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## The European Union and the Abolition of the Death Penalty

Christian Behrmann

*European External Action Service*, christian.behrmann@eeas.europa.eu

Jon Yorke

*Birmingham City University*, Jon.yorke@bcu.ac.uk

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THE EUROPEAN UNION  
AND ABOLITION OF THE  
DEATH PENALTY

**Dr. Christian Behrmann\* and Dr. Jon Yorke\***

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\* Dr. Christian Behrmann, Attorney-at-Law, Policy Officer, Global and Multilateral Issues, European External Action Service. Before joining the diplomatic service, Dr. Behrmann practiced law in private practice, EU institutions, and the United Nations. He holds a PhD in public international law and lectures at the University of Leuven. Email: christian.behrmann@eeas.europa.eu. The views expressed in this article are those of the authors and do not necessarily reflect the views of the EU institutions and services.

\* Dr. Jon Yorke, Reader in Law, School of Law, Birmingham City University, Birmingham, B42 2SU. Dr. Yorke presented an earlier version of this article at the 12<sup>th</sup> Annual EU-NGO Forum of Human Rights, EU Human Rights Instruments and the Lisbon Treaty: State of Play and Way Forward, European Commission, Brussels, July 12-13, 2010. Email: jon.yorke@bcu.ac.uk. We would like to thank Hannah Gorman and Daniel Gough for their research and editorial assistance, for the comments on earlier drafts by Julian Killingley, and members of the Editorial Board of Pace International Law Review.

## ABSTRACT

The European Union has become a leading regional force in the progress towards a world free of state sanctioned judicial killing in the form of the death penalty. This article investigates how the EU has evolved its abolitionist position. It analyzes the development of the region's internal policy beginning in the European Parliament, to the rejection of the punishment being mandated as a Treaty provision, which evolves into an integral component of the external human rights project. The EU has now formulated technical bilateral and multilateral initiatives to promote abolition worldwide. This is most clearly evidenced in the EU playing an important role in the 2007 United Nations General Assembly Resolution on the moratorium on the use of the death penalty, and the strengthening of the resolution in 2008, 2010, and 2012. This article demonstrates that the EU's contribution to the abolition of the death penalty is a recognizable success story of human rights, and it is one aspect of the regions' policies that was rewarded in 2012 with the Nobel Peace Prize.

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## I. INTRODUCTION

The European Union (hereinafter, “EU”) is initiating a “tireless” and “all out” campaign against the death penalty.<sup>1</sup> The region has formulated a “principled position”<sup>2</sup> against the punishment in all cases without exception<sup>3</sup>, and will “continue to intensify its initiatives”<sup>4</sup> until a death penalty free world is achieved. This anti-death penalty position is grounded within a human rights discourse, which is a “theme that lies at the heart of the EU.”<sup>5</sup> The *Treaty of Lisbon*<sup>6</sup> incorporated the *Charter of Fundamental Rights of the European Union*<sup>7</sup> (hereinafter, “Charter”) and provides for the accession of the EU to the Council of Europe’s (hereinafter, “CoE”) *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter, “ECHR”).<sup>8</sup> The last execution by an EU Member State

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<sup>1</sup> *All Out Against the Death Penalty*, EUR. COMM’N (June 20, 2007), <http://ec.europa.eu/news/externalrelations/0706201en.htm>.

<sup>2</sup> See *EU Policy on Death Penalty*, EUR. EXTERNAL ACTION SERV. (stating “The European Union holds a strong and principled position against the death penalty”), [http://eeas.europa.eu/human\\_rights/adp/index\\_en.htm](http://eeas.europa.eu/human_rights/adp/index_en.htm) (last visited Oct. 7, 2013).

<sup>3</sup> See *The Death Penalty Archive, in Delegation of the European Union to the United States*, EUNTHEUS.ORG, <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/> (last visited Oct. 7, 2013) (stating “The European Union is opposed to the death penalty in all cases and has consistently espoused its universal abolition”).

<sup>4</sup> *EU Guidelines on the Death Penalty: revised and updated version*, EUR. EXTERNAL ACTION SERV. (2013), [http://eeas.europa.eu/human\\_rights/guidelines/death\\_penalty/docs/10015\\_08\\_en.pdf](http://eeas.europa.eu/human_rights/guidelines/death_penalty/docs/10015_08_en.pdf) (last visited Oct. 7, 2013).

<sup>5</sup> See Steven Vanackere, Vice Prime Minister and Minister of Foreign Affairs of Belgium, Opening Session, at the 12th Annual EU-NGO Forum of Human Rights: EU Human Rights Instruments and the Lisbon Treaty: State of Play and Way Forward, (July 12, 2010) (“The fight against the death penalty is a theme that lies at the heart of the EU human rights approach. Also, for Belgium in particular, it remains an absolute policy priority.”).

<sup>6</sup> See generally *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter *Treaty of Lisbon*].

<sup>7</sup> *Charter of Fundamental Rights of the European Union*, Dec. 18, 2000, 2000 O.J. C 364/1, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>8</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, C.E.T.S. No. 5 (1950); *Protocol Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms*, 2007 O.J. (C 306/01), at 155.

was Latvia in 1996.<sup>9</sup> Latvia removed the death penalty from its domestic law in 2011 through the ratification of *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* (hereinafter, “*Protocol No. 13*”).<sup>10</sup>

The EU has developed human rights standards to frame abolitionism in the promotion of the protection of the right to life, the enhancement of human dignity, the prohibition against cruel and inhuman punishment, the necessity of ensuring effective representation, fair trials and appeals provisions, and the opportunity of a final commutation of sentence. These standards are now considered as providing an absolute abolitionist position, which was affirmed by the Council of the European Union in its 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy.<sup>11</sup> All prospective Member States must abolish the death penalty<sup>12</sup> and this internal abolitionist standard is now reflected as an intricate component of the external project within bilateral and multilateral communications. On this basis, the EU Guidelines on the Death Penalty - the first set of EU human rights guidelines adopted by the Council in 1998 – details the framework for diplomatic EU action, including objectives, circumstances and instruments.<sup>13</sup> The EU is constantly reviewing and evolving<sup>14</sup> its policies to utilize the most effective abolitionist mechanisms. It is developing educational projects with the aim of increasing awareness of the issues surrounding the death penalty and providing an opportunity for civil society to take a stand

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<sup>9</sup> See *Clemency Service*, LATVIJAS VALSTS PREZIDENTS, [http://www.president.lv/pk/content/?cat\\_id=9243&lng=en](http://www.president.lv/pk/content/?cat_id=9243&lng=en) (last visited Oct. 7, 2013).

<sup>10</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, C.E.T.S. No. 187.

<sup>11</sup> Press Release, European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy (June 25, 2012), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131181.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf).

<sup>12</sup> *Commission Communication to the Council and the European Parliament, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries*, COM (2001) 252 final (May 2001).

<sup>13</sup> See *EU Guidelines on the Death Penalty*, *supra* note 4.

<sup>14</sup> See, e.g., *12th EU NGO Forum on Human Rights*, EUR. COMM'N, [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/droi/dv/201/201009/20100913\\_ngoforumrecomms\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201009/20100913_ngoforumrecomms_en.pdf) (last visited Oct. 7, 2013).

against the punishment, for instance, through participation in the, “World/European Day Against the Death Penalty,” which occurs every October 10th.<sup>15</sup> These policies coincide with the extensive work undertaken by the CoE in the promotion of the abolition of the death penalty within its Member and Observer States, while also promoting abolition in retentionist states.<sup>16</sup>

This article engages with the creative processes initiated to formulate the political hegemony and legal rejection of the punishment. Part II considers the internal abolition of the death penalty within the EU. It analyzes the prominent role of the European Parliament in transforming the question of the death penalty from an issue, which was initially thought to be outside of the region’s competence, to the removal of the punishment being intricately reflected as a crucial component of the EU project. The internal removal of the death penalty developed into a Treaty provision, and is solidified by the incorporation of the *Charter* for a specific internal abolition mechanism. Following this, a review is provided of the political initiatives. It focuses on the dissemination and publication of *demarches*, and the role of bilateral and multilateral dialogue which can occur when a state’s capital judicial system is in flux or when executions are immanent.

Part III engages with the EU’s external project, through the three themes of political dialogue, capacity building, and support for defense attorneys and non-governmental organizations. The work of the European External Action Service (hereinafter, “EEAS”),<sup>17</sup> and specifically, Catherine Ashton, the High Representative of the Union for Foreign Affairs and Security Policy, has become increasingly important for the effective dissemination of the EU abolitionist discourse worldwide.<sup>18</sup>

Part IV reviews the effectiveness of EU *amicus curiae* briefs filed with United States courts. This section engages

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<sup>15</sup> Press Release, European External Action Service, European and World Day against the Death Penalty, EU underlines commitment to universal abolition, (Oct. 10, 2013), available at [http://www.eeas.europa.eu/statements/docs/2013/131010\\_01\\_en.pdf](http://www.eeas.europa.eu/statements/docs/2013/131010_01_en.pdf).

<sup>16</sup> See Jon Yorke, *The Right to Life and Abolition of the Death Penalty in the Council of Europe*, 34 EUR. L. REV. 205 (2009); Jon Yorke, *Inhuman and Degrading Punishment and Abolition of the Death Penalty in the Council of Europe*, 16 EUR. PUB. L. 77 (2010).

<sup>17</sup> Treaty of Lisbon, *supra* note 6, at 23-24.

<sup>18</sup> *Id.* at 24, 99.

with the judicial consideration of the question of the extent to which the death penalty is reserved as an exclusive state sovereign issue to be determined in isolation of international opinion and law. The work of the EU in the United Nations is analyzed in Part V, and its important contribution towards the first General Assembly resolution calling for a worldwide moratorium on the use of the death penalty. Finally, the abolition of the death penalty as a thematic issue of the European Initiative for Democracy and Human Rights (hereinafter, "EIDHR") is reviewed, through the EU's contribution to capacity building for capital defense within the United States, Africa, and Asia.

What this article demonstrates is that the EU has become a leading regional force for the progress towards global abolition of the death penalty.<sup>19</sup>

## II. INTERNAL POLICY AND THE ABOLITION OF THE DEATH PENALTY

### A. *The Evolution of the Political Process*

The initial promotion of the abolition of the death penalty in the region came from the European Parliament. Yet the first steps were cautious and modest. In 1979, a question was put to the Council by a member of the European Parliament, Mr. Schwartzberg, on the possibility of the region moving towards a homogenous position against the punishment. He asked:

[d]oes the Council not feel called upon to recommend the harmonization by the Community Member States of legislation on the death penalty in view of its commitment in the preamble to the Treaties "to lay the foundations of an ever closer union among the peoples of Europe?"<sup>20</sup>

The reply was:

[t]he Council does not consider that the passage of the preamble to the Treaty establishing the EEC referred to by the Honourable Member contains an invitation to harmonize legislation on the death penalty.<sup>21</sup>

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<sup>19</sup> *EU Policy on the Death Penalty*, *supra* note 2.

<sup>20</sup> 1981 O.J. (Annex to No. 250) 267 (Jan. 18, 1980).

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

This early position demonstrated that the European Community (hereinafter, “EC”<sup>22</sup>) thought it more pertinent to leave questions concerning the legitimacy of the punishment to the Member States. At this time, the Council thought that there was no basis to invite Member States to harmonize an abolitionist position. However, there was a growing reluctance by the Member States to impose the punishment. The Netherlands had a long-standing abolitionist tradition, as evidenced through the abolition of the punishment in 1869. Finland and (West) Germany removed the punishment from their laws in 1949 (and East Germany did so in 1987), as did Austria in 1968, the United Kingdom in 1969, Sweden in 1972, Spain in 1975, Portugal in 1976, Denmark in 1978, Luxembourg in 1979, and France in 1981.<sup>23</sup> At this time, only Belgium and Ireland reserved the punishment for ordinary crimes, but it was not imposed in either country.<sup>24</sup>

What this demonstrates is that the initial evolution in penology was not driven from a centralized EC position, but developed through the individual Member State rejection of the punishment. At this time, the region was not promoting change, but the Member States were evolving their policies in the rejection of the death penalty themselves. The punishment’s failure as an effective deterrence against murder had been cogently demonstrated throughout Western Europe most clearly through a detailed empirical study from 1928,<sup>25</sup> but fol-

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<sup>22</sup> The “European Community” became the “European Union” following the adoption of the Treaty on European Union (Treaty of Maastricht) February 7, 1992, 1992 O.J. (C 191) [hereinafter “Treaty of Maastricht”].

<sup>23</sup> See Robert Badinter, *Preface to Moving Towards Universal Abolition of the Death Penalty*, DEATH PENALTY: BEYOND ABOLITION 5, at 7 (Council of Europe ed., 2004).

<sup>24</sup> In Belgium, the death penalty was retained but it was not applied and the country was considered de facto abolitionist. The last execution in Belgium was in 1950, and the punishment was abolished in 1996. It should be noted that Michael Manning was the last person to be executed in Ireland in 1954. The death penalty remained on the statute books until it was abolished in 1990, and then the Twenty First Amendment of the Constitutional Act 2001, Article 15.5.2, explicitly prohibits the death penalty. See Twenty-First Amendment of the Constitution Act, 2001, available at <http://www.irishstatutebook.ie/2001/en/act/cam/0021/sched.html#sched-parti>

<sup>25</sup> In 1928, the Howard League for Penal Reform compiled comparative data from Denmark, Sweden, Norway, Holland, and England. See THE ABOLITION OF THE DEATH PENALTY IN HOLLAND AND SCANDINAVIA 3 (S. Margery Fry ed., 2d ed. 1928) (Fry stated that in reviewing the data, “we can

lowing the adoption of the *ECHR* in 1950, the regional human rights principles were initially inconsistently applied to the application of the death penalty.<sup>26</sup> However, the gradual removal of the punishment from the Member States' criminal legislation, predominantly for policy reasons in the recognition of the inutility of the punishment and a growing concern about the compatibility of the punishment with principles of humanitarianism, opened the door for a future centralized position against the punishment.<sup>27</sup> In 1979, only France, in Western Europe,

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obtain evidence of probability, almost amounting to proof, that its abolition does not permanently raise [the murder rate]"); *id.* at 5 (Carl Torp, Professor of Penal Law at the University of Copenhagen stated that in Denmark, the non-application of the death penalty had, "not in any way contributed to an increase in the number of such crimes which were formally punished by death."); *id.* at 8 (In Holland, Dr. J Simon van der Aa, stated, "since the abolition of capital punishment, the number of life sentences passed has shown a tendency to diminish."); *id.* at 15 (Victor Almquist, the Head of the Swedish Prison Administration in 1928 stated, "[t]he reduction in the number of capital sentences and the final abolition of the penalty so far from leading to an increase of offences of this kind was actually followed by a noticeable decrease in crimes legally punished by death"); *see also* REPORT OF THE SELECT COMMITTEE ON CAPITAL PUNISHMENT (1931) (a wide range of European perspectives was considered and the Belgium Minister of Justice stated in report for the Committee "[i]t seems inconceivable that a Minister of Justice should ever think it possible to establish a penalty the uselessness of which, to put it no higher, has been amply demonstrated,"); *id.* at 577. (The Danish Government submitted to the Committee stating "it seems unnecessary to propose the retention of capital punishment for the sake of public security"); *id.* at 584. In reviewing the evidence, the Committee concluded, "capital punishment may be abolished in [England] without endangering life or property, or impairing the security of society." *Id.* at xcvi; *see also* Report of the Royal Commission on Capital Punishment (1949-1953) (1954) (The Royal Commission arrived at a similar conclusion to that of the Select Committee, and Lord Templewood reviewed the comparative arguments presented to the Royal Commission and stated that the, "conclusion seems to be inescapable that, whatever may be argued to the contrary, the existence of the death penalty makes little or no difference to the security of life."). THE SHADOW OF THE GALLOWS: THE CASE AGAINST CAPITAL PUNISHMENT 56 (1951).

<sup>26</sup> It is important to note here that at this time there was no formulated coherent European Union position on the death penalty and the gradual state by state removal of the punishment reflects that this was initially an issue being considered by the individual governments.

