation of Reasons Given on Behalf of Mr. Pierre Mauroy, Speech Before the French National Assembly* (August 29, 1981).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

from this and to translate into our laws a choice to which the voters have implicitly given approval.”<sup>90</sup>

The French government also argued against deterrence as a justification. “There is no correlation between trends in violent crime and the absence or presence of the death penalty.”<sup>91</sup> It called capital punishment “inhuman, degrading, and cruel.” Capital punishment was “a remnant of another age.”<sup>92</sup>

A legislative commission studied the bill and reported back. It put abolition in “the humanist tradition” of France. The commission’s *rapporteur* said that “studies that have been done have not established scientifically whether criminality is affected by maintenance of the death penalty at the top of the scale of punishments.”<sup>93</sup>

Robert Badinter, Justice Minister and a long-time opponent of capital punishment, spoke to the National Assembly to advocate adoption of the Government’s abolition bill.<sup>94</sup> He put capital punishment in the context of other violations of rights by noting that France had been the first country in Europe to abolish torture, and one of the first to abolish slavery.<sup>95</sup> He noted that abolition had long been demanded by the forces of the political Left in France.<sup>96</sup> As he finished his speech, he later recalled, applause was stronger from National Assembly members on the political Left than from those on the political Right; the former group voted overwhelmingly for abolition, while in the latter group the outcome was mixed.<sup>97</sup> The draft law was adopted by the National Assembly, stating simply, “The death penalty is abolished.”<sup>98</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> No. 316, National Assembly, Constitution of October 4, 1958, Seventh Legislature, Second Special Session of 1980–1981, Annex to the transcript of the session of September 10, 1981, Report given on behalf of the Commission of the Republic on Constitutional Law, Legislation and General Administration on Draft Law No. 310 on abolition of the death penalty, by Mr. Raymond Forni, Deputy.

<sup>94</sup> Forst, *supra* note 86, at 114.

<sup>95</sup> Robert Badinter, Minister of Justice and Minister of Justice of the Government of Pierre Mauroy, Presentation of the Bill Abolishing the Death Penalty to the National Assembly (Sept. 17, 1981).

<sup>96</sup> *Id.*

<sup>97</sup> ROBERT BADINTER, ABOLITION: ONE MAN’S BATTLE AGAINST THE DEATH PENALTY 198–199 (2008).

<sup>98</sup> Loi 81–908 du 9 octobre 1981 portant abolition de la peine de mort [Law 81-908 of October 9, 1981 for Abolishing the Death Penalty], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 10, 1981, 2759.

## VI. DIVERGENCE IN EUROPE: EAST FROM WEST

The Eastern European countries associated with the Soviet Union did not join these moves against capital punishment. The death penalty had been in use in virtually all of Central and Eastern Europe in the early to mid-twentieth century.<sup>99</sup> It was retained after World War II in Czechoslovakia, Poland, Yugoslavia, Bulgaria, and Romania. In Germany, the Soviet-occupied sector became the German Democratic Republic, and it retained capital punishment.

The Soviet Union maintained capital punishment in penal codes from the time of its inception in the 1920s, though always with the proviso “until its abolition.”<sup>100</sup> The Soviet Union abolished capital punishment in 1947, with a legislative explanation tying the measure to World War II. The legislative decree proclaimed the “historical victory of the Soviet people over the enemy” showed both the strength of the Soviet state and the patriotism of the population.<sup>101</sup> As a result, it said, “the death penalty is no longer needed.”<sup>102</sup> However, the death penalty was restored in 1950 for “traitors, spies, and saboteurs,”<sup>103</sup> and in 1954 for persons convicted of purposeful murder. The 1954 legislation said that it was being adopted “as result of petitions by citizens and social organizations to apply the death penalty to murderers in order the better to protect the life of citizens.”<sup>104</sup> The Soviet Union in fact experienced an increase in crime, including murder, leading to citizen demands for stricter penalties in that era.<sup>105</sup>

In Western Europe, however, a consensus was building against capital punishment. The retentionist proviso in Article 2 of the European Human Rights Convention was thought no longer necessary. Activity began within the Council of Europe aiming at a treaty ban on capital punishment.

Decisions for the Council of Europe are made by a Committee of Ministers, comprised of the Minister of Foreign Affairs (or another representative) of each member state. Another organ of the Council of Europe is the Parliamentary Assembly, comprised of members of the parliaments of the member states. By 1980,

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<sup>99</sup> Robert Fico, *The Death Penalty in Slovakia*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 117 (Council of Europe Pub., 1999).

<sup>100</sup> Ger P. Van den Berg, *The Soviet Union and the Death Penalty*, 35 *SOVIET STUDIES* 154, 156–159 (1983).

<sup>101</sup> *Ob Otmene Smertnoy Kazni* [On the Abolition of the Death Penalty], *VEDOMOSTI VERKHOVNOGO SOVETA SSSR* [VVS SSSR] [Bulletin of the USSR Supreme Council] 1947, No. 17, at 1.

<sup>102</sup> *Id.*

<sup>103</sup> *On the Application of the Death Penalty to Traitors, Spies, and Saboteurs*, *VEDOMOSTI VERKHOVNOGO SOVETA SSSR* [VVS SSSR] [Bulletin of the USSR Supreme Council] 1950, No. 3, at 1.

<sup>104</sup> *On Increasing Criminal Responsibility for Murder*, *VEDOMOSTI VERKHOVNOGO SOVETA SSSR* [VVS SSSR] [Bulletin of the USSR Supreme Council], 1954, No. 11, art. 221.

<sup>105</sup> Van den Berg, *supra* note 100, at 159. *The Campaign to Extend the Death Penalty*, 6 *Bulletin: Institute for the Study of the USSR*, 25, at 28 (no. 1, 1959).

the membership of the Parliamentary Assembly concluded that Europe had moved far enough away from capital punishment that abolition might be acceptable to all member states of the Council of Europe by adopting the following resolution:

The Assembly,

1. Considering that capital punishment is inhuman,
2. Appeals to the parliaments of those member states of the Council of Europe which have retained capital punishment for crimes committed in times of peace, to abolish it from their penal systems.

The Parliamentary Assembly thus staked out a position that it hoped would be acceptable to European governments. To solidify this position in Europe, the Parliamentary Assembly adopted at the same time a “recommendation” based on this resolution:

1. Referring to its Resolution 727 (1980) on the abolition of capital punishment;
2. Considering that Article 2 of the European Convention on Human Rights<sup>106</sup> recognizes everyone’s right to life, but provides that a person may be deprived of his life intentionally in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law,
3. Recommends that the Committee of Ministers amend Article 2 of the European Convention on Human Rights to bring it into line with Assembly Resolution 727 (1980).<sup>107</sup>

The Committee of Ministers took up the recommendation. It sent the project to its Steering Committee for Human Rights, a body of experts comprised of one from each member state of the Council of Europe. Instead of an amendment, the Committee of Ministers asked the Steering Committee for a protocol that would be a document separate from the text of the European Convention on Human Rights.<sup>108</sup> Such a protocol would require states to abolish capital punishment. For states that might adhere to it, the protocol would override the exception for capital punishment in Article 2 of the European Convention on Human Rights. The Committee of

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<sup>106</sup> Because the title of the 1950 European treaty—Convention for the Protection of Human Rights and Fundamental Freedoms—is cumbersome, and, moreover, does not mention Europe, it is often referred to as the European Human Rights Convention, even in official European documents.

<sup>107</sup> Parliamentary Assembly, Council of Eur., *Recommendation 891 (1980) on the European Convention of Human Rights—Abolition of capital punishment*, 23 Y.B. EUR. CONV. ON H.R. 66, 66 (1980).

<sup>108</sup> Explanatory Report to the Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, April 28, 1983, E.T.S. No. 114; Renate Wohlwend, *The Efforts of the Parliamentary Assembly of the Council of Europe*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 55, 56 (1999).

Ministers adopted the text of this protocol, thereby opening it for adherence by member states.<sup>109</sup> By this time there had been five protocols on different topics to the European Convention, so this was Protocol No. 6. It read:

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty,

Have agreed as follows:

*Article 1—Abolition of the death penalty*

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

*Article 2—Death penalty in time of war*

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.<sup>110</sup>

Protocol No. 6 soon gained wide acceptance by members of the Council of Europe.<sup>111</sup>

## VII. EUROPE TAKES ABOLITION WORLD-WIDE

Europe also looked outward on capital punishment, seeking to end its use in other parts of the world. One project aimed at gaining a worldwide ban on capital punishment. Europe took this initiative to the United Nations. The idea was to draft and promote abolition by a worldwide treaty. A multilateral treaty on human rights already existed, not unlike the European Convention on Human Rights; it was called the International Covenant on Civil and Political Rights.<sup>112</sup> Like the European Convention on Human Rights, it protected the right to life. And like the European Convention it allowed an exception for capital punishment.

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<sup>109</sup> Edwin Bleichrodt, *Abolition of the Death Penalty*, in *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 959, 960 (Pieter van Dijk et. al. eds., 5th ed. 2018).

<sup>110</sup> Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, E.T.S. No. 114.

<sup>111</sup> *Chart of signatures and ratifications of Treaty 114*, COUNCIL OF EUR., [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p\\_auth=i0Hn2nr9](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=i0Hn2nr9) (Aug. 24, 2019).

<sup>112</sup> International Covenant on Civil and Political Rights art. 6, Dec. 19, 1966, 999 U.N.T.S. 171.

The Europeans proposed the same technique they were using with the European Convention on Human Rights. A protocol would be written to cancel the exception in the provision on the right to life. They raised the idea at the United Nations in 1980, even before their own Protocol No. 6 was adopted. Germany took the lead, suggesting in several UN bodies a protocol to the International Covenant on Civil and Political Rights in which states would commit not to use capital punishment.<sup>113</sup>

Germany voiced reasons, in an effort to convince other states of the world to support abolition. Germany said,

[T]he forces of society, especially its educational, penal and correctional systems, ought to be so powerful that the State has no need to deprive men of their lives to ensure its protection. As a matter of fact, crime statistics in many countries demonstrate that the abolition of capital punishment has no detrimental effect on the crime rate. On the other hand, experience has taught that miscarriages of justice and also misuse of the death penalty do create irrevocable facts.<sup>114</sup>

Since one protocol on another topic had already been adopted under the International Covenant on Civil and Political Rights, the protocol against capital punishment would be designated as the second. By the Second Optional Protocol, states agreed to forego capital punishment. Its operative provision read:

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.<sup>115</sup>

A preamble clause was included in the Second Optional Protocol to explain the rationale for abolition. It read: “Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of

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<sup>113</sup> Marc Bossuyt, *The UN Optional Protocol on the Abolition of the Death Penalty*, in *ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS* 109 (Margaret M. deGuzman & Diane Marie Amann eds. 2018).

<sup>114</sup> Marc J. Bossuyt (Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities), *Elaboration of a second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, 24, U.N. Doc. E/CN.4/Sub.2/1987/20 (June 29, 1987).

<sup>115</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, art. 1, Dec. 15, 1989, 1642 U.N.T.S. 414.

human rights.”<sup>116</sup> The Second Optional Protocol gained adherence by many states in and out of Europe.<sup>117</sup>

#### VIII. A FURTHER EUROPEAN TREATY

In 1994 the Parliamentary Assembly of the Council of Europe made a new proposal on capital punishment within Europe. It suggested abolition in all circumstances, including as punishment for war-related acts.<sup>118</sup> It gave reasons for its proposal.<sup>119</sup> The Parliamentary Assembly saw no greater reason for capital punishment in wartime:

The Assembly holds that there is no reason why capital punishment should be inflicted in wartime, when it is not inflicted in peacetime. On the contrary, it finds one very weighty reason why the death penalty should never be inflicted in wartime: wartime death sentences, meant to deter others from committing similar crimes, are usually carried out speedily so as not to lose their deterrent effect. The consequence, in the emotionally charged atmosphere of war, is a lack of legal safeguards and a high increase in the risk of executing an innocent prisoner.<sup>120</sup>

The Parliamentary Assembly also gave reasons that applied to capital punishment in general:

The Assembly considers that the death penalty has no legitimate place in the penal systems of modern civilized societies, and that its application may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of Article 3 of the European Convention on Human Rights.

It recalls, furthermore, that the imposition of the death penalty has proved ineffective as a deterrent, and, due to the possible fallibility of human justice, also tragic through the execution of innocent people.<sup>121</sup>

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<sup>116</sup> *Id.* at preamble.

<sup>117</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, IV 12. HUMAN RIGHTS 1, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-12.en.pdf>.

<sup>118</sup> Parliamentary Assembly, Council of Eur., *Recommendation 1246 (1994) on the abolition of capital punishment*, 37 Y.B. EUR. CONV. ON H.R. 486, 487 (1994) [hereinafter *Recommendation 1246 (1994) on the abolition of capital punishment*].

<sup>119</sup> *Id.*; Bleichrodt, *supra* note 109, at 961.

<sup>120</sup> *Recommendation 1246 (1994) on the Abolition of Capital Punishment*, *supra* note 118, at ¶5.

<sup>121</sup> *Id.*, at ¶¶3–4.

Again, the Parliamentary Assembly's idea went to the Committee of Ministers, which as before referred the issue to the Steering Committee for Human Rights.<sup>122</sup> The result was Protocol No. 13 to the European Convention on Human Rights, which read:

The member states of the Council of Europe signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

**Article 1—Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.<sup>123</sup>

## IX. FORMER SOCIALIST BLOC COUNTRIES

The German Democratic Republic abolished the death penalty in 1987.<sup>124</sup> This reform was apparently prompted by a desire to improve the political climate with the Federal Republic of Germany.<sup>125</sup> The German Democratic Republic ratified the Second Optional Protocol in 1990.<sup>126</sup> A few months later, the GDR merged with the Federal Republic of Germany, which had already abolished the death penalty.

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<sup>122</sup> Bleichrodt, *supra* note 109, at 961.

<sup>123</sup> 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, May 3, 2002, E.T.S. No. 187.

<sup>124</sup> EVANS, *supra* note 31, at 861.

<sup>125</sup> Anna Christensen, *East Germany Announces Amnesty, Abolishes Death Penalty*, UPI ARCHIVES (July 17, 1987), <https://www.upi.com/Archives/1987/07/17/East-Germany-announces-amnesty-abolishes-death-penalty/7876553492800/>.

<sup>126</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, *supra* note 117, at IV. 12.