<sup>27</sup> *See, e.g.*, ROGER HOOD ET AL., THE DEATH PENALTY: ABOLITION IN EUROPE (Council of Europe ed., 1999); ROBERT BADINTER ET AL., DEATH PENALTY: BEYOND ABOLITION (Council of Europe ed., 2004); HANS GÖRAN FRANCK, THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY (William A. Schabas ed., 2003); ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE, (4th ed. 2008); SANGMIN BAE, WHEN THE STATE NO LONGER KILLS: INTERNATIONAL HUMAN RIGHTS NORMS AND ABOLITION OF CAPITAL PUNISHMENT (2007); Evi Girling, *European Identity*

still implemented the death penalty as a punishment for ordinary crimes and had carried out an execution in 1977.<sup>28</sup> Then, in 1980, a member of the European Parliament, Mr. Rogers, raised a question on the death penalty to the conference of the Foreign Ministers.<sup>29</sup> He noted the campaign of Amnesty International and the early initiatives in the United Nations<sup>30</sup> and asked that the Foreign Ministers “coordinate their policies on this matter with the aim of speaking with a single voice in the United Nations and other international bodies against” the death penalty.<sup>31</sup> Mr. Zamberletti, the President-in-Office of the Foreign Ministers observed that the “ever increasing recourse to capital punishment for political reasons was intolerable”<sup>32</sup>

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*and the Mission Against the Death Penalty in the United States*, in *The Cultural Lives of Capital Punishment: Comparative Perspectives* 112 (Austin Sarat & Christian Boulanger eds., 2005); Agata Fijalkowski, *European Policy on the Death Penalty*, in *IS THE DEATH PENALTY DYING? EUROPEAN AND AMERICAN PERSPECTIVES* 268 (Austin Sarat & Jürgen Martschukat eds., 2011).

<sup>28</sup> HOOD & HOYLE, *supra* note 27, at 47. It should be noted that Michael Manning was the last person to be executed in Ireland in 1954. The death penalty remained on the statute books until it was abolished in 1990, and then the Twenty First Amendment of the Constitutional Act 2001, Article 15.5.2, explicitly prohibits the death penalty. See Twenty-First Amendment of the Constitution Act, 2001, available at <http://www.irishstatutebook.ie/2001/en/act/cam/0021/sched.html#sched-parti>

<sup>29</sup> 1980 O.J. (C 117) 33.

<sup>30</sup> At the 1977 Stockholm Conference Amnesty International laid the platform for their campaign against the death penalty, see, <http://www.amnesty.org/en/who-we-are/history>. See generally, G.A. Res. 2857 (XXVI), U.N. Doc. A/8588 (December 20, 1971). See also, Eric Prokosch, *The Death Penalty Verses Human Rights*, in Robert Hood et al., *The Death Penalty: Abolition in Europe* 18 (Council of Europe ed., 1999).

<sup>31</sup> *Supra* note 29.

<sup>32</sup> In Europe an early argument for the rejection of the death penalty for political crimes was most cogently made by the nineteenth century French jurist, François Guizot, who wrote about the use of the death penalty during and after the French Revolution. Guizot stated, “[p]unishments may destroy men, but they can neither change the interests nor sentiments of the people . . . [the government] may kill one or several individuals, and severely chastise one or several conspiracies, but if it can do no more than this, it will find the same perils and the same enemies always before it. If it is able to do more, let it dispense with killing for it has no more need of it; less terrible remedies will suffice.” In the presence of mass civil unrest (terrorist violence) Guizot observed, “[w]e live in a society recently overturned, where legitimate and illegitimate interests, honourable and blameable sentiment, just and false ideas, are so mingled, that it is very difficult to strike hard without striking wrong[.]” *A Treatise on Death Punishments*, in *GENERAL HISTORY OF CIVILISATION IN EUROPE: FROM THE FALL OF THE ROMAN EMPIRE TILL THE*

but that the then nine Member States had “not re-examined the question” of abolition.<sup>33</sup> So the death penalty was still reserved, and thus privileged, as a penological question for the Member States and not a competency question for the region. However, Mr. Rogers pressed the issue further when he replied:

[w]ould not the Foreign Ministers accept that, in spite of their constantly reiterated desire to speak with a single voice, it is rather anomalous that France alone in Western Europe applies the death penalty...[w]ould not the Ministers think this a rather anomalous situation that one country in the Community should still carry the death penalty?<sup>34</sup>

Mr. Zamberletti confined his reply and reiterated that “[t]he view of the Nine is that the application of the death penalty for political reasons is unacceptable” but the Member States of the EC will consider the question of the death penalty within the General Assembly of the United Nations.<sup>35</sup>

However, this attempt to shift the focus to the human rights region of the UN did not prevent further questions being tabled to the Commission and the Council. In 1985, a Member of the European Parliament, Mr Willy Kuijpers, noted that Amnesty International regularly campaigned against the death penalty and so repeated the call for clarity within the EC.<sup>36</sup>

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FRENCH REVOLUTION 327, 277 (1848). Guizot’s observations on the rejection of the death penalty for political offences, can also be applied for modern terrorist crimes, and when Marc Ancel reviewed the French and British abolitionist arguments from the mid-nineteenth century, he stated, “[i]n France, Guizot and Charles Lucas represented this movement [those arguing against the death penalty for ‘reason of state’], which in 1848 ended with the removing of the death penalty for political crimes...the utilitarian current, which, in diverse forms, was evident from [Jeremy] Bentham to [John] Stuart Mill or to [Herbert] Spencer, and among jurists to [Pellegrino] Rossi, affirmed that it was proper to search for happiness and not for pain. In particular, punishment should be ‘no more than just, nor more than necessary’; this led one logically to ask, if it was ever really necessary to punish any offender by death regardless of his crime.” See *The Problem of the Death Penalty*, in *CAPITAL PUNISHMENT 3* (Thorsten Sellin ed., 1967).

<sup>33</sup> In 1980, the nine Member States were Germany, France, Italy, the Netherlands, Belgium, Luxembourg, Denmark, Ireland, and the United Kingdom.

<sup>34</sup> 1980 O.J. (C 117) 33; see generally Robert Badinter, *ABOLITION: ONE MAN’S BATTLE AGAINST THE DEATH PENALTY* (2008).

<sup>35</sup> *Id.*

<sup>36</sup> 1985 O.J. (C 276) 28 (asking “[c]an the Commission say: in which Member States of the Community and Spain and Portugal does the death

Then in 1986 it was asked in the Council whether the EEC Treaty, Article 4(1) ensured that, “[a]bolition of the death penalty and possible restoration of it do not fall within the Community’s competence.”<sup>37</sup> The answer given by President Jacques Delors on behalf of the Commission was:

. . . the matter in question [on the death penalty] does not come within [the Community’s] jurisdiction and it is therefore unable to supply the information requested. It can, however, inform the Honourable Member that Parliament has examined the matter in question on a number of occasions in the past. It has no doubt that he will be able to obtain all the necessary references to the information he seeks from the relevant departments of Parliament’s General Secretariat.<sup>38</sup>

The Commission’s response demonstrated that at this time there was no specifically created regional body to create, analyze, and disseminate information on the death penalty. However, work was being done by the Parliament which had taken upon itself to be the initial petri-dish to consider the vicissitudes of the punishment. In 1980 the Parliament adopted its first resolution calling for abolition in the EC.<sup>39</sup> The *Resolution on the Abolition of the Death Penalty in the European Community* gave regard to the initiatives against the death penalty in the Parliamentary Assembly of the Council of Europe.<sup>40</sup> It stated that Mr Schwartzberg’s question had made it “possible for Parliament to hold a debate in the future” on the punishment, and Paragraph One of the Resolution, “[a]sks that, pending these developments the Member States should suspend all capital punishment.”<sup>41</sup> Paragraph Two then instructed that this resolution be forwarded to the Council and Commis-

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penalty still exist? In which countries is it still carried out? How is it carried out?”).

<sup>37</sup> 1986 O.J. (C 249) 27.

<sup>38</sup> 1985 O.J. (C 276) 28.

<sup>39</sup> Resolution on the Abolition of the Death Penalty in the European Community, 1980 O.J. (C 327) 95.

<sup>40</sup> The Parliamentary Assembly Resolution 727 (1980), *On the Abolition of Capital Punishment*. This resolution set the Assembly’s early standards on the abolition of the death penalty; see also, Parliamentary Assembly Recommendation 891 (1980) *On the European Convention on Human Rights – Abolition of Capital Punishment*, to the Committee of Minister’s to solidify the Assembly’s abolitionist standards to be communicated to the member states. See also PARL ASS. DEB. 32nd Sess. (Apr. 22, 1980).

<sup>41</sup> Resolution on the Abolition of the Death Penalty in the European Community, *supra* note 39.

sion.<sup>42</sup> Even though the death penalty was not being implemented in the region, the Parliament was attempting to establish an official moratorium on all executions in the region until the status of the punishment could be determined by the region's organs. At this time the Member States had suspended executions and restricted their own capital judicial systems independently of an official regional position, but the Parliament did not want to allow a de-centralized legal position to remain.<sup>43</sup> It therefore marked the political platform for developing a more thorough consideration of the punishment at the regional level. In 1981 the Parliament strengthened this initial abolitionist discourse with another resolution recognizing that the, "European Community is not simply a 'common market,' but also a common civilization."<sup>44</sup> It not only recalled the first Resolution<sup>45</sup> and Recommendation<sup>46</sup> on the death penalty in the Parliamentary Assembly of the Council of Europe, but it also considered Articles 3 and 5 of the *Universal Declaration of Human Rights*<sup>47</sup> and stated:

whereas any concept of human rights consonant with the principles of European civilisation requires that the right to live be respected and guaranteed for all, therefore the law must be strong to defend potential victims and be consistent by never ordering that human life be taken.<sup>48</sup>

The preamble also noted: (i) it was possible to execute innocent people; (ii) that the punishment did not have any special deterrent effect; (iii) that humanitarian measures should be pursued; and (iv) it was the Parliament's "hope that this initia-

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<sup>42</sup> *Id.* at 96.

<sup>43</sup> *Id.*

<sup>44</sup> European Parliament Resolution on the Abolition of the Death Penalty in the European Community, 1981 O.J. (C 172).

<sup>45</sup> *On the Abolition of Capital Punishment, supra note 40.* Although the question of the death penalty was first raised by Astrid Bergegren in the Consultative Assembly in 1973, see Committee on Legal Affairs, Motion for a Resolution on the Abolition of Capital Punishment, May 18, 1973 (8th sitting) Doc. 3297.

<sup>46</sup> *On the Abolition of Capital Punishment, supra note 40.*

<sup>47</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (Art. 3, "Everyone has the right to life, liberty and security of the person." Art. 5, "No one shall be subject to torture, or to cruel, inhuman or degrading treatment or punishment.").

<sup>48</sup> European Parliament Resolution on the Abolition of the Death Penalty in the European Community, 1981 O.J. (C 172) 73.

tive will provide inspiration for all countries in the world which still enforce the death penalty” to abolish the punishment.<sup>49</sup> Paragraph One stated that the Parliament “[e]xpresses its strong desire that the death penalty should be abolished throughout the Community” and Paragraph Three identified that it “[h]opes, with that end in view, that a wide-ranging debate on the abolition of the death penalty will take place within competent national bodies and in the necessary spirit of calm consideration.”<sup>50</sup> In doing so, the Parliament was persistently pushing for a centralized enquiry with the aim of creating uniformity on the rejection of the punishment. What was being proposed was the formation of the regional position on this criminal justice issue. The Parliament was attempting to provide the impetus for a legal platform that Member States should never be justified to order that “human life be taken”<sup>51</sup> in the application of a death penalty. These developments reveal that the early 1980s can be viewed as the Member States providing the initial solidification of the possibility of abolition and the initial regional approaches to this question were on the whole championed by the Parliament.

In 1986, the Parliament set a further proactive mandate in adopting a resolution<sup>52</sup> to call upon Member States to ratify *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty* (hereinafter, “*Protocol No. 6*”).<sup>53</sup> *Protocol No. 6* establishes the abolition of the death penalty for ordinary crimes for Member States of the CoE, but allows for the punishment in times of war or in the imminent threat of war.<sup>54</sup> The

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

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

<sup>52</sup> European Parliament Resolution on the Abolition of the Death Penalty and the Accession to the Sixth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1986 O.J. (C 36) 214.

<sup>53</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, C.E.T.S. No. 114. See Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. Res. 44/128, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Dec. 15, 1989).

<sup>54</sup> *Id.* Protocol No. 6, (Art. 1, “The death penalty shall be abolished. No-one shall be condemned to such penalty or executed,” Art. 2, “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 on-

resolution noted that Belgium, Germany, Greece, Italy, the Netherlands, and Portugal had not ratified *Protocol No. 6*<sup>55</sup> and that Ireland and the United Kingdom had not yet signed it.<sup>56</sup> By 1986, the only EC Member States which had ratified *Protocol No. 6* were Denmark, Luxembourg, and Spain.<sup>57</sup> This Parliament resolution not only called for the strengthening of the regional abolitionist position, by urging a unified rejection of the punishment within the EC, but it also demonstrated that within the sister European regions of the EC and the CoE, there was an emerging symbiosis of the abolitionist position.<sup>58</sup> A further Parliament resolution was then adopted in 1992,<sup>59</sup> reaffirming the call for abolition of the death penalty and urging all Member States to ratify *Protocol No. 6*, and also for the adoption of the United Nation's mechanism for abolition, in the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, (hereinafter, "*Second Optional Protocol*"), which abolishes the death penalty in times of peace.<sup>60</sup> Here, the Parliament was urging Member States to not only ratify the European human rights instrument of the CoE but it was also seeking a regional position against the death penalty at the level of the United Nations. This was a visionary position that will come to fruition over the next two decades.

Since 1986, the region has debated promoting abolition as a global initiative.<sup>61</sup> The Parliament's first resolution concern-

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ly 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>55</sup> 1986 O.J. (C 36) 215.

<sup>56</sup> *Id.* at 1.

<sup>57</sup> See *infra* Appendix 1.

<sup>58</sup> However, there were some early questions put to the restoration of the death penalty in Europe. See 1986 O.J. (C 249) 23. But this initiative was abandoned.

<sup>59</sup> European Parliament Resolution on the Death Penalty, 1992 O.J. (C 094) 277.

<sup>60</sup> Second Optional Protocol, (Art. 1(1), *supra* note 53 ("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>61</sup> Question No. 42 by Mr. Arbeloa Muru (H-467/86) to the Foreign Ministers of the Member States of the European Community meeting in Political Cooperation: Efforts to Abolish the Death Penalty in the World, Debates of the European Parliament, No. 343, at 0153; Question No. 31 by Mr. Arbeloa Muru (H-200/88) to the Foreign Ministers meeting in Political Cooperation: The Death Penalty in the USA, Debates of the European Parliament,

ing a third country outside of the region was the 1989 condemnation of the application of the death penalty for political prisoners in Chile.<sup>62</sup> In 1991, there was another resolution presented to Brazil urging it not to reinstate the death penalty.<sup>63</sup> In 1994, the Parliament shifted its focus to Africa, and denounced the death sentences imposed in Egypt and Algeria.<sup>64</sup> Additional resolutions had been passed against the extension of the death penalty in El Salvador,<sup>65</sup> the Philippines,<sup>66</sup> and Iran.<sup>67</sup> Further attempts were then made to prevent the death sentence of Tenzin Delek Rinpoche in Tibet.<sup>68</sup> Two resolutions were adopted condemning the death penalty practices of the United States in 1990<sup>69</sup> and 1992,<sup>70</sup> and in 1995, two further resolutions were passed, one against the reintroduction of the death penalty in the State of New York,<sup>71</sup> and the second in the specific case of Mumia Abu-Jamal.<sup>72</sup> From 1995 onwards, corpuses of resolutions have denounced both US state and federal government application of the death penalty.<sup>73</sup>

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91986H0467, No. 369, at 0178.

<sup>62</sup> European Parliament Resolution on the Application of the Death Penalty to Political Prisoners in Chile, 1989 O.J. (C 096) 139.

<sup>63</sup> European Parliament Resolution on the Possible Reintroduction of the Death Penalty in Brazil, 1991 O.J. (C 183) 183.

<sup>64</sup> European Parliament Resolution on the Death Penalty in Egypt and Algeria, 1994 O.J. (C 020), 168.

<sup>65</sup> European Parliament Resolution on the Possible Extension of the Death Penalty in El Salvador, 1998 O.J. (C 313) 185.

<sup>66</sup> European Parliament Resolution on the Death Penalty in the Philippines, 2004 O.J. (C 091 E) 691.

<sup>67</sup> European Parliament Resolution on Iran, 2005 O.J. (C174 E) 190.

<sup>68</sup> European Parliament Resolution on Tibet, the Case of Tenzin Delek Rinpoche, 2005 O.J. (C 201 E) 122; European Parliament Resolution on Tibet, 2005 O.J. (C 247 E) 158.

<sup>69</sup> European Parliament Resolution on the Death Penalty in the United States, 1990 O.J. (C 149) 139.

<sup>70</sup> European Parliament Resolution on the Death Penalty in the United States, 1992 O.J. (C 176) 124.

<sup>71</sup> European Parliament Resolution on the Reintroduction of the Death Penalty in the State of New York, 1995 O.J. (C 089) 154.

<sup>72</sup> European Parliament Resolution on the Death Penalty in the United States and the Abu-Jamal Case, 1995 O.J. (C 166) 131.

<sup>73</sup> *See, e.g.*, European Parliament Resolution on the Death Penalty in the United States, 1998 O.J. (C 138) 176; European Parliament Resolution on the Death Penalty Passed on Rocco Derek Barnabei in the United States, 1998 O.J. (C 328) 193; European Parliament Resolution on the Abolition of the Death Penalty in the United States, 2001 O.J. (C 040) 424; European Parliament Resolution on the Abolition of the Death Penalty in the United States, 2001 O.J. (C 121) 404.

These political statements contributed to the solidification of the region's abolitionist position in the 1990s and they encouraged its promotion in retentionist countries around the world. The recent EU external policies are considered below as part of the operations of the European External Action Service.

*B. The EU Treaties and the Formation of Internal Abolition Criteria*

The EU's Treaty provisions setting out its human rights policy in general and its abolitionist policy in particular, developed gradually. The *Treaty of Maastricht* of 1992<sup>74</sup> did not contain specific abolitionist language, but stated in Article F(2) that:

[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms...and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

This was a general recognition of the regional affirmation and promotion of human rights within the *ECHR*, without a specific reference to the death penalty. What this demonstrated was that at the Treaty level, the CoE human rights framework was recognized and affirmed, but the particular human rights standards within the Articles of the *ECHR* were yet to be determined. Under the *Treaty of Maastricht*, the CoE's *ECHR*, and at this time, *Protocol No. 6*, with the jurisprudence of the European Court of Human Rights, provided the human rights benchmark. As detailed above, the "constitutional traditions" of the EU Member States were evolving into a hegemonic state rejection of the punishment, but it is clear that the regional position was not yet fully homogenous with the general position of the Member States. A process was being laid for the solidification of the political will for a Treaty position against the punishment and this process was building upon the foundational work of the Parliament. A very positive step was then taken in the Final Act of the *Treaty of Amsterdam of the European Union* of 1997<sup>75</sup> which included the "Declaration on the Abolition

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<sup>74</sup> Treaty of Maastricht, *supra* note 22.

<sup>75</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts,

of the Death Penalty” that stated:

[w]ith reference to Article F(2) of the Treaty on European Union, the Conference recalls that Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . which has been signed and ratified by a large majority of Member States, provides for abolition of the death penalty.

In this context, the Conference notes the fact that since the signature of the abovementioned Protocol on 28 April 1983, the death penalty has been abolished in most of the Member States of the Union and has not been applied in any of them.<sup>76</sup>

The *Treaty of Amsterdam* provided the first Treaty affirmation that the move towards abolition of the death penalty was included within the legal and political agenda of the EU. Through this Declaration the *Treaty of Amsterdam* endorsed the strengthening of the human rights discourse against the death penalty, and pointed towards the creation of a regional position, which was at this time also reflected in the majority of the Member States’ ratification of *Protocol No. 6*.<sup>77</sup> Then, in 2000, the *Charter*<sup>78</sup> was adopted signaling a clear and specific EU rejection of the punishment and it was incorporated into the *Treaty of Lisbon* of 2007. Through the *Treaty of Lisbon*, the *Charter* has the same legal value as the Treaties. The *Treaty of Lisbon*, Article 6 states:

(1) The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union...which shall have the same legal value as the Treaties.

(2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.

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Oct. 2, 1997, 1997 O.J. (C 340) 1.

<sup>76</sup> *Id.* at 125. See also WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW*, 302-09 (3d ed. 2002).

<sup>77</sup> Protocol No. 6, *supra* note 53.

<sup>78</sup> Charter of Fundamental Rights, *supra* note 7; Protocol Relating to Article 6(2), *supra* note 8, at 155. The abolition of the death penalty can also be seen as being incorporated within the expansion process under the Agenda 2000 provisions. *Agenda 2000, For a Stronger and Wider Union*, COM (97) 2000 Final (July 15, 1997). For the implementation of Agenda 2000, see also ANDREW WILLIAMS, *EU HUMAN RIGHTS POLICIES: A STUDY IN IRONY*, 53-74 (2004).

(3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional treaties common to the Member States, shall constitute general principles of the Union's law.<sup>79</sup>

CoE human rights have become “general principles of the Union's law.” To understand how the “rights, freedoms and principles” are recognized and protected by the EU, it is necessary to evaluate the human rights principles set out in both the *ECHR* and the *Charter*. Article 1 of the *Charter* states that “[h]uman Dignity is inviolable. It must be respected and protected.”<sup>80</sup> It signals a legislative evolution with an enhanced human rights focus, as in 2007, Franco Frattini, former European Commissioner responsible for Justice, Freedom and Security, stated “the abolition of the death penalty is an essential achievement for the respect for human dignity . . .” and “[i]t is also a basic feature of the European model. In fact, we can say with pride, respect for human life and dignity are basic values”.<sup>81</sup> The EU's Strategic Framework and Action Plan on Human Rights and Democracy of June 2012 and the EU Guidelines on the Death Penalty affirmed the specific evolution in this human rights principle, as they state that the death penalty “constitutes [a] serious violation . . . of human rights and human dignity.”<sup>82</sup> This provision expands the language of contemporary European human rights to encompass the promotion of dignity in punishment and the notion that the death penalty itself should now be considered as a violation of human dignity.<sup>83</sup>

The *Charter*, Article 2, “Right to Life” states that: “(1) Everyone has the right to life, and (2) No one shall be condemned to the death penalty, or executed.”<sup>84</sup> Under the *Charter*, both

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<sup>79</sup> Protocol Relating to Article 6(2), *supra* note 8, at 13.

<sup>80</sup> Charter of Fundamental Rights, *supra* note 7, at 9.

<sup>81</sup> Franco Frattini, European Commissioner responsible for Justice, Freedom and Security, Speech at Europe Against the Death Penalty (Oct. 9, 2007); see also Elizabeth Wicks, *The Meaning of Life: Dignity and the Right to Life in International Human Rights Treaties*, 12 HUM. RTS. L. REV. 2, 199-219 (2012).

<sup>82</sup> EU Strategic Framework, *supra* note 11, at 3.

<sup>83</sup> For a detailed historical review of dignity in punishment in both Europe and America, see generally JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

<sup>84</sup> Charter of Fundamental Rights, *supra* note 7, at 9.

the “death penalty” and “executions” are prohibited.<sup>85</sup> This indicates that the whole capital judicial process is denounced from the possibility of a capital charge, the initiation of a capital trial, the sentence of death, placing people on death row, through to the final death sanctioned by the state in the execution of the inmate. Each part of any capital judicial system is a violation of *Charter* Article 2. Here the EU has mandated its complete rejection of the death penalty. In the sister European region of the CoE, the text of *ECHR* Article 2(1)<sup>86</sup> establishes the right to life, but originally provided for a possible death sentence. *ECHR* Article 2(1) states:

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>87</sup>

Article 2(1) has not yet been specifically amended through textual alteration. However, *Protocol 13* to the *ECHR*,<sup>88</sup> Article 1 states that “[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed . . .” and following ratification of this protocol, *ECHR* Article 2(1) should now be interpreted to not provide a loop-hole for any Member States to apply the punishment. This legal principle can be seen as established by the European Court of Human Rights in *Al-Saadoon and Mufdhi v. United Kingdom*,<sup>89</sup> and affirmed in *Rrapo v. Albania*,<sup>90</sup> through the court’s consideration of *ECHR* Article 2(1) and *Protocol No. 13*, Article 1 together.

In *Al-Saadoon and Mufdhi*, the European Court of Human Rights assessed the abolition of the death penalty by CoE Member States, and the ratifications of *Protocol No. 13* and held:

[t]he right under Article 1 of Protocol No. 13 not to be subjected to the death penalty, which admits of no derogation and applies in all circumstances, ranks along with the rights in Articles 2 and

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<sup>85</sup> *Id.*

<sup>86</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 8, art. 2(1).

<sup>87</sup> *Id.*

<sup>88</sup> Protocol No. 13, *supra* note 10.

<sup>89</sup> *Al-Saadoon and Mufdhi v. United Kingdom*, App. No. 61498/08, Eur. Ct. H.R. 282 (2010).

<sup>90</sup> *Rrapo v. Albania*, App. No. 58555/10, ¶ 69 Eur. Ct. H.R. (2012).

3 as a fundamental right, enshrining one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed. . . . 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>91</sup>

The Court provides the interpretation that Member States' signatures and ratifications of *Protocol No. 13* indicate that there is a human rights norm created in the CoE. *ECHR* Article 2(1) is now to be interpreted to not provide the facility for any Member State to impose the death penalty. Consequently, when a Member State ratifies *Protocol No. 13*, for that country, the text of the protocol supersedes the death penalty clause in the text of *ECHR* Article 2(1). Furthermore, CoE Member State practice in the abolition of the death penalty is a "strong indication" of a general principle of European human rights that Article 2(1) is now amended to nullify the clause permitting the death penalty.

The court also held that Articles 2(1) and 3 are fundamental rights. Both Articles provide human rights standards from which to scrutinize and denounce the death penalty. The *ECHR* Article 3 has an identical provision to the *Charter* Article 4, in that they state, "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>92</sup>

The CoE has debated since 1973 whether the death penalty is a *per se* violation of the prohibition against inhuman punishment.<sup>93</sup> The European Court of Human Rights has evolved its *ECHR* Article 3 analysis of the capital judicial system to cover; (i) the capital charge and trial process,<sup>94</sup> (ii) the circumstances when a death sentence is commuted to life imprison-

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<sup>91</sup> *Al-Saadoon*, App. No. 61498/08 Eur. Ct. H.R. ¶ 118, 120.

<sup>92</sup> Charter of Fundamental Rights, *supra* note 7.

<sup>93</sup> Motion for a Resolution on the Abolition of Capital Punishment (Doc. 3297), Committee on Legal Affairs, 8th sitting May 18, 1973. *See also*, unpublished report submitted to the Committee on Legal Affairs in 1975, cited in Parliamentary Assembly, *Report on the abolition of capital punishment* (Doc. 4509, 2), 2nd and 3rd sittings, Apr. 22, 1980; Parliamentary Assembly, Official Report of Debates (32nd Ordinary Session) *Abolition of Capital Punishment*, Debate on the report of the Committee on Legal Affairs, 2nd and 3rd sittings, Apr. 22, 1980.

<sup>94</sup> *See* *Tarlan v. Turkey*, App. No. 31096/02, Eur. Ct. H.R. (2006); *Öcalan v. Turkey*, App. No. 46221/99, 41 Eur. H.R. Rep. 45, 985 at ¶ 169 (2003).

ment,<sup>95</sup> (iii) extradition and deportation cases,<sup>96</sup> (iv) the initiation of a moratorium and the consequences of the suspension of executions,<sup>97</sup> (v) the physiological and psychological impact of incarceration conditions,<sup>98</sup> (vi) different methods of execution,<sup>99</sup> and (vii) the death row phenomenon as a jurisprudential consideration of the above factors collectively.<sup>100</sup> However, in *Al-Saadoon and Mufdhi*, the court has established an evolved Article 3 threshold from which to consider future death penalty cases when it held:

[t]he Court does not consider that the wording of the second sentence of Article 2(1) continues to act as a bar to [the Court] interpreting the words “inhuman or degrading treatment or punish-

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<sup>95</sup> See *Kotalla v. The Netherlands*, App. No. 7994/77, 14 Eur. Comm'n H.R. Dec. & Rep. 238 (1978); *Ilaşcu and others v. Russia and Moldova*, App. No. 48787/99, Eur. Ct. H.R. (2004); *Maksimov v. Azerbaijan*, App. No. 38228/05, Eur. Ct. H.R. (2010); *Hummatov v. Azerbaijan*, App. Nos. 9852/03 and 13413/04, Eur. Ct. H.R. (2006).

<sup>96</sup> See *Kirkwood v. United Kingdom*, App. No. 10479/83, 6 Eur. Comm'n H.R. 370 (1984); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 436 (1989); see also Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991); Ann Sherlock, *Extradition, Death Row and the Convention*, 15 EUR. L. REV. 87 (1990); Susan Marks, *Yes, Virginia, Extradition May Breach the European Convention on Human Rights*, 49 CAMBRIDGE L.J. 194 (1990); *Bader and Kanbor v. Sweden*, App. No. 13284/04, Eur. Ct. H.R. (2006).

<sup>97</sup> See *Poltoratskiy v. Ukraine*, App. No. 38812/97, Eur. Ct. H.R. (2003); *Kuznetsov v. Ukraine*, App. No. 39042/97, Eur. Ct. H.R. (2003); *Nazarenko v. Ukraine*, App. No. 39483/98, Eur. Ct. H.R. (2003); *Dankevich v. Ukraine*, App. No. 40679/98, Eur. Ct. H.R. (2003); *Aliev v. Ukraine*, App. No. 41220/98, Eur. Ct. H.R. (2003); *Khokhlich v. Ukraine*, App. No. 41707/98, Eur. Ct. H.R. (2003); *Iorgov v. Bulgaria*, App. No. 40653/98, Eur. Ct. H.R. (2004); *G.B. v. Bulgaria*, App. No. 42346/98, Eur. Ct. H.R. (2004).

<sup>98</sup> See *Poltoratskiy*, App. No. 38812/97 ¶ 109-117; *Kuznetsov*, App. No. 39042/97 ¶ 89-96; *Nazarenko*, App. No. 39483/98 ¶ 94-102; *Dankevich*, App. No. 40679/98 ¶ 94-102; *Aliev*, App. No. 41220/98 at 92-100; *Khokhlich*, App. No. 41707/98 ¶ 133-141.

<sup>99</sup> See *Soering*, 161 Eur. Ct. H.R. ¶ 141-143, (where the Commission held that electrocution did not “attain a level of severity contrary to Article 3”).

<sup>100</sup> See *Kirkwood*, App. No. 10479/83 at 165. (Under the heading, ‘Implementation of the Death Penalty and the “Death Row” Phenomenon,’ the European Commission of Human Rights considered the fluctuation of the total number of people on death row in California and the time inmates waited on death row during their appeals up to their execution. Up to March 1983, the longest an inmate had to wait following appeals was a period of 5 years. The Soering Court confirmed that the death row phenomenon: “may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death.” *Soering*, 161 Eur. Ct. H.R. ¶ 81).

ment” in Article 3 as including the death penalty.<sup>101</sup>

It now appears appropriate that along with the Court’s recognition that there are circumstances in which Article 2(1) can be viewed as amended, that it now should be interpreted that the death penalty is a *per se* violation of *ECHR* Article 3. As the text of Article 2(1) is considered amended, there is no “bar” to the death penalty being considered to be an inhuman and degrading punishment.

In addition, as the *Charter* Article 2 prohibits the “death penalty” and “executions,” it would appear that all of these aspects of the capital judicial process would be considered by the Court of Justice of the European Union<sup>102</sup> (as opposed to the many cases of complex jurisprudence of the CoE’s European Court of Human Rights) as a *per se* violation of Union law. The *Charter* appears to offer a clearer and more easily defined route towards abolition of the death penalty, and this is primarily because it is a more recent regional instrument on human rights. The *ECHR* was drafted in 1949-1950,<sup>103</sup> when the European political sentiment concerning the punishment was ambivalent, but the *Charter* was adopted in 2000 within an evolved and solidified European anti-death penalty discourse. The human rights issues that the CoE organs have had to consider, debate, and adjudicate, may be less felt by the organs of the EU.

As prospective Member States must have a commitment to human rights, they would be required to abolish the death penalty as a, “pre-condition for entry into the Union.”<sup>104</sup> This prerequisite for membership became the official policy following the 2001 Commission communication to the Council and the Parliament, *The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries*, which identified that the “EU’s commitment to the abolition of the

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<sup>101</sup> *Al-Saadoon*, App. No. 61498/08 Eur. Ct. H.R. ¶ 118, 120.

<sup>102</sup> For a discussion on the adjudication of European human rights, and the relationship of the European Court of Human Rights and the Court of Justice of the European Union, see *An Interview with Judge Paul Mahoney by Dr Jon Yorke*, BLOGSPOT (Oct. 17, 2013), <http://jonyorkehumanrights.blogspot.co.uk/2013/10/an-interview-with-judge-paul-mahoney-by.html> (last visited Oct. 30, 2013).

<sup>103</sup> See generally, COLLECTED EDITION OF THE ‘TRAVAUX PREPARATOIRES’ OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1976).