Political change in Eastern Europe in the closing decade of the twentieth century brought major developments in the use of capital punishment. During those years, European institutions like the Council of Europe proved attractive to countries in the eastern segment of the continent. The Council of Europe had been a Western European organization, but with the breakup of the Soviet Union, and then of Yugoslavia, membership in the Council was sought by countries of Eastern Europe.<sup>127</sup>

The Parliamentary Assembly of the Council of Europe adopted a resolution in 1994 titled “Abolition of Capital Punishment.”<sup>128</sup> With an eye on the countries of Eastern Europe, the Parliamentary Assembly included in this resolution a clause to say that “willingness” to adhere to Protocol No. 6 on the part of countries applying should “be made a prerequisite for membership of the Council of Europe.”<sup>129</sup>

Countries in Eastern Europe did join the Council of Europe, and abolished capital punishment as they did so. Belarus has remained alone in Europe in staying out of the Council. Belarus has adhered to neither of the European protocols and still uses capital punishment.<sup>130</sup>

The Eastern European countries that joined the Council of Europe have become party to European Protocol No. 6, with the exception of the Russian Federation, as will be explained below. These countries also adhered to European Protocol No. 13, except for the Russian Federation, Azerbaijan, and Armenia.<sup>131</sup> While Armenia has not ratified Protocol No. 13, it has signed it.<sup>132</sup> A signature is a first step to adhering to a treaty, but most multilateral treaties call for a signature to be followed by deposit of a ratification. Ratification for most countries involves approval of the treaty by the legislative branch of government.<sup>133</sup>

The Second Optional Protocol also gained acceptance by the Eastern European countries that joined the Council of Europe. The only exceptions are the Russian Federation and Armenia.<sup>134</sup> Dates for acceptances of the Second Optional Protocol are: Romania (1991), Hungary (1994), Slovenia (1994), Macedonia (1995), Croatia (1995), Azerbaijan (1996), Georgia (1999), Slovakia (1999), Bulgaria (1999), Bosnia and Herzegovina (2001), Serbia (2001), Lithuania (2002), Czech Republic

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<sup>127</sup> Krüger, *supra* note 53, at 71.

<sup>128</sup> Parliamentary Assembly, Council of Eur., *Resolution 1044 (1994) Abolition of Capital Punishment* (Oct. 4, 1994), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16455&lang=en>.

<sup>129</sup> *Id.*

<sup>130</sup> Hugo Bachega, *Belarus: The Secret Executions in Europe's 'Last Dictatorship,'* BBC NEWS (May 15, 2018), <https://www.bbc.com/news/world-europe-43799280>.

<sup>131</sup> *Chart of Signatures and Ratifications of Treaty 187*, COUNCIL OF EUROPE, [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p\\_auth=i0Hn2nr9](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=i0Hn2nr9).

<sup>132</sup> *Id.*

<sup>133</sup> Vienna Convention on the Law of Treaties, art. 14, May 23, 1969, 1155 U.N.T.S. 332.

<sup>134</sup> *Resolution 1044 (1994) on the Abolition of Capital Punishment*, *supra* note 128.

(2004), Estonia (2004), Montenegro (2006), Moldova (2006), Albania (2007), Ukraine (2007), Latvia (2013), and Poland (2014).<sup>135</sup>

#### X. RUSSIAN FEDERATION'S MORATORIUM

The Russian Federation has taken a path different from that of the other Eastern European countries that joined the Council of Europe. The Russian Federation has not abolished capital punishment legislatively. It has not signed the Second Optional Protocol.<sup>136</sup> It has not signed European Protocol No. 13.<sup>137</sup> In 1997, the Russian Federation signed European Protocol No. 6 but to date has not ratified it.<sup>138</sup>

At the same time, Russia's membership in the Council of Europe has not been without effect.<sup>139</sup> That membership has played a key role in litigation in Russia that has led to a moratorium on capital charges and on executions.<sup>140</sup> A constitution adopted in the Russian Federation in 1993 contained a bill of rights, including a right to life.<sup>141</sup> This constitution allowed for capital punishment but envisaged its eventual abolition. Moreover, the constitution permitted using capital punishment only if the person was tried by a jury; the constitutional provision read:

1. Everyone shall have the right to life.
2. Capital punishment until its complete elimination may be envisaged by a federal law as an exclusive penalty for especially grave crimes against life, and the accused shall be granted the right to have his case examined by jury trial.<sup>142</sup>

Jury trial was being introduced at that time in the Russian Federation, but procedures for these trials were being implemented region by region. In 1999, the Constitutional Court of Russia declared a moratorium on capital punishment until those procedures were in place throughout the country.<sup>143</sup> The Court considered that

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Chart of Signatures and Ratifications of Treaty 187*, *supra* note 131.

<sup>138</sup> *Chart of Signatures and Ratifications of Treaty 114*, *supra* note 111.

<sup>139</sup> Bakhtiyar Tuzmukhamedov, *Doing Away with Capital Punishment in Russia: International Law and the Pursuit of Domestic Constitutional Goals*, in *COMPARATIVE INTERNATIONAL LAW* 353, 358 (Oxford Scholarship Online, 2018).

<sup>140</sup> *See* case cited *infra* note 145.

<sup>141</sup> KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 20 (Russ.).

<sup>142</sup> *Id.*

<sup>143</sup> [Decision on Clarification of Section 5 of the Operative Part of the Decision of the Constitutional Court of the Russian Federation of February 2, 1999], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII, KONST. [SZ RF][Russian Federation Collection of Legislation] November 19, 2009, No. 1344-O-R.

it would be unfair if defendants were subject to execution in some regions but not in others.<sup>144</sup>

By late 2009, procedures for jury trials were completed.<sup>145</sup> The last region to comply was Chechnya and its procedures were to be in place by January 1, 2010.<sup>146</sup> The approach of that date created uncertainty as to whether the moratorium would automatically end, thus allowing capital charges to be brought. Consequently, the Supreme Court of Russia invoked a process whereby it could pose a question to the Constitutional Court.

The Constitutional Court issued a decision in November 2009.<sup>147</sup> The Court acknowledged that the requirement of the constitution on the availability of jury trial for a capital charge would be fulfilled after January 1, 2010.<sup>148</sup> It said, however, that in its ruling of 1999 it had not addressed requirements imposed on the Russian Federation by international law, and specifically by the Russian Federation's signature on Protocol No. 6.<sup>149</sup> It said that the Russian Federation must be guided by "trends in the world community," citing language in the preamble to the Constitution that recited that the people "recognize ourselves as part of the world community."<sup>150</sup>

As an indication of the "trends," the Constitutional Court mentioned Protocol No. 6 as well as Protocol No. 13 to the European Convention, the Second Optional Protocol to the International Covenant on Civil and Political Rights, and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.<sup>151</sup> The Protocol to the American Convention on Human Rights to Abolish the Death Penalty is an instrument of the Organization of American States, to which a number of Western Hemisphere states are party. The Constitutional Court referred as well to two resolutions of the General Assembly of the United Nations that called for a moratorium on capital punishment.<sup>152</sup>

The Constitutional Court also mentioned "the stated intention of the Russian Federation to establish a moratorium" on executions "as one of the bases for its invitation into the Council of Europe."<sup>153</sup> In that regard, the Court cited the

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*; *Higher Courts of Russia have changed their minds on the fate of the death penalty in the country—because of Chechnya*, NEWS.RU.COM, Oct. 29, 2009, <https://www.newsru.com/russia/29oct2009/kazn.html>.