<sup>104</sup> European Union, European External Action Service, *EU Policy on Death Penalty*, [http://www.eas.europa.eu/human\\_rights/adp/index\\_en.htm](http://www.eas.europa.eu/human_rights/adp/index_en.htm) (last visited Oct. 7, 2013).

death penalty was reaffirmed in Article 2 of the EU Charter. It is a requirement for countries seeking EU membership.”<sup>105</sup> This precondition for membership is also considered to be implicit within the abovementioned *Charter* and the *Treaty of Lisbon*.<sup>106</sup> No existing or future Member State can legally re-introduce the death penalty once it is abolished.

### III. ABOLITION AND THE EU’S EXTERNAL HUMAN RIGHTS POLICY

The EU has utilized the internal abolitionist strategies to create, assess, and enhance bilateral and multi-lateral policies for its human rights external project. The European Treaties now provide a firm basis for the EU’s external human rights policy. According to Article 2 of the *Treaty of Maastricht*, the “Union is founded on the value of respect for human dignity . . . the rule of law and respect for human rights” and under Article 3 the Union must uphold and promote these values in its relations with the “wider world.”<sup>107</sup> This task is also taken up in Article 21(a), which states that the:

[u]nion’s action on the international scene shall be guided by the principles which have inspired its own creation...and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms.<sup>108</sup>

On June 16 2010, Catherine Ashton, the High Representa-

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<sup>105</sup> *Commission Communication*, *supra* note 12, at 16 (Between 1994 and 1997, the Council of Europe Parliamentary Assembly and Committee of Ministers had a dialogue on the requirement of the abolition of the death penalty as a prerequisite of membership to the CoE region, and Resolution 1097 on the abolition of the death penalty in Europe, text adopted by the Parliamentary Assembly (24<sup>th</sup> Sitting, Jun. 28, 1996, 6) stated, “a moratorium upon accession has become a prerequisite for membership of the Council of Europe.” See Yorke, *The Right to Life*, *supra* note 16, at 213-216.

<sup>106</sup> *Treaty of Lisbon*, *supra* note 6.

<sup>107</sup> *Treaty of Maastricht*, *supra* note 22, at art. 3 (“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”).

<sup>108</sup> *Id.* art. 21(a).

tive of the Union for Foreign Affairs and Security Policy,<sup>109</sup> in her speech in the Parliament, declared the EU's work on abolishing the death penalty worldwide to be a "personal priority."<sup>110</sup> The 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy, list the fight against the death penalty as one of the EU's priority human rights issues, stating that the death penalty constitutes "a serious violation . . . of human rights and human dignity. Encouraged by the growing momentum towards abolition of the death penalty worldwide, the EU will continue its long-standing campaign against the death penalty."<sup>111</sup> At the bilateral level, the EU has implemented targeted strategies identified in the EU Guidelines on the Death Penalty,<sup>112</sup> including bilateral diplomacy, general bilateral action, and bilateral intervention in individual cases.

#### A. *EU Guidelines on the Death Penalty*

The framework for diplomatic EU abolitionist action, including objectives, circumstances and instruments, are set out in the EU Guidelines on the Death Penalty.<sup>113</sup> The Death Penalty Guidelines were the first set of EU human rights guidelines.<sup>114</sup> The guidelines, adopted at the ministerial level, are

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<sup>109</sup>*Id.* According to the Treaty of Maastricht arts 18 and 27, the Union's common foreign and security policy is conducted by a High Representative of the Union for Foreign Affairs and Security.

<sup>110</sup> Catherine Ashton, High Representative of the Union for Foreign Affairs and Security Policy, speech during the European Parliament debate (June 16, 2010). (stating, "I want to see what more we can do to support the abolition of the death penalty worldwide. I want to assure [the European Parliament] that work on abolishing the death penalty is a personal priority for me. I will see to it that work advances, both bilaterally and in multilateral fora.").

<sup>111</sup> *EU Strategic Framework*, *supra* note 11 (The Action Plan contained three specific aims for implementation of this priority: (a) Actively contribute to lobbying on the UNGA 67 Resolution on the death penalty moratorium, in order to increase support among States while developing also further the content of the initiative; (b) Undertake targeted campaigns on the death penalty and intensify engagement with retentionist countries, and; (c) Ensure EU input to the World Congress against the Death Penalty 2013).

<sup>112</sup> *EU Guidelines on the Death Penalty*, *supra* note 4.

<sup>113</sup> *Id.*

<sup>114</sup> Further EU Human Rights Guidelines cover torture and other cruel, inhuman or degrading treatment or punishment; human rights dialogues with third countries; children and armed conflict; human rights defenders; promotion and protection of the rights of the child; violence against women and girls and combating all forms of discrimination against them; as well as

best understood as pragmatic instruments of the EU human rights policy, serving as practical tools to help EU representatives in the field better advance its human rights work. The EU Guidelines on the Death Penalty were first adopted by the Council of Ministers in 1998 when EU Member States decided to strengthen their activities in opposition to the death penalty.<sup>115</sup> In 2008 and 2013, the EU Guidelines were revised and updated.<sup>116</sup> Based on today's strong consensus among all EU Member States in their rejection of the death penalty, the objectives of the Union's abolitionist work are clear-cut and have Member State support. The EU has opted for a pragmatic multifaceted approach and the five notable themes in the EU Guidelines are: (i) bilateral diplomacy, (ii) action in the multilateral fora, (iii) transfer of persons in security circumstances, (iv) regulations on execution technologies, and (v) financial assistance to the abolitionist movement.<sup>117</sup> These are considered below.

### B. *Bilateral Diplomacy*

The EU carries out a significant number of demarches or makes public statements on the death penalty towards third countries. The EU Guidelines on the Death Penalty state, “[w]here relevant, the European Union will raise the issue of the death penalty in its dialogues and consultations with third countries.”<sup>118</sup> The elements in these contacts will include, the EU's call for universal abolition of the death penalty, or if the country maintains the punishment, then a call for a moratorium will be made.<sup>119</sup> Where a country imposes the punishment, the EU will emphasize that states should only use the death penalty in line with the provisions contained in the EU Minimum Standards.<sup>120</sup> These Minimum Standards are based on

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international Humanitarian Law. New EU Human Rights Guidelines on the freedom of religion or belief and on LGBTI are expected to be adopted later in 2013. See *Human Rights Guidelines*, EUR. UNION EXTERNAL ACTION, [http://eeas.europa.eu/human\\_rights/guidelines/index\\_en.htm](http://eeas.europa.eu/human_rights/guidelines/index_en.htm) (last visited Oct. 7, 2013).

<sup>115</sup> *EU Guidelines on the Death Penalty*, *supra* note 4.

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

<sup>117</sup> *Id.* at 1-7.

<sup>118</sup> *Id.* at 4.

<sup>119</sup> *Id.* at 6.

<sup>120</sup> *Id.*

the abolitionist provisions contained in international human rights law and other international standards, including the maintenance of maximum transparency, through publishing information about the death penalty and its use.<sup>121</sup>

The Minimum Standards<sup>122</sup> spelt out in the EU Death

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<sup>121</sup> *Id.* at 1-7.

<sup>122</sup> *EU Guidelines On Death Penalty*, EUR. UNION EXTERNAL ACTION, (Apr. 12, 2013), [http://eeas.europa.eu/human\\_rights/guidelines/death\\_penalty/docs/guidelines\\_death\\_penalty\\_st08416\\_en.pdf](http://eeas.europa.eu/human_rights/guidelines/death_penalty/docs/guidelines_death_penalty_st08416_en.pdf). The Minimum Standards in the EU Death Penalty Guidelines states:

While continuing to state its strong opposition to the death penalty and advocate for its full abolition, the EU shall insist that those countries that still maintain executions respect the following minimum standards:

i) The death penalty must not be imposed for non-violent acts such as financial or economic crimes, or because of political offences or rivalries. It shall also not be imposed for drug related crimes, religious practices or expression of conscience, or for sexual relations between consenting adults, it also being understood that scope should never go beyond the most serious intentional crimes.

ii) Capital punishment must never be provided for in law as a mandatory sentence.

iii) Capital punishment shall not be imposed for a crime for which the death penalty was not prescribed at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

iv) Capital punishment shall not be imposed on:

Persons below 18 years of age at the time of the commission of their crime;

Pregnant women, new mothers and nursing women;

Persons suffering from any mental illness or having an intellectual disability

The elderly.

v) Capital punishment shall not be imposed if the guilt of the person charged is not based upon clear and convincing evidence, leaving room for alternative explanation of the facts. In this respect, the use of torture to extract guilty pleas shall be strictly prohibited.

vi) A final judgement rendered by an independent and impartial competent court after legal proceedings, including those before special tribunals or jurisdictions, which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings shall be necessary.

vii) When considering whether legal proceedings provide all possible safeguards to ensure a fair trial, due attention shall be given to whether anyone suspected of or charged with a crime for which capital pun-

Penalty Guidelines reflect and, in parts, go beyond the thresholds established in the UN context. In international law, for example, those standards concerning capital trials and the application of executions, notably in Article 6 of the *International Covenant on Civil and Political Rights* (“ICCPR”),<sup>123</sup> Article 37

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ishment may be imposed has been informed of the right to contact a consular representative.

viii) Military tribunals may not impose death sentences on civilians under any circumstances.

ix) Anyone sentenced to death shall have an effective right to appeal to a court of higher jurisdiction.

x) Where applicable, anyone sentenced to death shall have the right to submit an Individual complaint under international or regional procedures; the death sentence will not be carried out while the complaint remains under consideration under those procedures; the death penalty will not be carried out as long as any related legal or formal procedure, at the international, regional or national level, is pending.

xi) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases of capital punishment; the death sentence will not be carried out while such applications remain under consideration under relevant procedures in a state.

xii) Capital punishment may not be carried out in contravention of a state's international commitments.

xiii) Consideration shall be given to the length of time spent on death row and the conditions of imprisonment after having been sentenced to death, bearing in mind that the conditions of imprisonment of persons on death row should not be inferior to that of other inmates. These elements may constitute forms of torture or inhumane or degrading treatment or punishment

xiv) Where capital punishment occurs notwithstanding the EU's best efforts to prevent it, it shall only be carried out so as to inflict the minimum possible suffering. It may not be carried out in public or in any other manner intended to further degrade the person facing execution. Equally, it must not be practised in secrecy. The family and lawyers of prisoners on death row must be notified of details of their execution.

xv) The death penalty must not be applied or used in a discriminatory manner on any ground including political affiliation, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

<sup>123</sup> International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of this life. (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant...This penalty can only be carried out pursuant to a final judgment rendered by a competent court.”). For a comprehensive review of ICCPR Art. 6, see HOOD & HOYLE, *supra* note 27.

(a) of the *Convention on the Rights of the Child*,<sup>124</sup> and the UN Economic and Social Council *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*.<sup>125</sup>

The EU understands the Minimum Standards as a mechanism for restricting, but not promoting, any residual efficacy of the capital judicial process. They are read in line with *ICCPR* Article 6(6) which states that “[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment.”<sup>126</sup> Hence, a retentionist state cannot claim to follow the Minimum Standards in a continued effort to ameliorate the inherent deficiencies of the capital judicial process. This is because the EU does not hold the position that an improvement in the Minimum Standards of a state’s capital judicial system can lead it to being in full compliance with the human rights standards set out in the *Charter*.<sup>127</sup> This is because the death penalty is fundamentally prohibited.

The Guidelines state that when the EU approaches retentionist countries it takes into consideration, *inter alia*: (i) whether the country has an independent and efficient judicial system guaranteeing a fair trial to any accused person; (ii) whether the country has made international undertakings not to use the death penalty; (iii) whether the legal system of the country, and its use of the death penalty, is closed to public and international scrutiny, and; (iv) whether there are indications that the death penalty is widely used in contravention of the

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<sup>124</sup> Convention on the Rights of the Child art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3 (“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment shall be imposed for offences committed by persons below 18 years of age.”).

<sup>125</sup> Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty E.S.C. Res. 1984/50, U.N. Doc. E/RES/1984/50; Additions to the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty E.S.C. Res. 1989/64, U.N. Doc. E/RES/1989/64; Strengthening of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty E.S.C. Res. 1996/15, U.N. Doc. E/RES/1996/15. For a review of the application of the Safeguards around the world, see E.S.C. Res. 2010/10, U.N. Doc. E/RES/2010/10 (Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty).

<sup>126</sup> The International Covenant on Civil and Political Rights, *supra* note 123.

<sup>127</sup> The Charter of Fundamental Rights, *supra* note 7.

Minimum Standards.<sup>128</sup> These interventions can concern the general policy of a third country with regard to the death penalty or focus specifically on individuals currently under threat of being sentenced to death or executed. These are dealt with in general bilateral action and in specific individual cases.

#### i. General Bilateral Action

The EU raises the issue of the death penalty with third countries in various forms. In addition to the focus on human rights, the EU supports the position that miscarriages of justice, which are inevitable in any legal system, are irreversible.<sup>129</sup> In the context of its numerous human rights dialogues and consultations with third countries,<sup>130</sup> these apply to States that are sometimes referred to as “like-minded,” such as (on the whole) the United States and Japan.<sup>131</sup> Prominent EU tools are demarches and statements at times when a third country’s death penalty policy is in flux, both to welcome positive developments (e.g., abolition) or to comment on negative ones (e.g., a death sentence and/or administration of an execution).<sup>132</sup> The communications also encourage transparency in a retentionist state’s capital judicial system when the death penalty is

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<sup>128</sup> *EU Guidelines on the Death Penalty*, *supra* note 4, at 2.

<sup>129</sup> *See, e.g.*, E.U. Open Letter to Illinois Governor Pat Quinn Urging Illinois Death Penalty Abolition Legislation Passage, (Jan. 14, 2011), *available at* <http://www.eurunion.org/eu/images/stories/ilgovquinn-dpabol-1-14-11.jpg> (last visited Oct 7, 2013).

<sup>130</sup> Human rights dialogues are one of the tools that the EU uses to implement its human rights policy and are established in accordance with the EU Guidelines on Human Rights dialogues. *EU Guidelines on Human Rights Dialogues with Third Countries*, EUR. EXT. ACTION SERV, [http://eeas.europa.eu/human\\_rights/guidelines/dialogues/docs/16526\\_08\\_en.pdf](http://eeas.europa.eu/human_rights/guidelines/dialogues/docs/16526_08_en.pdf). (last visited Oct. 7, 2013). The EU has established over 40 dialogues focused on human rights.

<sup>131</sup> *See, e.g.*, The Transatlantic Declaration on EC-US Relations 1990, *available at* [http://eeas.europa.eu/us/docs/trans\\_declaration\\_90\\_en.pdf](http://eeas.europa.eu/us/docs/trans_declaration_90_en.pdf); *see generally* the “United States” page on the European External Action Service website, <http://eeas.europa.eu/us/> (last visited, Oct. 10, 2013); *see also* Speech by EU Commission President José Manuel Barroso, “EU-Japan: A Mature Relationship with Untapped Potential, TOKYO CHAMBER OF COMMERCE (Apr. 21 2006), [http://www.eu-un.europa.eu/articles/en/article\\_5918\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_5918_en.htm).

<sup>132</sup> *See, e.g.*, Press Release, European Union, EU High Representative Catherine Ashton, Declaration on Behalf of the EU on the Moratorium on the Death Penalty in Mongolia (Jan. 14, 2010), *available at* [http://europa.eu/rapid/press-release\\_PESC-10-3\\_en.htm?locale=en](http://europa.eu/rapid/press-release_PESC-10-3_en.htm?locale=en).

used.<sup>133</sup> Under its so-called “countries on the cusp” campaign, the EU has carried out periodic demarche initiatives in countries on the verge of abolishing or reintroducing the death penalty.<sup>134</sup> In addition, the EU encourages third countries to ratify the relevant international UN and other instruments, such as the *Second Optional Protocol*.<sup>135</sup>

General demarches are carried out and statements are issued by the EU to cover a large variety of circumstances. For instance, in the second half of 2012, statements covered different issues from the criminalization of homosexuality in Cameroon,<sup>136</sup> the decision of Thailand to abolish the death penalty for juvenile offenders,<sup>137</sup> the refused access of EU diplomatic representatives to the Supreme Court of Gambia in a death penalty case,<sup>138</sup> and the condemnation of recent executions in Iran.<sup>139</sup> Catherine Ashton, the High Representative for Foreign

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<sup>133</sup> This is achieved through authoring and publishing demarches, which highlight and evaluate individual country’s capital charges, sentences, death row conditions and executions. See generally, EU Policy on the Death Penalty, [http://eeas.europa.eu/human\\_rights/adp/index\\_en.htm](http://eeas.europa.eu/human_rights/adp/index_en.htm) (last visited Oct. 10, 2013).