<sup>146</sup> Decision of the Constitutional Court of the Russian Federation of November 19, 2009, *supra* note 143.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at ¶ 1.

<sup>149</sup> *Id.* at ¶ 4.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at ¶ 4.1, citing European Convention Protocols 6 and 13 and Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73.

<sup>152</sup> *Id.*, citing G.A. Res. 62/149 (Dec. 18, 2007), G.A. Res. 63/168 (Dec. 18, 2008).

<sup>153</sup> *Id.* at ¶ 4.1.

recommendation of the Parliamentary Assembly of the Council of Europe to the Committee of Ministers of the Council of Europe to invite Russia to join the Council of Europe.<sup>154</sup> That recommendation was expressly conditioned on the Russian Federation instituting a moratorium on executions.<sup>155</sup> The Parliamentary Assembly required the Russian Federation,

to sign within one year and ratify within three years from the time of accession Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty in time of peace, and to put into place a moratorium on executions with effect from the day of accession.<sup>156</sup>

The Constitutional Court noted that the Russian Federation had yet to ratify Protocol No. 6, but said that ratification remained under consideration in the State Duma. Under the Constitution, the State Duma approves treaties after the Government signs.<sup>157</sup> The Constitutional Court said that the fact that the Russian Federation had not ratified Protocol No. 6 “does not prevent its being deemed an essential element of the legal regulation of the right to life.”<sup>158</sup>

The Constitutional Court even found Protocol No. 6 to be binding on the Russian Federation despite its failure to ratify.<sup>159</sup> To reach that conclusion, the Constitutional Court referred to the Vienna Convention on the Law of Treaties, which imposes obligations on a state that signs a treaty that is subject to ratification but has yet to ratify:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) It has signed the treaty . . . subject to ratification, . . . until it shall have made its intention clear not to become a party to the treaty.<sup>160</sup>

The Russian Federation had not expressed intent to decline becoming a party to Protocol No. 6. The Constitutional Court took the Vienna Convention to mean in this situation that implementing capital punishment would “defeat the object and

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Parliamentary Assembly, Application by Russia for Membership of the Council of Europe, EUR. PARL. ASS., Op. No. 193 (1996), ¶10.2.

<sup>157</sup> KONSTITUTSIYA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 106 (Russ.).

<sup>158</sup> Decision of the Constitutional Court of the Russian Federation of November 19, 2009, *supra* note 143, at ¶ 4.3.

<sup>159</sup> *Id.*

<sup>160</sup> Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 332.

purpose” of Protocol No. 6, that “object and purpose” being to end capital punishment.<sup>161</sup>

The Constitutional Court concluded that although capital punishment was still envisaged in legislation of the Russian Federation, the obligation of the Russian Federation to preserve the right to life prevented either an execution or the entry of a death sentence by a court.<sup>162</sup>

In the Russian Federation, death remains a prescribed potential penalty for murder and several related crimes.<sup>163</sup> Even the method of execution (by gunshot) is prescribed by law; however, the moratorium has held.<sup>164</sup> In 2015 and again in 2018, Russia’s worst serial killer in a century, Mikhail Popov, was sentenced to life terms following convictions for killing a total of seventy-eight women.<sup>165</sup> The moratorium has relieved the legislative and executive branches of pressure to abolish capital punishment, since so long as they remain silent on the country’s connection to Protocol No. 6, the moratorium remains in force.<sup>166</sup>

#### XI. CAPITAL PUNISHMENT AS TORTURE

While European states are not carrying out executions, the issue of the legality of capital punishment nonetheless came before the European Court of Human Rights in a case involving an unusual set of facts.<sup>167</sup> British military forces that participated in the 2003 invasion of Iraq detained Iraqi nationals and turned them over to Iraqi authorities under circumstances in which capital punishment might be applied by Iraqi courts.<sup>168</sup> The European Court of Human Rights addressed the issue of whether the British Government violated the European Human Rights Convention by these surrenders.

After saying that the European Convention on Human Rights applied to such a surrender, even though occurring outside Europe, the Court made two points. First,

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<sup>161</sup> Decision of the Constitutional Court of the Russian Federation of November 19, 2009, *supra* note 143, at ¶ 4.3.

<sup>162</sup> *Id.*

<sup>163</sup> WILLIAM E. BUTLER, CRIMINAL CODE OF THE RUSSIAN FEDERATION 22, Art. 105, 66–67, (William E. Butler trans., 4th ed. 2004).

<sup>164</sup> UGOLOVNO-PROTSESSUAL’NYI KODEKS ROSSIYSKOI FEDERATSII [UPK RF][Criminal Procedural Code] No. 1-F-3, art. 186.

<sup>165</sup> *Jailed Russian Serial Killer Convicted of 56 More Murders*, REUTERS (Dec. 10, 2018), <https://www.reuters.com/article/us-russia-killer/jailed-russian-serial-killer-convicted-of-56-more-murders-idUSKBN1O920K>.

<sup>166</sup> Decision of the Constitutional Court of the Russian Federation of November 19, 2009, *supra* note 143, ¶ 6–7.

<sup>167</sup> *Al-Saadoon and Mufdhi v. The United Kingdom*, 2010-II Eur. Ct. H.R. 61, 88–89.

<sup>168</sup> *Id.*

it said that the clause in Article 2 of the European Convention allowing for capital punishment was no longer valid.<sup>169</sup> It stated:

[T]he position has evolved since then. All but two of the member States have now signed Protocol No. 13 and all but three of the States which have signed it have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances.<sup>170</sup>

Then the Court focused on the European Convention's Article 3, which prohibits "torture" and "inhuman or degrading treatment or punishment."<sup>171</sup> The Court had previously said that Article 3 did not prohibit capital punishment, given the exception to the right to life that was written into Article 2 for capital punishment.<sup>172</sup> However, the Court said that the near total abolition of capital punishment in Europe, as reflected in Protocol 13, cast doubt on whether that exception remained valid.<sup>173</sup> From there, the Court said that it could apply Article 3 to capital punishment.<sup>174</sup> It explained the scope of the Article 3 prohibition:

In accordance with its constant case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a punishment or treatment was "degrading" within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of

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<sup>169</sup> *Id.* at 56.

<sup>170</sup> *Id.*

<sup>171</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, ETS No.005.

<sup>172</sup> *Soering v. United Kingdom*, App. No. 14038/88, Series A vol. 161, 41 (1989), [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57619%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57619%22]}).

<sup>173</sup> *Al-Saadoon and Mufdhi v. The United Kingdom*, 2010-II Eur. Ct. H.R. 61, 125–26.

<sup>174</sup> *Id.* at 126.

a violation of Article 3. In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.<sup>175</sup>

The Court went on to say,

Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. It makes no provision for exceptions . . . . As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct, the nature of any offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.”<sup>176</sup>

On that analysis, the Court found that capital punishment violated Article 3, thereby adding a new reason why capital punishment is unlawful.<sup>177</sup> The Court said that since it could rule against the United Kingdom on Article 3, it did not need to consider Article 2.<sup>178</sup>

## XII. MUTUAL LEGAL ASSISTANCE

Britain’s surrender of Iraqis turned out to be an anomaly. The Council of Europe and its member states became increasingly assertive in opposing capital punishment in other parts of the world. One aspect of this policy is a refusal to facilitate executions outside Europe if a suspect who may potentially be sentenced to death is in the territory of a European country.