<sup>134</sup> See, e.g., Press Release, European Union, Declaration by the High Representative Catherine Ashton on behalf of the European Union on the re-introduction of the death penalty in Papua New Guinea, Brussels, (June 3, 2013), available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/cfsp/137377.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/cfsp/137377.pdf).

<sup>135</sup> See, e.g., Press Release, European Union, EU High Representative Catherine Ashton, Declaration on Behalf of the EU on the Parliamentary and Presidential Approval of the Kyrgyz law on accession to the Second Optional Protocol to the ICCPR on the Abolition of the Death Penalty (Mar. 17, 2010), available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/cfsp/113417.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/cfsp/113417.pdf).

<sup>136</sup> Press Release, European Union, EU Spokesperson of High Representative Catherine Ashton, Statement on the Criminalisation of Homosexuality in Cameroon (Dec. 20, 2012), available at [http://consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/134576.pdf](http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/134576.pdf).

<sup>137</sup> Press Release, European Union, EU High Representative Catherine Ashton, The Decision of Thailand to Abolish the Death Penalty for Juvenile Offenders (Sept. 10, 2012), available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/132302.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/132302.pdf).

<sup>138</sup> Press Release, Local EU Statement, EU diplomatic representatives refused access to the Supreme Court (Oct. 19, 2012), available at [http://eeas.europa.eu/delegations/gambia/press\\_corner/all\\_news/news/2012/20121019\\_en.htm](http://eeas.europa.eu/delegations/gambia/press_corner/all_news/news/2012/20121019_en.htm).

<sup>139</sup> Press Release, European Union, Statement by EU High Representative Catherine Ashton on ten recent executions in Iran (Oct. 23, 2012), avail-

Affairs and Security Policy on behalf of the EU, also provides statements when countries sign up to the international instruments abolishing the death penalty.<sup>140</sup> For example, on behalf of the EU on Benin's accession to the *Second Optional Protocol*,<sup>141</sup> and on behalf of the EU on the abolition of the death penalty in the U.S. State of Connecticut.<sup>142</sup> The EU also issues statements on the occasion of the World/European Day against the Death Penalty on October 10th, not only on behalf of the EU,<sup>143</sup> but also together with the CoE.<sup>144</sup>

The statements made by the High Representative or her spokesperson,<sup>145</sup> are complemented by statements of members of the European Parliament. By way of example, in 2011 there was a debate on the EU-Libya Framework Agreement where Ana Gomes stated “[t]he Union cannot abstain from persuading Libya to commit itself to a moratorium on the death penalty and it is essential that it demands that the Libyan authorities publish the identity of national and foreign citizens who are

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able at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/133152.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/133152.pdf).

<sup>140</sup> Press Release, European Union, Statement by the Spokesperson of EU High Representative Catherine Ashton on Bolivia's accession to the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty (July 17, 2013), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/138105.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/138105.pdf).

<sup>141</sup> Press Release, EU High Representative Catherine Ashton, Declaration on Behalf of the European Union on Benin's Accession to the Second Optional Protocol to the International Convention on Civil and Political Rights Aiming at the Abolition of the Death Penalty (July 12, 2012), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/genaff/131711.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/131711.pdf).

<sup>142</sup> Press Release, European Union, EU High Representative, Declaration on Behalf of the European Union on the Abolition of the Death Penalty in the US State of Connecticut (Jan. 14, 2010), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/cfsp/129830.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/cfsp/129830.pdf).

<sup>143</sup> *See, e.g.*, Press Release, European Union, European and World Day Against the Death Penalty – EU Underlines Commitment to Universal Abolition (Oct. 10, 2012), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/132781.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/132781.pdf).

<sup>144</sup> *See, e.g.*, Press Release, European Union, Thorbjørn Jagland, Secretary General of the Council of Europe and Catherine Ashton, European Union High Representative for Foreign Affairs and Security Policy, Joint Declaration on the European and World Day against the Death Penalty (Oct. 10, 2012), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/132777.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/132777.pdf).

<sup>145</sup> There is also the possibility of local EU statements.

executed.”<sup>146</sup> The 2012 Parliament resolution on Pakistan commended the efforts of Shahbaz Bhatti, the Minister for Minorities, for the introduction of a bill seeking the abolition of the death penalty for the crime of blasphemy.<sup>147</sup> These strengthened the call for the ceasing of the death penalty for juveniles in the Yemen,<sup>148</sup> the call for a moratorium on the death penalty in Bahrain,<sup>149</sup> the denunciation of the 146 secret executions in Iran, and the calling for a moratorium<sup>150</sup> and for an end to the mandatory death penalty in Pakistan.<sup>151</sup> In the first half of 2012, the Parliament adopted resolutions to call for the initiation of a moratorium as a step to abolition of the death penalty in Belarus,<sup>152</sup> it urged the Japan Minister of Justice, Toshio Ogawa, not to approve execution orders,<sup>153</sup> and repeated its call for Nigeria to abolish the death penalty.<sup>154</sup>

The EU equally pursues its abolitionist agenda in its contacts with the anti-death penalty community and works on fostering public debate about the death penalty in retentionist

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<sup>146</sup> Remarks of Ana Gomes, Debate: EU-Libya Framework Agreement, CRE 19/01/2011, EUR. PARL. DEB. (Jan. 19, 2011), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20110119&secondRef=ITEM-013&language=EN>.

<sup>147</sup> Resolution of 20 January 2011 on Pakistan, in Particular the Murder of Governor Salmaan Taseer, 2012 O.J. (C 136 E/16).

<sup>148</sup> Resolution on the Yemen, Persecution of Juvenile Offenders, in Particular the Case of Muhammed Taher Thabet Samoum. 2012 O.J. (C 188 E/13).

<sup>149</sup> Resolution, Bahrain, 2012 O.J. (C 48 E/238).

<sup>150</sup> Resolution on Iran – Recent Cases of Human Rights Violations, P7\_TA(2011)0517, EUR. PARL. DOC. (Nov. 17, 2011), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P7-RC-2011-0594&language=EN>.

<sup>151</sup> Resolution on the Situation of women in Afghanistan and Pakistan, P7\_TA(2011)0591, EUR. PARL. DOC. (Dec. 15, 2011), *available at*, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P7-RC-2011-0702+0+DOC+XML+V0//EN&language=EN>.

<sup>152</sup> Resolution of 16 February 2012 the death penalty in Belarus, in particular the cases of Dzmitry Kanavalau and Uladzislau Kavalyou, 2012 O.J. (C 286 E/22).

<sup>153</sup> Resolution on the death penalty in Japan, P7\_TA(2012)0065, EUR. PARL. DOC. (Feb. 16, 2012), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B7-2012-0091+0+DOC+XML+V0//EN&language=en>.

<sup>154</sup> Resolution on the Situation in Nigeria, P7\_TA(2013)0335, EUR. PARL. DOC. (July 4, 2013), *available at*, <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0350&language=EN>.

countries, e.g., by organizing public seminars.<sup>155</sup> One example of such activity was the Death Penalty Symposium, “Reflections on Life: European and Asian Perspectives on Capital Punishment,” which was organized by the EU in co-operation with Waseda University on December 2, 2009 in Tokyo.<sup>156</sup> During the event, a range of speakers including State Minister Kamei, offered Japanese, Asian, and European views on the death penalty and its abolition. Speeches included historical and legal aspects, as well as a discussion of values and the role of the media with regard to the abolition of capital punishment.<sup>157</sup> Roger Hood and Carolyn Hoyle have noted the increased abolitionist focus and the development of anti-death penalty strategies, within the Asia region.<sup>158</sup> Roger Hood has authored a report for the European Parliament’s Directorate-General for External Policies, titled *Enhancing EU Action on the Death Penalty in Asia*, and provided a detailed strategy for the region to adopt in its bilateral and multilateral action in Asian countries.<sup>159</sup> Hood recommended that an individualized approach to different Asian countries be initiated, as “no single strategy should have priority, rather each country should be approached in regard to the stage that it has reached in considering whether to continue to retain or to move towards further restriction or complete abolition of the death penalty.”<sup>160</sup> This advice to the EU institutions, particularly the Commission,

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<sup>155</sup> See, e.g., Public event to promote the abolition of the death penalty in Malaysia, Kuala Lumpur Convention Centre, Kuala Lumpur, October 13, 2011, see, [http://eeas.europa.eu/delegations/malaysia/documents/press\\_corner/all\\_news/2011/20111013\\_en.pdf](http://eeas.europa.eu/delegations/malaysia/documents/press_corner/all_news/2011/20111013_en.pdf).

<sup>156</sup> Reflections on Life: European and Asian Perspectives on Capital Punishment, EUIJ, WASEDA UNIV., TOKYO, December 2, 2009, available at <http://www.euij-waseda.jp/eng/outreach/reflections-on-life-european-and-asian-perspectives-on-capital-punishment.html>.

<sup>157</sup> *Id.*

<sup>158</sup> See HOOD & HOYLE, *supra* note 27, at 84-103.

<sup>159</sup> European Parliament, *Enhancing EU Action on the Death Penalty in Asia*, EUR PARL. DOC. EXPO/B/DROI/2011/22, (October 17, 2012).

<sup>160</sup> *Id.* at 8; See also DAVID T. JOHNSON & FRANKLIN E. ZIMRING, THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA 333 (2009) (In their scholarly study, Zimring and Johnson note the regions’ policy developments when they state: “The Europeans’ success on their home turf has left death penalty activists with energy and resources for other geographic zones. If the death penalty issues continue to command the interest that was evident at the turn of the 21<sup>st</sup> century, then more of the missionary vigor of European activists will get directed to countries in Asia.”).

Parliament, and the specific role of the EEAS, will prove extremely valuable for the EU dialogue with Asian countries on the issue of capital punishment.

## ii. Individual Cases

When a retentionist country continues to apply the death penalty, the EU has argued that it must observe the fundamental legal tenets of due process and the rule of law.<sup>161</sup> The EU Death Penalty Guidelines task the EU to consider making a specific demarche, where it becomes aware of individual death penalty cases that violate EU Minimum Standards. Consequently, the EU does not intervene in every individual death penalty case in the world.<sup>162</sup> Rather, the EU considers litigation on a case-by-case basis.<sup>163</sup> The reason for this is not so much the obvious practical impossibility to collect sufficient information on every capital case, but primarily the intent to maintain a strategic approach. Each case is considered individually and if an EU intervention would be expected to be counter-productive in a given case, it would refrain from taking action.<sup>164</sup>

Once the decision has been taken that the EU should intervene, appropriate action is determined – again on a case-by-case basis.<sup>165</sup> The criterion is to identify what appears to be the most effective way of preventing a death sentence or the execution of the individual.<sup>166</sup> Speed is often of the essence. Possible actions include public statements or declarations, as well as confidential intervention (in particular, demarches).<sup>167</sup> On this basis, in the second semester of 2012, the EU sent a number of demarches. While most demarches were of a confidential nature, some interventions on behalf of individuals are public. In 2011-12, examples of individual cases around the world included, the execution of Troy Davis in Georgia, U.S.A. on Septem-

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<sup>161</sup> *EU Guidelines on the Death Penalty*, *supra* note 4, at 1.

<sup>162</sup> *Id.* (“The European Union will consider, case by case, and on the basis of relevant criteria, whether to make demarches to other countries over the use of the death penalty.” *Id.* at 3).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 3-4.

<sup>167</sup> *Id.* at 3.

ber 22, 2011,<sup>168</sup> and the execution in Japan of Yukinori Matsuda and Sachiko Eto on September 27, 2012.<sup>169</sup> Publicly available interventions occurred in America, where the EU has intervened in recent years in the following cases: *Tennessee v. Stephen West*, *Virginia v. Teresa Lewis*, *California v. Albert Greenwood Brown*, *Ohio v. Kevin Keith* and *Washington State v. Cal Coburn Brown*.<sup>170</sup>

#### IV. AMICUS CURIAE

The EU also submits *amicus curiae* briefs in capital cases at first instance and in capital appeals, in particular in America.<sup>171</sup> The *amicus curiae* brief provides an extra source of information, which presents to the court the interests of global organizations and citizens.<sup>172</sup> As *amici*, the EU is contributing to the human rights discourse, which can then be used to inform the jurisprudence of American state and federal courts. Since 1998, there has been an increase in EU *amicus curiae* briefs.<sup>173</sup> The fact that the EU files a brief in a case reveals to the American courts that the people of Europe are interested in

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<sup>168</sup> Press Release, European Union, Statement by High Representative Catherine Ashton on the execution of Troy Davis (Sept. 22, 2011), available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/124707.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/124707.pdf).

<sup>169</sup> Press Release, European Union, Statement by EU High Representative Catherine Ashton on the recent executions in Japan. (Sept. 28, 2012), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/136952.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/136952.pdf).

<sup>170</sup> See *Death Penalty Archive 2010*, DELEGATION OF THE EUR. UNION TO THE US, available at <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/death-penalty-archive-2010/>. Letters to the respective Governors are available at the website of the EU Delegation in Washington D.C.

<sup>171</sup> *Amicus curiae* (friend of the court) briefs are filed by (*amici*) persons or groups who are not parties to the proceedings that the court is considering. The *amici* need to demonstrate that they have a legitimate interest in one or more of the legal questions before the court. See JULIAN KILLINGLEY, EXECUTION OF JUVENILES AND MENTALLY RETARDED DEFENDANTS IN THE UNITED STATES: REPORT OF AMICUS TO THE FOREIGN AND COMMONWEALTH OFFICE (2005) (on file with the author).

<sup>172</sup> See generally Joseph T. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000).

<sup>173</sup> See generally, for EU action in US death penalty cases (including filing *amicus curiae* briefs), Delegation of the European Union to the United States, THE DEATH PENALTY ARCHIVE, <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/> (last visited Oct. 17, 2013).

this litigation. It is evident that US death penalty scholars are also interested in analyzing how the world picture can be used to inform the death penalty as applied in America.<sup>174</sup> The leading web resources on capital punishment in the United States include the Washington, DC based Death Penalty Information Center, which has a detailed section on international perspectives and the United States' use and rejection of international law.<sup>175</sup> On the Death Penalty Worldwide website, Professor Sandra Babcock of the Center for International Human Rights at Northwestern Law School's Bluhm Legal Clinic, provides a comprehensive database of retentionist countries' capital laws and cogent international materials.<sup>176</sup> Both of these web resources on the death penalty provide key information not just for capital defense in the United States, but also for disseminating information for the defense of people who face capital charges or who are now on death row, around the world. What these and other resources demonstrate is that there is a strong community of American scholars who consider the bilateral and multilateral perspectives relevant for the consideration of the death penalty at the domestic level. In essence, the application and rejection of the death penalty should take place within a global dialogue. Transparency of state practice allows a multifaceted analysis, through both domestic and international means, to determine the legitimacy of state punishment.

The EU *amicus curiae* brief facilitates this international consideration and legal dialogue on the punishment. Indeed, the EU argues that it has an identifiable "interest" in filing

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<sup>174</sup> See, e.g., RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 1025-1096 (4th ed. 2012) (which is a leading resource book on the capital judicial system of the United States. It includes a substantial section on international issues detailing both municipal and regional court and policy considerations); FRANKLIN ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 1-42 (2003); AUSTIN SARAT & JÜRGEN MARTSCHUKAT, IS THE DEATH PENALTY DYING? EUROPEAN AND AMERICAN PERSPECTIVES (2011); AUSTIN SARAT & CHRISTIAN BOULANGER, THE CULTURAL LIVES OF CAPITAL PUNISHMENT (2005); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

<sup>175</sup> See generally The Death Penalty: An International Perspective, THE DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-penalty-international-perspective> (last visited Oct. 10, 2013).

<sup>176</sup> See generally Death Penalty Worldwide, NORTHWESTERN LAW CTR. FOR INT'L RIGHTS, <http://www.deathpenaltyworldwide.org/about.cfm> (last visited Oct. 25, 2013).

amicus curiae briefs. The EU brief in *Roper v. Simmons* stated the interest as:

The EU and its Member States, as members of the international community, have a strong interest in providing information to this Court on international human rights norms in a case in which those norms may be relevant.<sup>177</sup>

In 2001, the EU submitted an *amicus curiae* brief in support of *certiorari* in the case of *McCarver v. North Carolina*.<sup>178</sup> It concerned the impending execution of a mentally retarded inmate,<sup>179</sup> but the U.S. Supreme Court held that *certiorari* had been improvidently granted as North Carolina introduced a mental retardation statute preventing the death penalty for inmates with the mental health condition.<sup>180</sup> However, another case concerning a mentally retarded inmate was submitted to the U.S. Supreme Court in 2002. In *Atkins v. Virginia*, Justice Stevens referred to the EU brief filed in *McCarver*, when he gave judgment on the constitutionality of executing Daryl Atkins who suffered from mild mental retardation.<sup>181</sup> In holding that the death penalty for inmates suffering from this mental health condition was a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause, Justice Stevens stated in an observation in footnote 21, that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."<sup>182</sup>

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<sup>177</sup> Brief of Richard J. Wilson, Counsel for The European Union and Members of the International Community as Amici Curiae Supporting Respondents, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) at 1.