Extradition is carried out under bilateral treaties. European countries routinely include in their extradition treaties a provision allowing them to decline extradition in the absence of assurances against a death penalty. Thus, the U.S.-U.K. extradition treaty reads:

### Article 7

#### Capital Punishment

When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 144–45.

provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out.<sup>179</sup>

Such was the situation in the case of a Texas woman in France. Joy Aylor was arrested in Dallas, Texas, in 1989 following the murder of her husband's lover.<sup>180</sup> Aylor was charged with hiring the killer.<sup>181</sup> Released pending trial, Aylor fled to France.<sup>182</sup> She was arrested there two years later, with the United States requesting extradition so that she could stand trial in Texas.<sup>183</sup> France insisted on a commitment that Aylor not be sentenced to death.<sup>184</sup> After two years of negotiations, the United States gave an assurance that Aylor would not be executed.<sup>185</sup> As a result, Aylor was convicted in Texas and sentenced to a term of life imprisonment.<sup>186</sup>

In a 1989 case, the United States sought extradition from the United Kingdom on behalf of Virginia for a suspect indicted in that state on a capital murder charge.<sup>187</sup> The United Kingdom asked for assurances that the suspect, if convicted, would not be executed.<sup>188</sup> The only assurance given was that the view of the United Kingdom would be conveyed to the Virginia court.<sup>189</sup> When the United Kingdom appeared to be on the cusp of surrendering the suspect, he turned to the European Commission of Human Rights.<sup>190</sup> The Commission transferred the case to the European Court of Human Rights, which focused not on a potential death sentence, but rather on the prison conditions under which the suspect would be held pending execution were he to be convicted and sentenced to death.<sup>191</sup> The European Court examined death row conditions in Virginia and concluded that they constituted "inhuman" or

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<sup>179</sup> Extradition Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland art. 7, U.S.-U.K., March 31, 2003, T.I.A.S. No. 07-426.

<sup>180</sup> Stefani Kopenc, *Jury Convicts Woman in 11-Year-Old Murder-for-Hire*, ASSOCIATED PRESS (Aug. 18, 1994), <https://apnews.com/3ce554ee929e5d12b6232ca4aa6eaea0>.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Aylor-Davis v. France*, European Commission on Human Rights, Application No. 22742/93, decision of January 20, 1994, DR 76-A at 164, 165.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 164, 166; Caroline Ravaud, *The Death Penalty and the Case-Law of the Institutions of the European Convention on Human Rights*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 79, 88 (Council of Europe Publishing, 1999)

<sup>186</sup> *Texas woman returned from France to face Texas charges*, URBAN PRESS INTERNATIONAL (Nov. 5, 1993), <https://www.upi.com/Archives/1993/11/05/Texas-woman-returned-from-France-to-face-Texas-charges/3979752475600/>.

<sup>187</sup> *Soering v. United Kingdom*, App. No. 14038/88, Series A vol. 161, 12 (1989), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-57619%22%7D>.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 13-14.

<sup>190</sup> *Id.* at 9.

<sup>191</sup> *Id.* at 36.

“degrading” treatment.<sup>192</sup> In light of this decision, the United Kingdom renewed its request for assurances against the death penalty.<sup>193</sup> This time they were given, and the surrender proceeded.<sup>194</sup>

Assisting another state in gaining evidence has also presented a context in which European states have sought to avoid facilitating executions. The German government raised the death penalty issue when the United States began criminal proceedings against persons suspected of crashing an airplane into the World Trade Center in 2001.<sup>195</sup> One suspect was Zacarias Moussaoui.<sup>196</sup> Germany held certain bank documents showing a transfer of funds to Moussaoui.<sup>197</sup> Germany surrendered the documents, but only subject to an understanding that they would not be used to carry out a death sentence on Moussaoui.<sup>198</sup>

Several World Trade Center suspects had shared an apartment in Hamburg.<sup>199</sup> U.S. authorities wanted bank documents showing a transfer of funds among the suspects.<sup>200</sup> Germany demanded and received assurance that the evidence would not be introduced at penalty proceedings in the cases, though under political pressure from the United States, it dropped its objection to the evidence being used during the guilt phase.<sup>201</sup> Moussaoui was tried on a capital charge and was convicted, but he was sentenced to life imprisonment after the trial jury declined to recommend a death sentence.<sup>202</sup>

In a 2014 case, German authorities declined to cooperate with U.S. military prosecutors after a U.S. serviceman killed a fellow U.S. serviceman in Germany.<sup>203</sup> Making a traffic stop, German police found the victim in an automobile being driven

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<sup>192</sup> *Id.* at 45.

<sup>193</sup> *Britain Conditions Extradition on U.S. Avoiding Death Penalty*, WASH. POST, Aug. 2, 1989, at A 24.

<sup>194</sup> Monica Davey, *Jury Finds Soering Guilty*, THE ROANOKE TIMES (Oct. 25, 2019, 5:30 PM), [https://www.roanoke.com/archive/jury-finds-soering-guilty/article\\_c228afed-93c5-56e8-b0a1-e15f3a23a95c.html](https://www.roanoke.com/archive/jury-finds-soering-guilty/article_c228afed-93c5-56e8-b0a1-e15f3a23a95c.html).

<sup>195</sup> John Goetz & Marcel Rosenbach, *The Death Penalty Problem: 9/11 Trial Puts German-US Relations Under Strain*, SPIEGEL ONLINE, (Nov. 23, 2009), <https://www.spiegel.de/international/world/the-death-penalty-problem-9-11-trial-puts-german-us-relations-under-strain-a-662814.html>.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*; THOMAS MICHAEL McDONNELL, THE UNITED STATES, INTERNATIONAL LAW, AND THE STRUGGLE AGAINST TERRORISM 180–81 (2010).

<sup>202</sup> Neil A. Lewis, *Moussaoui Given Life Term by Jury Over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A1.

<sup>203</sup> Jennifer H. Svan, *Airman Charged with Killing AFN Broadcaster Could Face Death*, STARS AND STRIPES (July 18, 2014), <https://www.stripes.com/news/airman-charged-with-killing-afn-broadcaster-could-face-death-1.294173>.

by the suspect.<sup>204</sup> Under the Status of Forces Agreement of the North Atlantic Treaty Organization, the United States had jurisdiction to punish in this situation.<sup>205</sup> The suspect was charged with murder, opening the possibility the death penalty might be sought.<sup>206</sup> An autopsy on the victim had been performed by German medical officials.<sup>207</sup> U.S. military authorities sought evidence in German custody.<sup>208</sup> As a condition of cooperating, the German government demanded and received assurances that the death penalty would not be sought.<sup>209</sup> No death specification was made by military prosecutors.<sup>210</sup> The suspect was convicted in a U.S. military court and sentenced to life imprisonment.<sup>211</sup>

Another form of non-cooperation has seen the European Union banning the sale of drugs to states that need them to execute persons sentenced to death. From around 2010, U.S. states were hard pressed to find suppliers for these drugs.<sup>212</sup> Lethal injection is the method most commonly used in the United States for carrying out a sentence of death.<sup>213</sup> The European Commission, the executive arm of the European Union, banned the export of these drugs to the United States.<sup>214</sup> The ban applied to eight named barbiturate anesthetic drugs identified as “[p]roducts which could be used for the execution of human beings by means of lethal injection.”<sup>215</sup> The

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<sup>204</sup> *Id.*

<sup>205</sup> Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. 7, June 19, 1951, 199 U.N.T.S. 67.

<sup>206</sup> Jennifer H. Svan & Marcus Kloeckner, *Germans Withholding Evidence in AFN Murder Case Pending Death Penalty Decision*, STARS AND STRIPES (July 23, 2014), <https://www.stripes.com/news/germans-withholding-evidence-in-afn-murder-case-pending-death-penalty-decision-1.294821>

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Matt Hillham, *Oliver Sentenced to Life with Parole for Killing of AFN Broadcaster*, STARS AND STRIPES (Jan. 30, 2015), <https://www.stripes.com/news/europe/oliver-sentenced-to-life-with-parole-for-killing-of-afn-broadcaster-1.326733>.

<sup>211</sup> *Id.*

<sup>212</sup> John Schwartz, *Drug Sales for Executions Are Halted*, N.Y. TIMES, July 2, 2011, at A13.

<sup>213</sup> *State by State Lethal Injection Protocols*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/executions/lethal-injection/state-by-state-lethal-injection-protocols>.

<sup>214</sup> Ed Pilkington, *Europe Moves to Block Trade in Medical Drugs Used in US Executions*, THE GUARDIAN (Dec. 20, 2011), <https://www.theguardian.com/world/2011/dec/20/death-penalty-drugs-european-commission>.

<sup>215</sup> Commission Implementing Regulation (EU) No. 1352/2011, December 20, 2011 Amending Council Regulation (EC) No. 1236/2005 Concerning Trade in Certain Goods Which Could Be Used for Capital Punishment, Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, annex III, ¶4, 2011 O.J. (L 338) 31, 34.

Commission's ban was observed by exporters.<sup>216</sup> Major European drug companies stopped sales of the drugs to U.S. states.<sup>217</sup>

### XIII. INTERVENTION IN CAPITAL CASES OUTSIDE EUROPE

European governments have directly pressured the United States to end the use of capital punishment. The European Union has directed communications to governors in U.S. states asking them to stop imminent executions.<sup>218</sup>

In June 2001, U.S. President George W. Bush made his first visit to Europe as president.<sup>219</sup> To his discomfort, European leaders quizzed Bush about capital punishment.<sup>220</sup> One immediate issue at the time was that President Bush had just declined to intervene to prevent an execution by federal authorities in a high-profile capital case.<sup>221</sup> Juan Raul Garza was an American citizen under sentence of death in a federal prosecution for murder.<sup>222</sup> At Garza's sentencing hearing, evidence was introduced of his involvement in four unrelated murders in Mexico that had not been charged against him there.<sup>223</sup> A petition was filed in the Inter-American Commission on Human Rights over that issue.<sup>224</sup> The Commission found a violation of Due Process, since Garza was sentenced to death on the basis, in part, of the four murders in Mexico "without having been properly and fairly charged and tried for these additional crimes."<sup>225</sup>

The European Parliament called for clemency for Garza in a resolution that was broadly condemnatory of capital punishment in the United States.<sup>226</sup> President Bush was in Europe the week before Garza's execution date. President Bush, who was not planning to grant clemency to Garza, was forced to rationalize the use of the death penalty. Bush told the European leaders that "the death penalty is the will of

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<sup>216</sup> *EU Imposes Strict Controls on 'Execution Drug' Exports*, BBC NEWS (Mar. 5, 2012), <https://www.bbc.com/news/world-europe-16281016>.

<sup>217</sup> Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), <http://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html?partner=bloomberg>

<sup>218</sup> WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 306 (3d ed. 2002).

<sup>219</sup> Editorial, *The Executions Continue*, N.Y. TIMES, June 19, 2001, at A22.

<sup>220</sup> *Id.*

<sup>221</sup> Jo Thomas, *Bush Rejects Clemency for Drug Lord Set to Die Today*, N.Y. TIMES, June 19, 2001, at A18.

<sup>222</sup> *Garza v. U.S.*, Case 12.243, Inter-Am. Comm'n H.R. Report No. 52/01, OEA/Ser.L./V/II.111, doc. 20, rev. ¶2 (2001).

<sup>223</sup> *Id.* at ¶105.

<sup>224</sup> *Id.* at ¶1.

<sup>225</sup> *Id.* at ¶105.

<sup>226</sup> Resolution on Abolition of the Death Penalty in the United States, Eur. Par. Doc. (B5-0341) & 0376/2000 (2000).

the people in the United States.”<sup>227</sup> The U.S. Supreme Court denied review to Garza and he was executed.<sup>228</sup>

In 2018, Germany publicly criticized Japan when it executed the leader of a cult that had spread poison gas in the Tokyo subway, killing thirteen persons.<sup>229</sup> Germany had no connection to the case but deemed it appropriate to insist on its principled objection to capital punishment. Baerbel Kofler, a German government official responsible for overseeing international human rights, said, “despite the seriousness of this crime the German government stands by its principled rejection of the death penalty as an inhumane and cruel form of punishment that should be abolished worldwide.”<sup>230</sup> Steffen Seibert, a German Government spokesperson, explained that Germany wanted “the unconditional abolition of the death penalty and we convey this position toward friendly states as well.”<sup>231</sup>

The Council of Europe and the European Union coordinate efforts with non-governmental organizations that oppose capital punishment.<sup>232</sup> In 2018 they issued a declaration together to mark the observance of European and World Day against the Death Penalty. This day of observance is organized annually by the World Coalition Against the Death Penalty, a non-governmental organization based in France.<sup>233</sup> The joint declaration expressed a stance that the Council of Europe and the European Union have repeatedly espoused: “The death penalty is an affront to human dignity. It constitutes cruel, inhuman and degrading treatment and is contrary to the right to life. The death penalty has no established deterrent effect and it makes judicial errors irreversible.”<sup>234</sup>

In 2019 the European Union hosted the Seventh World Congress Against the Death Penalty in Brussels, sponsored by the same non-governmental organization.<sup>235</sup>

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<sup>227</sup> *U.S. Condemned for Death Penalty*, CBS NEWS, (June 21, 2001, 4:28 PM), <https://www.cbsnews.com/news/us-condemned-for-death-penalty/>.

<sup>228</sup> *Garza v. Lappin*, 533 U.S. 924 (2001).

<sup>229</sup> *German Government Says Death Penalty Cruel*, AP NEWS, (July 6, 2018, 8:40 PM), <https://www.apnews.com/0af80439165f463199ff0f4f30430236>.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Dr. Christian Behrmann & Dr. Jon Yorke, *The European Union and Abolition of the Death Penalty*, 4 PACE INT’L L. REV. ONLINE COMPANION 1, 72 (2013).

<sup>233</sup> World Coalition Against the Death Penalty, <http://www.worldcoalition.org/History.html> (last visited Oct. 25, 2019).

<sup>234</sup> *Europe Day against the Death Penalty*, COUNCIL OF EUROPE (Oct. 10, 2018), [https://www.coe.int/en/web/human-rights-rule-of-law/events/-/asset\\_publisher/E5WWthsy4Jfg/content/10-october-european-day-against-the-death-penalty?inheritRedirect=false](https://www.coe.int/en/web/human-rights-rule-of-law/events/-/asset_publisher/E5WWthsy4Jfg/content/10-october-european-day-against-the-death-penalty?inheritRedirect=false).

<sup>235</sup> *7th World Congress Against the Death Penalty*, EU EVENTS, <https://www.eu-events.eu/12885-7th-world-congress-against-the-death-penalty.html>.