<sup>178</sup> *McCarver v. North Carolina*, 533 U.S. 975 (2001); *see also*, Brief of Richard J. Wilson, Brief of *Amicus Curiae*, the European Union, Ernest Paul McCarver, v. State of North Carolina, No. 00-8727, *available at* <http://www.internationaljusticeproject.org/pdfs/emccarver.pdf>.

<sup>179</sup> *See generally* AMERICAN ASSOC. ON INTELLECTUAL AND DEV. DISABILITIES, <http://www.aaid.org> (last visited July 10, 2013) (The mental health diagnosis "mental retardation" is termed as "learning difficulties" in the United Kingdom. The United States term "mental retardation" has now been replaced with, "intellectual disabilities.").

<sup>180</sup> *McCarver*, 533 U.S. 975.

<sup>181</sup> *Atkins v. Virginia*, 536 U.S. 304, 308 (2002).

<sup>182</sup> *Id.* at 316 n.21 (citing Brief of Richard J. Wilson for the European Union as Amici Curiae Supporting Petitioner, *McCarver v. North Carolina* 533 U.S. 975 (2001) (No. 00-8727), *available at* [www.internationaljusticeproject.org/pdfs/emccarver.pdf](http://www.internationaljusticeproject.org/pdfs/emccarver.pdf)).

During the *Atkins* oral argument,<sup>183</sup> in the U.S. Supreme Court on Wednesday, February 20, 2002, there was a dialogue between counsel for the Respondent, Pamela A. Rumpz, and various Justices of the Supreme Court. It concerned the question of the relevance and applicability of international opinion for the Court's determination of whether executing people suffering from mental retardation violated the Eighth Amendment.<sup>184</sup> Justice Ginsburg asked:

Ms. Rumpz, in making this cruel and unusual decision . . . this is an issue that's come up before, but does what the rest of the world think about executing the mentally retarded . . . should that have any relevance at all? I mean, we have, since the time we said we don't look to the rest of the world, been supporters of international human rights tribunals in . . . the former Yugoslavia, for the former Rwanda. But is it still, would you say, just irrelevant that most of the rest of the world thinks . . . it's inhuman to execute them?<sup>185</sup>

Ms. Rumpz responded:

This Court has said previously that the notions of other countries and the notions of other lands cannot play the deciding factor in what.<sup>186</sup>

Justice Ginsburg continued:

Not deciding. I asked you if it was relevant.<sup>187</sup>

Ms. Rumpz's answer was that it is relevant to:

determine whether our practice is a historical accident or not. But it certainly is not relevant in deciding the Eighth Amendment.<sup>188</sup>

The use of the EU brief in the opinion of the Supreme Court by Justice Stevens demonstrated that he, Justice Ginsburg, and the majority opinion Justices<sup>189</sup> thought that the

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<sup>183</sup> Oral Argument, *Atkins v. Virginia*, 536 U.S. 304 (No. 00-8452), available at [http://www.oyez.org/cases/2000-2009/2001/2001\\_00\\_8452](http://www.oyez.org/cases/2000-2009/2001/2001_00_8452).

<sup>184</sup> *Atkins*, 536 U.S. at 304.

<sup>185</sup> Oral Argument at 53:54, *Atkins v. Virginia*, 536 U.S. 304 (No. 00-8452).

<sup>186</sup> *Id.* at 54:40.

<sup>187</sup> *Id.* at 54:52.

<sup>188</sup> *Id.* at 54:56.

<sup>189</sup> *Id.* (*Atkins v. Virginia* was a 6-3 decision. The Justices in the majority were Stevens, J. O'Connor, J. Kennedy, J. Souter, J. Ginsburg, J. and Breyer J. The Justices in the minority were Chief Justice Rehnquist, and Scalia J.

views of the EU were relevant for the determination of whether the Eighth Amendment prohibits states from executing people with mental retardation. The Supreme Court was concerned to demonstrate that in order to determine the constitutionality of punishment within the United States, it would involve a component, or is part of, the international dialogue focused upon what is considered legitimate state treatment of individuals.<sup>190</sup> This is also confirmed by a corpus of previous jurisprudence affirming the Supreme Court's analysis of international opinion and law, for its own constitutional adjudication.<sup>191</sup>

The use of the views of the "world community" was severely criticized by both Chief Justice Rehnquist and Justice Scalia in their dissenting opinions. Both of the Justices argued that the sovereignty of the United States should have overridden the reliance on the EU brief. Chief Justice Rehnquist stated that he needed to "call attention to the defects in the Court's decision to place weight on foreign laws,"<sup>192</sup> that he did not see "how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination,"<sup>193</sup> and that "if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant."<sup>194</sup>

In line with this reasoning, Justice Scalia stated that "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of . . . members of the so-called "world community. . . ."<sup>195</sup> Then he cited his own dictum in the previous Supreme Court case of *Thompson v. Oklahoma*, and stated:

We must never forget that it is a Constitution for the United States of America that we are expounding . . . . [W]here there is not first a settled consensus among our own people, the views of

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and Thomas J.)

<sup>190</sup> *Atkins*, 536 U.S. at 316.

<sup>191</sup> See, e.g., *Murray v. Charming Betsy*, 2 Cranch 64 (1804); *Trop v. Dulles* 356 U.S. 86 (1958); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Baze v. Rees*, 553 U.S. 35 (2008).

<sup>192</sup> *Atkins*, 536 U.S. at 322.

<sup>193</sup> *Id.* at 324-25.

<sup>194</sup> *Id.* at 325.

<sup>195</sup> *Id.* at 347 (letters capitalized in original).

other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.<sup>196</sup>

This is a central issue in constitutional adjudication. It is clear that the death penalty has become internationalized, and so the question is to what extent the U.S. Supreme Court can maintain an isolated and confined consideration of the legal controversy surrounding the punishment. In line with this jurisprudential issue a recent edited collection, *Is the Death Penalty Dying? European and American Perspectives* by death penalty scholars, Austin Sarat (from America) and Jürgen Martschukat (from Germany), reviewed the benefit of considering European principles.<sup>197</sup> In the introduction, Sarat and Martschukat stated:

[The collection focuses on] what can be learned about the American death penalty and the prospects of its abolition by studying the European experience with capital punishment and especially the multifaceted trajectory of abolition in different European nations and the European Union . . . [t]his work shows how the death penalty has helped define the political and cultural identities of both Europe and the United States and will help readers understand the cultural and institutional barriers that stand in the way of abolition of the death penalty in America.<sup>198</sup>

There is a growing perception that there are irredeemable constitutional deficiencies of the capital judicial system in the United States. Sarat and Martschukat note, “[w]ith increasing intensity, capital punishment in America has been labelled a broken system.”<sup>199</sup> In Justice Blackmun’s dissent against the denial of *certiorari* in *Callins v. Collins*, he argued:

It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants “deserve” to die? – cannot be answered in the affirmative.<sup>200</sup>

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<sup>196</sup> *Id.* at 348 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 (1989). Scalia, J., dissenting).

<sup>197</sup> Sarat and Martschukat, *supra* note 22.

<sup>198</sup> *Id.* at 1.

<sup>199</sup> *Id.* at 2.

<sup>200</sup> *Callins v. Collins*, 510 U.S. 1141 (1994).

Furthermore, Justice Stevens, in *Baze v. Rees*, confirmed this damning observation when he claimed:

The current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the cost and risks of administering that penalty against its identifiable benefits.<sup>201</sup>

Hence it appears most appropriate, as the United States is a very important member of the global community, for the country to assess its capital judicial system, not just through the lens of its own federal and state law, but also to continually review the international developments on the punishment. The EU *amicus curiae* brief provides an international perspective from which those within the United States capital judicial system can use to reflect upon whether the state and federal practices are indeed “broken,” and merely the “product of habit and inattention.”<sup>202</sup> With respect to punishment of criminals with mental health problems, the EU brief helps provide further resources for an assessment of whether the recognized “habit” and “inattention” is not applied to this vulnerable group of people in American society. These global perspectives on mental health assessment, diagnosis and prognosis, provides a greater opportunity for the judiciary to make the most informed decisions when determining sentences.

The next significant case where an EU *amicus curiae* brief provided extra information for sentencing guidelines was in *Roper v. Simmons*.<sup>203</sup> The Court considered the punishment of juvenile offenders who faced the death penalty.<sup>204</sup> In this case, the EU abolitionist position was discussed between Mr. James R. Layton, attorney for the Petitioner, and various Justices. Justice Kennedy, who is a renowned expert on international law, began the dialogue on comparative law and policy, and

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<sup>201</sup> *Baze v. Rees*, 553 U.S. 35, 93 (2008); *id.* at 78 (Justice Stevens then cited *Gregg v. Georgia* and stated “we explained that unless a criminal sanction serves a legitimate penological function, it constitutes a ‘gratuitous infliction of suffering’ in violation of the Eighth Amendment.”); *see also* *Thompson v. McNeil*, 129 S.Ct. 1299, 1300-01 (2009).

<sup>202</sup> *Id.*

<sup>203</sup> *Roper v. Simmons*, 543 U.S. 551 (2005). *See also*, Brief of Richard J. Wilson, *supra* note 136.

<sup>204</sup> *Simmons*, 543 U.S. 551.

said:

Let's focus on the word unusual. Forget cruel for the moment, although they're both obviously involved. We've seen very substantial demonstration that world opinion is . . . against this, at least as interpreted by the leaders of the European Union. Does that have a bearing on what's unusual? Suppose it were shown that the United States were one of the very, very few countries that executed juveniles, and that's true. Does that have a bearing on whether or not it's unusual?<sup>205</sup>

Mr. Layton answered:

No more than if we were one of the very few countries that didn't do this. It would bear on the question of unusual. The decision as to the Eighth Amendment should not be based on what happens in the rest of the world. It needs to be based on the mores of . . . American society.<sup>206</sup>

Here, Justice Kennedy provides a cogent interpretation of the EU abolitionist position and asks Mr. Layton whether this regional perspective of how juvenile offenders should be treated by sovereign states has a "bearing" on the Supreme Court's interpretation of the Eighth Amendment.<sup>207</sup> According to Mr. Layton, the issue remained one to be dealt with in isolation from the rest of the world, as an expression of the sovereign state privilege to determine criminal sanctions within a territory. This was revealed in Mr. Layton's opinion through what he termed the "mores . . . of American society."<sup>208</sup> The social and political "mores" that have contributed to the maintenance of the death penalty in America have received much academic scrutiny.<sup>209</sup>

Theories on the historiography of American punishment and the death penalty, have led to the domestic application being compared to the abolitionist movement in Europe. Carol

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<sup>205</sup> *Id.* Oral Argument at 11:53, *Roper v. Simmons*, 534 U.S. 551 (No. 03-633), available at [http://www.oyez.org/cases/2000-2009/2004/2004\\_03\\_633](http://www.oyez.org/cases/2000-2009/2004/2004_03_633).

<sup>206</sup> *Id.* at 12:31.

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

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

<sup>209</sup> For example see the debate in the journal *Punishment and Society*, David Garland, Capital Punishment and American Culture, 7 *PUNISHMENT & SOCIETY* 4, 347-376 (2005); Franklin E. Zimring, Path Dependence Culture and State Level Execution Policy, A Reply to David Garland, 7 *PUNISHMENT & SOCIETY* 4, 377-384 (2005); James Q. Whitman, *Response to Garland*, 7 *PUNISHMENT & SOCIETY* 4, 389-396.

Steiker highlighted the issue of the contemporary practice of American use of the death penalty. She argued that in the use of this punishment, “America is ‘exceptional’ compared to Europe and other Westernized countries in the world.”<sup>210</sup> Hadar Aviram and Ryan Newby agree that:

The death penalty is generally considered a stark example of American exceptionalism in matters of punishment and corrections. Long after most European countries had abolished capital punishment, death sentences and capital post-conviction litigation are still features of the American legal system.”<sup>211</sup>

A clear distinction has emerged between the most severe punishment imposed upon the worst offenders in Europe and the punishment that is applied in such circumstances in the retentionist states of the United States.<sup>212</sup> Explicitly, the “worst of the worst” offenders in Europe do not receive the death penalty and the “worst of the worst” offenders in the death penalty retentionist states in the United States can receive the death penalty.<sup>213</sup>

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<sup>210</sup> Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97-130 (2002) (discussing the theory of “American exceptionalism,” which demonstrates America’s specific cultural sentiment(s) in applying the death penalty).

<sup>211</sup> Hadar Aviram & Ryan Newby, *Death Row Economics: The Rise of Fiscally Prudent Anti-Death Penalty Activism*, 28 CRIMINAL JUSTICE 33 (2013).

<sup>212</sup> However, identifying a state as “retentionist” requires empirical analysis as the full picture of the capital system of a state may not emerge. For example, as Texas is by far the leading state in executions in the United States, it might be more accurate to identify “Texas exceptionalism,” or “Southern States Exceptionalism.” Within individual states death sentences per county vary, for example, Harris County in Texas has recorded the highest execution rates in the country. So even in Texas, it might be appropriate to identify a “Harris County Exceptionalism.” For the statistics on the execution rates per country, see *Top 15 Counties by Execution since 1976*, THE DEATH PENALTY INFO. CTR, <http://www.deathpenaltyinfo.org/executions-county> (last visited Oct. 17, 2013).

<sup>213</sup> Scholars such as Francois Guizot, Marc Ancel, Roger Hood and Carolyn Hoyle, have persuasively identified that a capital justice system is not able to effectively, and consistently, identify who the “worst of the worst” criminals are. It is an insurmountable practical obstacle for any capital judicial process to consistently reserve the death penalty for a class of criminal described as the “worst of the worst,” see, *supra* notes 27 and 32. For further arguments on the fallacy of maintaining the death penalty for the “worst of the worst,” see Jon Yorke, *Sovereignty and the Unnecessary Penalty of Death: European and United States Perspectives*, in *IS THE DEATH PENALTY DYING? EUROPEAN AND AMERICAN PERSPECTIVES* (Austin Sarat & Jürgen Martschukat eds., 2011). Under international law, the Rome Statute of the International

Franklin Zimring has provided an illumination of this exceptionalism thesis by observing a correlation between the historical practice of popular justice (through lynching) in selected Southern states, with states that currently impose the death penalty.<sup>214</sup> For Zimring the “exception,” exists because of the heritage, and psychological implications, of lynching, and that:

Those parts of the United States where mob killings were repeatedly inflicted as crime control without government sanction are more likely now to view official executions as expressions of the will of the community rather than the power of a distant and alien government.<sup>215</sup>

Staying within the historiography of American exceptionalism but providing an alternative framing of the discussion, James Whitman has proposed a dignity versus degradation thesis as a reason for America being different in its use of the punishment.<sup>216</sup> Whitman argues we need to have an understanding of the differing paths taken by America and many European countries, by placing the discussions on the relationship of punishment with concepts of “degradation,” “harshness” and “mercy.”<sup>217</sup> This has resulted in an American tradition which has a strong opposition to authority creating, “a criminal justice system long on degradation and short on mercy.”<sup>218</sup> In effect, it is argued that an intellectual elite in Europe has been able to cogently reveal the inhumanity and uselessness of the death penalty, and the political structures (both domestic and regional) have accepted these propositions. As identified above

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Criminal Court, A/CONF.183/9 of 17 July 1998, art. 5(1) identifies the crimes of (a) genocide, (b) crimes against humanity, (c) war crimes, and (d) the crime of aggression are examples of governments who commits atrocious crimes, and which are punishment under international law. Art 77(1) states, “the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” The international legal regime is demonstrating to the retentionist countries of the world, that punishing with death is now an antiquated punishment that does not belong in our cosmopolitan world of international human rights.

<sup>214</sup> ZIMRING, *supra* note 174, at 65-140 (as being a phenomenological remnant of the southern state’s “vigilante justice”).

<sup>215</sup> *Id.* at 89.

<sup>216</sup> WHITMAN, *supra* note 83.