## XIV. OPPOSING EXECUTION OF FOREIGNERS

Another situation in which European countries have sought to stop a death sentence outside Europe has been the execution of a person who was not a national of the country in which she or he was convicted. Such persons are entitled to certain rights under a multilateral treaty, specifically a right to be in touch with a consul of their home state and to be informed by authorities at the time of arrest of that right.<sup>236</sup> In cases in which nationals of Europe or even of states outside Europe have been sentenced to death without these rights being observed, European states have filed diplomatic protests and have taken legal action.<sup>237</sup>

In 2001, the European Union pressed the UN Commission on Human Rights to adopt a resolution against death sentences imposed on foreign nationals who were not informed at the time of arrest about the opportunity to contact a consul.<sup>238</sup> The resolution was adopted in the Commission over the negative vote of the United States.<sup>239</sup>

In 2004, the International Court of Justice ruled that the United States must provide judicial review of the cases of Mexican nationals who were sentenced to death without being informed about the opportunity to contact a consul.<sup>240</sup> When implementation in the United States was not forthcoming, the European Union directed communications to state governors, asking that such a review be conducted.<sup>241</sup>

A case over this issue went to the Supreme Court of the United States. Jose Medellín was one of the Mexican nationals concerned. He faced execution in Texas. He filed in a federal district court in Texas, asking that it review his case and reconsider the outcome.<sup>242</sup> When that court ruled against him, he appealed, but the U.S. Court of Appeals turned him down.<sup>243</sup> Medellín then approached the U.S. Supreme Court.<sup>244</sup>

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<sup>236</sup> Vienna Convention on Consular Relations art. 36, April 24, 1963, 596 U.N.T.S. 261.

<sup>237</sup> Brief of Amici Curiae the European Union and Members of the Int'l Cmty. in Support of Petitioner, *Medellín v. Dretke*, 543 U.S. 1032 (2004) (No. 04-5928).

<sup>238</sup> U.N. ESCOR, Comm'n on Human Rights, 57th Sess., 78th mtg. at 3, U.N. Doc. E/Cn.4/2001/SR.78 (April 25, 2001).

<sup>239</sup> *Id.*

<sup>240</sup> *Avena and Other Mexican Nationals (Mexico v. U.S.)*, Judgment, 2004 I.J.C. 12, 14 (Mar. 31).

<sup>241</sup> JOHN QUIGLEY, *FOREIGNERS ON AMERICA'S DEATH ROWS: THE LEGAL COMBAT OVER ACCESS TO A CONSUL* 165 (2018).

<sup>242</sup> *Medellín v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

<sup>243</sup> *Id.*

<sup>244</sup> *Medellín v Dretke*, 543 U.S. 1032 (2004) *cert. granted*.

At that point, the European Union filed an *amicus curiae* brief in the name of its 25 member states, plus 21 additional states of Europe that had signed on.<sup>245</sup> The European Union urged the Supreme Court to enforce the obligation to inform foreigners under arrest of their right to contact a consul.<sup>246</sup>

The Supreme Court accepted the case for hearing.<sup>247</sup> Before the case could be decided, however, President George W. Bush asked the courts of the various states in which these Mexican nationals were tried to review and reconsider their cases.<sup>248</sup> Likewise, Medellín asked the courts of Texas to do so in his case.<sup>249</sup> At that point the Supreme Court of the United States decided not to continue hearing Medellín's case, opting instead to let the Texas courts deal with the matter.<sup>250</sup>

The courts of Texas declined, however, to review Medellín's case. They said that Medellín had not raised the issue of his treaty rights in a timely fashion.<sup>251</sup> Medellín again approached the Supreme Court of the United States, which again agreed to hear his case.<sup>252</sup> Once more Europe weighed in, as it had done on Medellín's first foray into the Supreme Court. A brief *amicus curiae* was filed in Medellín's support by the Council of Europe.<sup>253</sup> The Supreme Court ruled in favor of Texas, however, and Medellín was executed.<sup>254</sup>

#### XV. CALL FOR A DEATH PENALTY MORATORIUM

As part of its external work against capital punishment, the European Union and the Council of Europe have filed *amicus curiae* briefs in U.S. courts in a wide range of death penalty cases, not only those involving the execution of foreigners.<sup>255</sup> The aim is to demonstrate to U.S. courts how isolated the United States has become in employing the death penalty.<sup>256</sup>

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<sup>245</sup> Brief of Amici Curiae the European Union and Members of the Int'l Cmty. in Support of Petitioner, *Medellín v. Dretke*, 543 U.S. 1032 (2004) (No. 04-5928).

<sup>246</sup> *Id.*

<sup>247</sup> *Medellín v. Dretke*, 543 U.S. 1032 (2004) *cert. granted*.

<sup>248</sup> Memorandum from President George W. Bush to the Attorney General, Compliance with the Decision of the International Court of Justice in *Avena*, Feb. 28, 2005, *Medellín v. Texas*, 552 U.S. 491, at 503 (2008) (No. 06-984).

<sup>249</sup> *Medellín v. Dretke*, 544 US 660, 663–664 (2005).

<sup>250</sup> *Id.* at 666.

<sup>251</sup> *Ex Parte Medellín*, 223 S.W.3d, 315, 352 (2006); *Medellín v. Texas*, 552 US 491, at 504 (2008).

<sup>252</sup> *Medellín v. Texas*, 550 US 917 (2007).

<sup>253</sup> Brief of Amici Curiae the European Union and Members of the Int'l Cmty. in Support of Petitioner, *Medellín v. Texas*, 552 U.S. 491 (2008) (No. 06-984).

<sup>254</sup> *Medellín v. Texas*, 552 U.S. 491 (2008).

<sup>255</sup> *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

<sup>256</sup> Christian Behrmann & Jon Yorke, *The European Union and Abolition of the Death Penalty*, 4 PACE INT'L L. REV. ONLINE COMPANION 1, 40 (2013).

Europe has also promoted a worldwide moratorium on executions: on 26 June 2007, the Parliamentary Assembly of the Council of Europe adopted a resolution titled “Promotion by Council of Europe member States of an international moratorium on the death penalty”:

1. The Parliamentary Assembly confirms its strong opposition to the death penalty in all circumstances. The death penalty is the ultimate form of cruel, inhuman and degrading punishment: it violates the right to life. The Assembly takes pride in its decisive contribution to making the member States of the Council of Europe a *de facto* death penalty-free zone, and strongly regrets the fact that one European country—Belarus—still carries out executions.

2. The Assembly has also on several occasions taken a strong stand against executions in other parts of the world, and in particular in the Council of Europe observer States which retain the death penalty, namely Japan and the United States of America.

3. It notes with satisfaction that the death penalty is on the decline worldwide, as shown by a 25% decrease in executions and death sentences between 2005 and 2006.

4. It also draws attention to the fact that more than 90% of known executions in 2006 took place in only six countries: China, Iran, Pakistan, Iraq, Sudan, and the United States of America—a Council of Europe observer State. Based on available public records, which may cause the number of executions to be underestimated in countries lacking free media or an accountable government, China alone accounts for more than two thirds of all executions worldwide. Iran’s execution rate nearly doubled from 2005 to 2006. Iraq also witnessed a dramatic increase in executions in 2006, bringing the number up to 65. Saudi Arabia, among the worst offenders in 2005, saw a decrease in 2006 to 39 executions, but witnessed an upsurge in early 2007 (48 executions through to the end of April).

5. The small number of countries that still resort to executions on a significant scale is becoming increasingly isolated in the international community. Between 1977 and 2006, the number of abolitionist countries rose from 16 to 89. This number increases to 129 when including those countries which have not carried out any executions for the past ten years or more and which can therefore be considered as abolitionist in practice. The time is now ripe to give new impetus to the campaign in favour of a death penalty-free world.

6. The Assembly therefore strongly welcomes Italian efforts in the United Nations General Assembly in advocating for a moratorium on the death penalty, as well as the support of the European Union for this initiative, and expects it to be proceeded with in such a manner as to guarantee the best possible success within the United Nations.

7. A moratorium on executions is but one step in the right direction, the ultimate goal remaining the complete abolition of the death penalty in all circumstances.

8. In the meantime, a moratorium is an important step as it saves lives immediately and has the potential of demonstrating to the public in retentionist countries that an end to State-sponsored killings does not lead to any increase in violent crime. On the contrary, a moratorium on executions can bring about a change of atmosphere in society fostering greater respect for the sanctity of human life, and thus contribute to reversing the trend towards ever-increasing hate and violence.<sup>257</sup>

#### XVI. EUROPE'S REASONS FOR OPPOSING CAPITAL PUNISHMENT

Cataloguing the reasons for abolition in Europe is not an easy task. The Continent uniformly believes that capital punishment is bad policy. The pan-European push for human rights protection yielded a certain uniformity, yet the path of each country to abolition was to some extent unique.

A divide is to be noted between Western and Eastern Europe. In the late nineteenth century, when Western European countries were beginning to question capital punishment, one saw little pro-abolitionist discussion in Eastern Europe. In the years immediately following World War II, the Council of Europe promoted abolition, and, one by one, the countries of Western Europe that had not abolished earlier did so. The countries of Eastern Europe were not involved in this process. Then, however, in the context of the political change in Eastern Europe in the last decade of the twentieth century, abolition came virtually overnight.

The Eastern European countries reacted to the demands of the Council of Europe. Their reasons for abolishing had less to do with the advisability of capital punishment than with their desire to be accepted under the larger European umbrella. In the Eastern European countries, the social instability that accompanied the political change of the 1990s left the public, fearful about crime, favoring capital punishment, but it was abolished nonetheless.<sup>258</sup>

In Europe, opposition to capital punishment became, by the turn of the twenty-first century, a necessary policy of governance. Capital punishment had come to be seen as inconsistent with civilized rule, along with other policies deemed anathema (like torture).<sup>259</sup> Abolition of capital punishment in Europe had been rationalized on

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<sup>257</sup> EUR. PAR. ASS., *Promotion by Council of Europe Member States of an International Moratorium on the Death Penalty*, Res. 1560 (2007).

<sup>258</sup> STANISLAW FRANKOWSKI, *INTRODUCTION TO POLISH LAW* 358 (2005); see also Peter Hodgkinson, *Europe—A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 OHIO N. U. L. REV. 625, 634 (2000) (on public opinion in Ukraine).

<sup>259</sup> Badinter, *supra* note 95; see also *Recommendation 1246 (1994) on the Abolition of Capital Punishment*, *supra* note 118 at ¶¶3–4.

a perceived absence of utility. Deterrence was dismissed as a justification for retention, on the ground that deterrence could not be proved.<sup>260</sup>

The reasons the European states have given for abolishing capital punishment include the arguments familiar in the debate over capital punishment in the United States. An asserted absence of deterrence has been the most frequent point. One sees as well mention of mistakes leading to execution of persons who are either totally innocent or whose crime did not merit the most severe penalty.<sup>261</sup>

To be sure, idiosyncratic reasons have sometimes played a role. As shown above, abolition was advocated by some politicians in Germany because the Allies were executing Nazi officials. In Spain, the perceived unfair use of capital punishment by the Franco government brought an outcry against capital punishment.<sup>262</sup>

The analysis of deterrence has proceeded from the standpoint of human rights, namely, that rights exist, and they may be evaded by a state only where some societal interest so requires. With capital punishment, the European analysis is that no societal interest so requires. This analysis has played out *legislatively* in Europe, not in the courts. One court decision—albeit not in Europe—has gone through such an analysis. The Constitutional Court of South Africa found capital punishment unconstitutional in that country.<sup>263</sup> The Constitution contained a protection for the right to life.<sup>264</sup> Rights enumerated in the Constitution, according to Section 33 of the Constitution, could be infringed only if an infringement was “necessary.”<sup>265</sup>

The Constitutional Court of South Africa said that capital punishment would override the right to life only if it were “necessary.”<sup>266</sup> The Court put the onus on the state’s attorney to sustain that proposition. It concluded that the state’s attorney could not do so, and said:

[T]he fact that there is no proof that the death sentence is a greater deterrent than imprisonment does not necessarily mean that the requirements of *section 33* cannot be met. It is, however, a major obstacle in the way of the Attorney General’s argument, for he has to satisfy us that the penalty is reasonable and necessary, and the doubt which exists in regard to the deterrent effect of the sentence must weigh heavily against his argument.<sup>267</sup>

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<sup>260</sup> Badinter, *supra* note 95.

<sup>261</sup> *Recommendation 1246 (1994) on the Abolition of Capital Punishment*, *supra* note 118 at ¶¶3–5.

<sup>262</sup> Schwarz, *supra* note 81.

<sup>263</sup> *State v. Makwanyane* 1995 (2) SACR 1 (CC) (S. Afr.).

<sup>264</sup> S. AFR. (INTERIM) CONST., 1994.

<sup>265</sup> *Id.*

<sup>266</sup> *State v. Makwanyane* 1995 (2) SACR 1 (CC) at 83 para. 127 (S. Afr.).

<sup>267</sup> *Id.*

That analysis, and in particular the placement of the burden, stood in contrast to the analysis of the Supreme Court of the United States in which it considered a constitutional challenge to capital punishment.<sup>268</sup> Like the Constitutional Court of South Africa, the U.S. Supreme Court addressed deterrence. But, relying on the federal character of the United States, the Supreme Court said that the states using capital punishment had decided that deterrence provided a sufficient rationale, and that it would honor that determination unless it could be shown to be inaccurate.<sup>269</sup> Finding that opponents of capital punishment could not demonstrate an absence of deterrence, the Court upheld the death penalty.<sup>270</sup>

The European states have taken the mode of analysis reflected in the South Africa case. They do not require opponents of capital punishment to show that deterrence is ineffective. Rather, they ask whether it can be shown that deterrence is effective. Life is protected, they say, and life can be taken by execution only if it can be shown that execution deters more effectively than a term of imprisonment. The conclusion has been that such a showing cannot be made.

While deterrence has been discounted, the European countries have gone beyond the aims of punishment in their analysis of capital punishment. The death penalty has come to be seen as a sign of a lack of civilization, as a punishment fundamentally at odds with how a government should conduct itself. Europeans have come around to the belief of J.W. Pease that capital punishment is “no longer needed for the civilization of the age in which we live.”<sup>271</sup> It is that view of capital punishment that Europe now seeks to propagate around the world.

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<sup>268</sup> *Gregg v. Georgia*, 428 U.S. 153, 186 (1976).

<sup>269</sup> *Id.* at 186–187.

<sup>270</sup> *Id.*

<sup>271</sup> 234 Parl. Deb. H.C., *supra* note 1.