<sup>217</sup> *Id.* at 97-150.

<sup>218</sup> *Id.* at 207.

in this paper, the evolution of the intellectual discourse in the EU developed from the mid-1980s. In the United States, the intellectual elite are currently in the process of achieving the solidification of the abolitionist sentiment. The road has been longer, but the abolitionist community within the United States demonstrates that in the future there will be congruence. However, there are some technical political and sociological obstacles currently in the way.

David Garland has identified some of the structural processes which are currently maintaining the death penalty in America. The “peculiar institution,”<sup>219</sup> of the death penalty is sustained by, *inter alia*, what he terms “radical localized democracy.”<sup>220</sup> The complex federal system of government is the primary reason for the retentionist states currently maintaining the death penalty. The U.S. Supreme Court is yet to hold that the death penalty is *per se* a violation of the Eighth and/or the Fourteenth Amendments of the United States Constitution, and so the state’s freedom to determine capital statutes is not yet a question of fundamental Constitutional legitimacy.<sup>221</sup> Hence, Garland maintains:

American capital punishment persists, despite its conflicts with contemporary liberal and humanitarian norms, because of the structure of the American polity. That structure makes it difficult to abolish the death penalty in the face of majority public opinion and deprives governing elites of the opportunity from top-down, countermajoritarian reform of the kind that has led to abolition elsewhere.<sup>222</sup>

However, Jordan Steiker has pointed to a current fragility in the American death penalty system. He argues that we are now entering a new era of transparency, acceptance of the inhumanity and the ineffectiveness of the punishment, and consequential stark fiscal issues. Steiker states:

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<sup>219</sup> See generally DAVID GARLAND, PECULIAR INSTITUTION (2010).

<sup>220</sup> *Id.* at 96.

<sup>221</sup> In 1972 the United States Supreme Court suspended the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), and four years later in *Gregg v. Georgia*, 428 U.S. 153 (1976). The state statutes had *prima facie* included safeguards into the capital judicial process. Most prominent was the development of the bifurcated process of firstly determining guilt or innocence, and then a separate hearing if the defendant is found guilty to determine sentence. In most circumstances, this was either the death penalty or a prison term which included up to life without parole. See *Gregg*, 428 U.S. at 188-95.

<sup>222</sup> GARLAND, *supra* note 219, at 310.

Today, the conflict between the legal regulation of the death penalty and its continued use appears more permanent and more destructive than the early decades of regulation would have predicted. In short, the modern American death penalty--with its unprecedented costs, alternatives, and legal regulatory framework--seems newly vulnerable to judicial invalidation. Reform of the death penalty and its abolition might well be on the same path.<sup>223</sup>

Steiker observes that in the current vicissitudes – costs, alternative punishments and the labyrinthine appeals processes – the capital political and judicial process is experiencing a new level of vulnerability, and it thus increasingly susceptible to “judicial invalidation.”<sup>224</sup> In death penalty litigation, the *EU amicus curiae* brief may be a powerful tool, which defense counsel and members of the judiciary can use for their constitutional analysis on the road to the rejection of the punishment. It may be through a combined litigation and political strategy that ultimately provides the U.S. Supreme Court with the opportunity for final judicial invalidation. Currently, there are 32 states that have the death penalty,<sup>225</sup> with 18 that do not,<sup>226</sup> but as the abolitionist states increase, the greater the legitimacy for the U.S. Supreme Court to find that the punishment is no longer an acceptable practice under the Eighth and Fourteenth Amendments.

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<sup>223</sup> Jordan M. Steiker, *The American Death Penalty: Constitutional Regulation as a Distinctive Feature of American Exceptionalism*, 67 U. MIAMI L. REV. 329, 355 (2013).

<sup>224</sup> *Id.*

<sup>225</sup> The states which currently retain the death penalty are: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, (also, U.S. Government and U.S. Military). DEATH PENALTY INFO. CTR. *States with and without the death penalty*, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 17, 2013).

<sup>226</sup> The states which have abolished the death penalty are: Alaska (abolished in 1957), Connecticut (2012), Hawaii (1957), Illinois (2011), Iowa (1965), Maine (1887), Maryland (2013), Massachusetts (1984), Michigan (1846), Minnesota (1911), New Jersey (2007), New Mexico (2009), New York (2007), North Dakota (1984), Vermont (1964), West Virginia (1965), Wisconsin (1853), and also, the District of Columbia (1981). DEATH PENALTY INFO. CTR. *States with and without the death penalty*, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 17, 2013).

Furthermore, in the *Roper* oral argument, Justice Scalia attempted to demonstrate that the EU's abolitionist position is against some form of popular sovereignty of the region, when he asked, "have the countries of the European Union abolished the death penalty by popular vote?"<sup>227</sup>

Mr. Layton replied:

I don't know how they've done that, Your Honor.<sup>228</sup>

Justice Scalia continued:

I thought they did it by reason of a judgment of a court...which required all of them to abolish it...And I thought that some of the public opinion polls in...a number of the countries support the death penalty.<sup>229</sup>

Mr. Layton stated:

I believe that there are countries in Europe who abolished it because of their membership in the European Union—<sup>230</sup>

The removal of the death penalty in the EU began with the western Member States, and then abolition solidified into a regional internal position and is now incorporated into the Treaty and *Charter*. Abolition then evolved into a focus of the external project. Mr. Layton's response identified abolition of the death penalty in the EU is a contingent position for membership. There are some examples, however, of public support for the death penalty. Aleksandra Gliszczynska, Katarzyna Sękowska, and Rowan Wieruszewski, referred to the research conducted by the Public Opinion Research Centre in Poland, which stated that in 2004, 77 per cent of people polled declared that they favored the death penalty.<sup>231</sup> But, this has not grown into a political platform for the reintroduction of the punishment.<sup>232</sup> Agata Fijalkowski has noted the existence of public support for the death penalty during the membership discussions in the Ukraine in 1995.<sup>233</sup> She observed, however, that, "[i]n the end,

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<sup>227</sup> Oral Argument at 12:45, *Roper v. Simmons*, 534 U.S. 551 (No. 03-633).

<sup>228</sup> *Id.* at 12:49.

<sup>229</sup> *Id.* at 12:50.

<sup>230</sup> *Id.* at 13:05.

<sup>231</sup> THE ABOLITION OF THE DEATH PENALTY IN POLAND, THE DEATH PENALTY IN THE OSCE AREA 24 (2006), available at <http://www.osce.org/odihr/20752>. See also Fijalkowski, *supra* note 27, at 147-68.

<sup>232</sup> *Id.*

<sup>233</sup> Application of Ukraine for Membership to the Council of Europe,

public opinion is only a sentiment, and one that cannot override serious human rights concerns and questions. For Europe, education is the key to making informed decisions.”<sup>234</sup> Furthermore, William Schabas, Roger Hood and Carolyn Hoyle, argue that such sentiment in favor of the death penalty appears to be higher when vicious crimes occur and are reported in the media.<sup>235</sup> So it is a sentiment, which is correlative with heinous crimes in society, and is thus determined by events, not a continuous mode of rationality. It is evident that if there are examples of public support for the death penalty in the EU, they do not evolve into a discourse platform from which to engage the political and legal processes to reintroduce the punishment. Hence, if there are examples of public support for the death penalty in Europe, it is a weak support and, in all circumstances it dissolves.

Then Justice Breyer contributed to the dialogue in the *Roper* oral argument by engaging with a historical sentiment on the scholarship on English law, when he asked:

Is there any indication? I mean, I've never seen any either way, to tell you the truth, but...that Madison or Jefferson or whoever, when they were writing the Constitution, would have thought what happened elsewhere, let's say, in Britain or in the British...they were a British colony. They did think Blackstone was relevant...would have thought it was totally irrelevant what happened elsewhere in the world to the word unusual. Is there any indication in any debate or any of the ratification conventions?<sup>236</sup>

Mr. Layton:

Nothing that I have seen has suggested that—...<sup>237</sup>

Justice Breyer:

Abraham Lincoln used to study Blackstone and I think he

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Opinion 190/1995, Parliamentary Assembly, September 26, 1995, *available at*, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=13929&lang=EN&search=T3BpbmlvbiBOby4gMTkw1CgxOTk1KQ==> (last visited Oct. 17, 2013).

<sup>234</sup> Fijalkowski, *supra* note 27, at 287.

<sup>235</sup> See, William A. Schabas, *Public Opinion and the Death Penalty, CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION*, 309-11 (Peter Hodgkinson & William A. Schabas eds., 2004); *see also*, HOOD & HOYLE, *supra* note 27, at 350-82.

<sup>236</sup> Oral Argument at 13:42, *Roper v. Simmons*, 534 U.S. 551 (No. 03-633).

<sup>237</sup> *Id.* at 14:14.

thought that the Founding Fathers studied Blackstone, and all that happened in England was relevant, is there some special reason why what happens abroad would not be relevant here? Relevant. I'm not saying controlling.<sup>238</sup>

Mr. Layton:

There's a special reason why Blackstone would be relevant because that was the law from which they were operating when they put this language into the Constitution.<sup>239</sup>

Justice Breyer:

Absolutely, and they, I guess, were looking at English practices, and would they have thought it was wrong to look abroad as a relevant feature?<sup>240</sup>

Mr. Layton:

I don't know the answer to that, Your Honor.<sup>241</sup>

Justice Breyer affirmed the position that the framers of the Eighth Amendment, in 1789-90, were aware of contemporary English opinion, and they thought that Eighteenth Century values in England were relevant to what constituted cruel and unusual punishment in America.<sup>242</sup> The Founding Fathers were very aware of the writings of William Blackstone, especially the *Commentaries on the Laws of England*,<sup>243</sup> who was

<sup>238</sup> *Id.* at 14:18.

<sup>239</sup> *Id.* at 14:32.

<sup>240</sup> *Id.* at 14:39.

<sup>241</sup> *Id.* at 14:49.

<sup>242</sup> See Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839 (1969) (For scholarship on the drafting and original meaning of the Eight Amendment); David B. Hershenov, *Why Must Punishment be Unusual as Well as Cruel to be Unconstitutional?*, 16 PUBLIC AFFAIRS QUARTERLY 1, 77-98 (2002); Megan J. Ryan, *Does the Eighteenth Amendment Punishment's Clause Prohibit Only Punishment which are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567 (2010); LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 61 (1989); John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21<sup>st</sup> Century*, 2 BR. J. AM. LEG. STUDIES (2013) 297-451.

<sup>243</sup> WILLIAM BLACKSTONE, *COMMENTARIES OF THE LAWS OF ENGLAND (1765-1769)* 4:74-91, 350-51 THE FOUNDER'S CONSTITUTION (1769), available at [http://press-pubs.uchicago.edu/founders/documents/a3\\_3\\_1-2s8.html](http://press-pubs.uchicago.edu/founders/documents/a3_3_1-2s8.html); See generally, Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984) (Lutz analyzed various European influences on early American political perceptions. Furthermore, the United States Supreme Court has cited William Blackstone in numerous capital cases, in its jurisprudence on the

influenced by John Locke's theory on natural law, natural rights, and the concept of, "life, liberty and the pursuit of happiness," which is included in the American Declaration of Independence.<sup>244</sup>

Friedrich Hayek has charted the evolution of the rule of law in America and pointed to the significant influence of Blackstone.<sup>245</sup> Robert Stein notes that "the writings of the great British legal scholars: Edward Coke, William Blackstone, David Hume, and of course, John Locke . . . had such an enormous influence on our founding fathers."<sup>246</sup> John Bessler, in his thorough research, has demonstrated that the Founding Fathers were also very aware of Cesare Beccaria, the Enlightenment thinker against the death penalty.<sup>247</sup> It should also be remem-

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Eighth Amendment); *See e.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972); *Roberts v. Louisiana* 431 U.S. 633 (1977); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Baze v. Rees*, 553 U.S. 35 (2008); *Johnson v. Bredeesen*, 558 U.S. 1067 (2009); and *Ryan v. Gonzales*, 133 S. Ct. 696 (2013).

<sup>244</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see* JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1690) (There is scholarship demonstrating the influence of the natural law and natural rights theory of John Locke in the Declaration of Independence and the formation of the text of the U.S. Constitution); *see* DOUGLAS W. KMIEC, STEPHEN B. PRESSER, JOHN C. EASTMAN & RAYMOND B. MARCIN, *INDIVIDUAL RIGHTS AND THE AMERICAN CONSTITUTION* 7-44 (3d ed. 2009); DOUGLAS W. KMIEC, STEPHEN B. PRESSER, JOHN C. EASTMAN AND RAYMOND B. MARCIN, *THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY* 1-125 (3d ed. 2009).

<sup>245</sup> FRIEDRICH A. HAYEK, *The Origins of the Rule of Law*, in *THE CONSTITUTION OF LIBERTY* 162 (1960).

<sup>246</sup> Robert Stein, *Rule of Law: What Does it Mean?*, 18 *MINN. J. INT'L L.* 293, 298 (2009).

<sup>247</sup> *See* John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 *NW. J.L. & SOC. POL'Y* 195, 207-08 (2009). John Bessler provides a scholarly review of the early use of Beccaria's work. Bessler states, "In 1770, the American patriot and lawyer John Adams famously defended the British soldiers accused of murder in the Boston massacre, and Adams showed close familiarity with the reform-minded Italian criminologist. In taking on this unpopular cause, Adams—though a death penalty supporter—eloquently invoked Beccaria in his opening statement on behalf of his clients:

I am for the prisoners at the bar and shall apologize for it only in the words of the Marquis Beccaria. "If by supporting the rights of mankind, and of invincible truth, I shall contribute to save from the agonies of death one unfortunate victim of tyranny, or ignorance, equally fatal, his blessings and years of transport shall be sufficient consolation to me for the contempt of all mankind"

(citing Marvin Wolfgang, Introduction to *CESARE BECCARIA, OF CRIMES*

bered that Thomas Paine, a Founding Father, argued against the state right to the death penalty, except in exceptional circumstances of a threat to the life of the nation.<sup>248</sup> Furthermore, in the drafting debates on the text of the Eight Amendment in 1789, Samuel Livermore of New Hampshire, argued that when punishment technologies, such as through modernized prison systems, were improved by being more humane and effective, there would be no need for the death penalty, when he stated:

It is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.<sup>249</sup>

The Annals of Congress of 1789 reveal that William Smith of South Carolina objected to the words “nor cruel and unusual punishments,” because he thought them, “too indefinite.”<sup>250</sup> It can be inferred that he feared a lack of clarity would result and the parameters for identifying constitutionally permissible punishment would be very difficult to achieve. Samuel Livermore had stated that leniency should be a determining feature in punishment, and that only “necessary” laws should be adopted.<sup>251</sup> So when the death penalty becomes “unnecessary,” the question should arise as to it being abandoned.<sup>252</sup> Hence,

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AND PUNISHMENT, at ii (1996)).

<sup>248</sup> THOMAS PAINE, *Rights of Man*, in COLLECTED WRITINGS 213 (1995) (In 1791-1792, Thomas Paine published the *Rights of Man*, and in Part One, he dedicated it to George Washington, and President Andrew Jackson was very familiar with the text. Concerning the death penalty, Paine stated, “[l]ay then the axe to the root, and teach governments humanity. It is their sanguinary punishments which corrupt mankind.” Thomas Paine was also a founding member of the American Philosophic Society. See *About the APS*, AM. PHIL. SOC’Y, <http://www.amphilsoc.org/about> (last visited Oct. 7, 2013); see also R.B. Bernstein, *Rediscovering Thomas Paine*, 39 N.Y.L. SCH. L. REV. 873 (1994).

<sup>249</sup> 1 ANNALS OF CONG. 754 (1789), available at [http://press-pubs.uchicago.edu/founders/print\\_documents/amendVIIIIs14.html](http://press-pubs.uchicago.edu/founders/print_documents/amendVIIIIs14.html).

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

<sup>251</sup> *Id.*

<sup>252</sup> See Jon Yorke, *Sovereignty and the Unnecessary Penalty of Death: European and United States Perspectives*, in IS THE DEATH PENALTY DYING?

the Founding Fathers did not envision that the death penalty should remain a punishment within the American criminal justice system in perpetuity. There would become a time when it would be unnecessary, and in our contemporary times of effective policing and imprisonment, it now appears that we have arrived at the moment in which the death penalty should be abandoned.

In 1787, the American abolitionist, Benjamin Rush, lectured against the death penalty. In 1797, he published a pamphlet, *Considerations on the Injustice and Impolicy of Punishing Murderers by Death*, in which he argued that the punishment was “contrary to reason.”<sup>253</sup> Applying Livermore’s construction of “necessary” punishments, reason dictates that there would become a time when the death penalty would be regarded as an illegitimate punishment. The arguments by Rush and Livermore should be considered as realized today. Max Weber’s view that the state is recognized through the “monopoly of the legitimate use of physical force in the enforcement of its order”<sup>254</sup> is a useful guide for analyzing the process. In the political and legal metamorphosis that has occurred in the era of human rights, the death penalty should now be considered to be an “illegitimate” use of physical force.

In the *Roper* oral argument, Justice Kennedy engaged with the issue of whether there should be some *quid pro quo* in the use of comparative perspectives. In essence, if the rest of the world needs to take note of legal developments in America, America should also give credence to what happens in human rights regions and in Member State constitutional courts. Justice Kennedy asked:

Do we ever take the position that what we do here should influence what people think elsewhere?<sup>255</sup>

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EUROPEAN AND AMERICAN PERSPECTIVES (Austin Sarat & Jürgen Martschukat eds., 2011) (arguing that the death penalty is now an “unnecessary punishment” in America); *see also*, Jon Yorke, *Capital Punishment*, in THE OXFORD COMPANION TO COMPARATIVE POLITICS 140, 143 (Joel Krieger et al. eds. 2012).

<sup>253</sup> Hugo Adam Bedau, *An Abolitionist’s Survey of the Death Penalty in America Today*, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT 15, 16 (Hugo Bedau & Paul Cassell eds., 2004).

<sup>254</sup> MAX WEBER, *ECONOMY AND SOCIETY* 45 (1978).

<sup>255</sup> Oral Argument at 14:48, *Roper v. Simmons*, 534 U.S. 551 (No. 03-633).

Mr. Layton:

I have not seen that overtly in any of the Court's opinions, Your Honor.<sup>256</sup>

Justice Kennedy:

You thought that Mr. Jefferson thought that what we did here had no bearing on the rest of the world?<sup>257</sup>

Mr. Layton:

I think Mr. Jefferson thought that. I think many of the Founders thought that they were leading the world, and I have no objection to us leading the world, but Mr. Jefferson's lead of the world was through the legislature not through the courts.<sup>258</sup>

Justice Ginsburg:

But did he not also say that to lead the world, we would have to show a decent respect for the opinions of mankind?<sup>259</sup>

Mr. Layton:

That . . . may well be.<sup>260</sup>

Justice Kennedy opened the door for the issue of the circumstance of American values being expressed to the world and Justice Ginsburg questioned the appropriateness of America disregarding the "opinions of mankind," when the country claims to "lead the world."<sup>261</sup> In both Justice Kennedy and Justice Ginsburg's questions, it appears implicit that the inclusion of the death penalty in this "leadership" is questionable. Harold Koh, US Assistant Secretary of State for Democracy, Human Rights and Labor, between 1998 and 2001, and the Stirling Professor of International Law at Yale Law School, has argued that in the field of foreign relations, the death penalty is America's Achilles' heel "in almost every multilateral human rights forum."<sup>262</sup> He argued, "As Americans committed to transnational legal process, we must do what we can to make the day arrive when this nation, conceived in liberty, again pays decent

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<sup>256</sup> *Id.* at 14:55.

<sup>257</sup> *Id.* at 14:59.

<sup>258</sup> *Id.* at 15:04.

<sup>259</sup> *Id.* at 15:14.

<sup>260</sup> *Id.* at 15:25.

<sup>261</sup> *Id.*

<sup>262</sup> Harold H. Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1105, 1130 (2002).

respect to the world opinion on the death penalty.”<sup>263</sup>

Placing the way in which America implements punishments, within the complexities of international dialogue, is a difficult but necessary endeavor. Here the fields of international relations and international judicial communication can prove illuminating. Gábor Halmai explains:

Judicial use of foreign law is a product of the globalization of the practice of modern constitutionalism: it has been made possible by a dialogue among high court judges with constitutional jurisdiction around the world, conducted through mutual citation and increasingly direct interactions. This growing “constitutional cross-fertilization” can afford not only a tool for better judgments, but also for the construction of a “global legal system”. The globalization of constitutional law means that constitutionalism is no longer the privilege of the nation-state, but has now instead become a worldwide concept and standard.<sup>264</sup>

The death penalty is an internationalized constitutional question. This issue should no longer be viewed as a “privilege of the nation-state.”<sup>265</sup> In delivering the judgment for the Court that the execution of juvenile offenders was unconstitutional, in violation of the Eighth Amendment’s Cruel and Unusual Punishment Clause, Justice Kennedy made a reference to the EU brief,<sup>266</sup> and held, “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.”<sup>267</sup> In the *Roper* oral argument cited above, Justice Kennedy acknowledged that the application of the death penalty has global implications. As such the administration of the punishment necessitates that at least the highest domestic judiciary (here the United States Supreme Court), consider the policy and judicial activity which occurs in the international arena. Halmai has taken such a judicial consideration of global norms and practices as an example of the “globalization of constitutional law.”<sup>268</sup>

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<sup>263</sup> *Id.*

<sup>264</sup> Gábor Halmai, *Constitutional Interpretation in a Globalized World*, 6 J. PARLIAMENTARY & POL. L. 449, 449 (2012).

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

<sup>266</sup> *Simmons*, 534 U.S. at 576-78.

<sup>267</sup> *Id.* at 578; see also Dirk van Zyl Smit, *The Abolition of Capital Punishment for Persons Under the Age of Eighteen Years in the United States of America. What Next?*, 5 HUM. RTS. L. REV. 393 (2005).

<sup>268</sup> Halmai, *supra* note 264, at 449.

However, as in *Atkins*, Justice Scalia could not accept the use of international perspectives in *Roper*, and he was of the opinion that through the majority holding in the case, an illegitimate encroachment upon American sovereignty had occurred. He stated, “Though the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.”<sup>269</sup> He did not “believe that approval by ‘other nations and peoples’ should buttress our commitment to American principles any more than (what should logically follow) disapproval by ‘other nations and peoples’ should weaken that commitment.”<sup>270</sup>

Justice Scalia’s firm rejection of the benefit of international opinion and law for US constitutional adjudication was criticized by Justice O’Connor.<sup>271</sup> Although dissenting in the case, she sought to open the door for international opinion in restricted circumstances. Justice O’Connor stated that international values could be used to provide a “confirmatory role” to an already existing United States punishment practice, but that it should not be used to dictate change of state penal systems. Justice O’Connor held:

[T]his Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.<sup>272</sup>

The last sentence of this passage of Justice O’Connor’s dissent reaches the core of her consideration of the sovereign state

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<sup>269</sup> *Simmons*, 534 U.S. at 624 (Scalia, J., dissenting).

<sup>270</sup> *Id.* at 625.

<sup>271</sup> *Id.* at 606 (O’Connor, J., dissenting).

<sup>272</sup> *Id.* at 605 (O’Connor, J., dissenting); see also, van Zyl Smit, *supra* note 267.

right of the death penalty. In her opinion, if the whole international community had reached a consensus on a specific aspect of the death penalty, in this case, the execution of juveniles, such consensus could not affect the American consensus.<sup>273</sup> The United States must come to the conclusion on its own and then view the position of the international community. However, the opinions of the international community through *amicus curiae* briefs, can serve more than to “confirm the reasonableness of a consonant and genuine American consensus”<sup>274</sup> as they can act as a lens of human rights to help evaluate the American capital judicial system. Here, the role of EU *amicus curiae* briefs may prove useful,<sup>275</sup> and rather than being confined to providing a “confirmatory” role, they can provide analysis, the means to test the legitimacy of state practice, and reveal the extent of global norms.

## V. ACTION IN THE MULTILATERAL FORA

The EU Guidelines on the Death Penalty state:

The EU will raise the issue of the death penalty in relevant multilateral fora and seize all appropriate opportunities to put before them initiatives aimed at introducing a moratorium on the use of the death penalty and, in due course, abolition. Whenever appropriate, the EU will seek to include references to the establishment of a moratorium on executions and the abolition of the death penalty in documents produced under the proceedings of these multilateral fora.<sup>276</sup>

The EU co-operates with relevant international organizations in encouraging states to follow an abolitionist agenda, not

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<sup>273</sup> *Simmons*, 534 U.S. at 605 (O'Connor, J., dissenting).

<sup>274</sup> *Id.*

<sup>275</sup> See, e.g., Brief of The European Union and Members of the International Community as Amici Curiae Supporting Petitioner, *Maharaj v. Secretary for the Department of Corrections for the State of Florida*, 549 U.S. 819 (2006); S. Adele Shank & John B. Quigley, Brief of The European Union and Members of the International Community as Amici Curiae Supporting Petitioner, *Medellin v Dretke*, Case No. 04-5928; see also *ibid.*, Brief of Amici Curiae: The European Union and Members of the International Community in Support of Petitioner, in the case of *Maharaj v. Secretary for the Department of Corrections for the State of Florida*, Case No. 05-1555; Brief of Shank and Quigley for The European Union & Members of the International Community as Amici Curiae Supporting Petitioner, *Sanchez-Llamas v. Oregon*, 131 S. Ct. 1197 (2011); *Bustillo v. Johnson*, 548 U.S. 331 (2006).

<sup>276</sup> *EU Guidelines on the Death Penalty*, *supra* note 4.

least by ratifying and complying with international treaties<sup>277</sup> and standards relating to the death penalty. An example of this close co-operation is displayed when the EU and the CoE issue a joint declaration on the occasion of the World/European Day against Death Penalty on October 10, in which they jointly reaffirm their opposition to the use of capital punishment in all circumstances, and their commitment to the abolition of the death penalty worldwide.<sup>278</sup> In this context, both the EU and the CoE have repeatedly urged Belarus, the only European country that still imposes the death penalty, “to introduce a moratorium with a view to complete abolition.”<sup>279</sup> In connection with this joint approach, the EU Delegation organized together with CoE staff a joint EU/CoE exhibition, “Death is not justice,” in Minsk on October 8, 2010.<sup>280</sup>

Another important platform for EU abolitionist action is in the United Nations General Assembly. In 1994, a resolution for a moratorium on the death penalty was presented for the first time at the United Nations General Assembly by the Italian government and it only lost by eight votes.<sup>281</sup> In 1999, at the

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<sup>277</sup> See Appendix 1, all EU Member States have ratified Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty. All EU Member States apart from Poland have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, as well as 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.

<sup>278</sup> Press Release, European Union, Joint Declaration by Thorbjørn Jagland, Secretary General of the Council of Europe, and Catherine Ashton, European Union High Representative for Foreign Affairs and Security Policy, on the European and World Day against the Death Penalty, Brussels European Union (Oct. 10, 2012), available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/132777.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/132777.pdf).

<sup>279</sup> *Id.*

<sup>280</sup> Press Release, European External Action Service, Delegation of the European Union to Belarus, “Death is not Justice:” Exhibition in Minsk to mark European and World Day Against the Death Penalty (Oct. 8, 2010), available at [http://eeas.europa.eu/delegations/belarus/press\\_corner/all\\_news/news/2010/2010\\_10\\_08\\_en.htm](http://eeas.europa.eu/delegations/belarus/press_corner/all_news/news/2010/2010_10_08_en.htm).

<sup>281</sup> Subsequently, since 1997, through Italy’s initiative, and since 1999 through the EU’s endeavor, the United Nations Commission on Human Rights (“UNCHR”) approved a resolution calling for a moratorium on executions with a view to completely abolishing the death penalty. This occurred every year until 2005, as the UNCHR held its final meeting in March 2006. Then due to the transition period the EU focus changed to the General Assembly.

54th meeting of the UN General Assembly, then Finish Foreign Minister, Tarja Halonen, called on behalf of the EU for the worldwide restriction of the death penalty for the most serious crimes, and for all retentionist countries to initiate a moratorium which should then lead to abolition.<sup>282</sup> She also submitted on behalf of the EU a resolution to the General Assembly, which called for a moratorium by all retentionist states.<sup>283</sup> However, the EU's original ambition to introduce a resolution on the moratorium of the death penalty during the 1999 General Assembly session did not materialize and the respective proposal was withdrawn.<sup>284</sup>

The withdrawal of the draft resolution caused an internal EU debate, and William Schabas observed that the "European Union decided to withdraw the resolution rather than see it transformed beyond recognition."<sup>285</sup> Christopher Patten, former European Commissioner for External Relations, defended the withdrawal in the European Parliament in February 16, 2000 by arguing that it had been necessary "to freeze our resolution on the death penalty or risk the passing of a resolution that would have incorporated wholly unacceptable arguments that asserted that human rights are not universally applicable and valid."<sup>286</sup> Commissioner Patten reviewed the issue in his speech to the European Parliament on October 25, 2000, stating that "following intensive negotiation, we decided at last year's General Assembly in November that no resolution was better than a fatally flawed text, and therefore, the [EU] should not pursue its initiative."<sup>287</sup> Further, retentionist countries "will continue to resist strongly any efforts to secure a General

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<sup>282</sup> Tarja Halonen, Minister for Foreign Affairs, Address at the 54th UN General Assembly, New York (Sept. 21, 1999), *available at* [www.eurunion.org/legislat/DeathPenalty/54thFinspeechexrpt.htm](http://www.eurunion.org/legislat/DeathPenalty/54thFinspeechexrpt.htm).

<sup>283</sup> Memorandum by the European Union at the 54th United Nations General Assembly (Sept. 21, 1999), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/er/Memo.eng.htm](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/Memo.eng.htm).

<sup>284</sup> *Id.*

<sup>285</sup> William A. Schabas, *The United Nations and the Abolition of the Death Penalty*, in *ABOLITION OF THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS*, 30-31 (Jon Yorke ed., 2008).

<sup>286</sup> The Rt. Hon. Christopher Patten, Speech before the European Parliament (Feb. 16, 2000), *quoted in* William A. Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 417, 437 (2004).

<sup>287</sup> *Id.*

Assembly resolution.”<sup>288</sup> However, the Italian UN Permanent Representative in New York, Ambassador Francesco Paolo Fulci, expressed doubts about the necessity of the withdrawal of the draft resolution by stating, “We, European Ambassadors, received the order from Bruxelles to suspend any initiative because of insufficient votes. I can assume that that wasn’t the case, because I had personally contacted 90 Ambassadors that granted support.”<sup>289</sup>

Such ambivalence demonstrated that while the EU’s external strategy remained a focus, the specific strategy in the General Assembly was not realized, so the impetus was realigned in the Commission on Human Rights. On December 19, 2006, the Finnish Presidency of the EU read out a political declaration, committing its signatories to work towards the abolition of the death penalty and calling, where the death penalty still existed, for its use to be progressively restricted, insisting that it be carried out according to minimum standards and, in the meantime, urging the establishment of a moratorium on executions.<sup>290</sup>

In 2007, the idea of introducing a resolution in the General Assembly was again discussed. This time, the German Presidency of the Council of the EU, initiated a Declaration by the Presidency on behalf of the EU on the occasion of the Third World Congress against the Death Penalty, in Paris on February 1-3, 2007.<sup>291</sup> It announced that “the EU will intensify its initiatives in international fora, including the United Nations.”<sup>292</sup> In addition, on April 26, 2007, the European Parlia-

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<sup>288</sup> The Rt. Hon. Christopher Patten, Speech before the European Parliament, Plen. Sess. (Oct. 25, 2000), *quoted in* Schabas, *supra* note 286, at 437.

<sup>289</sup> Letter to Chancellor Hon. Angela Merkel, President of the European Council, Campaign for the adoption of a Resolution for the Universal Moratorium on the Death Penalty by the UN General Assembly, Rome 3 (May 4, 2007).

<sup>290</sup> H.E. Ms. Kirsti Lintonen, Ambassador, Permanent Representative of Finland to the United Nations, Statement on Abolition of the Death Penalty, New York (Dec. 16, 2006), *available at* [http://eu2006.fi/NEWS\\_AND\\_DOCUMENTS/SPEECHES/VKO51/EN\\_GB/1166630395097/INDEX.HTM](http://eu2006.fi/NEWS_AND_DOCUMENTS/SPEECHES/VKO51/EN_GB/1166630395097/INDEX.HTM).

<sup>291</sup> Press Release, European Union, Declaration by the Presidency on Behalf of the EU on the Occasion of the Third World Congress Against the Death Penalty, Paris (Feb. 1-3, 2007), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/cfsp/92602.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/cfsp/92602.pdf).

<sup>292</sup> *Id.*

ment adopted a resolution on the initiative for a universal moratorium on the death penalty, which:

. . . encouraged the EU to seize the existing opportunities and press its case and calls on the EU Member States and the EU to immediately submit – seeking the co-sponsorship of countries in other continents – a resolution for a universal moratorium on the death penalty to the current UN General Assembly.<sup>293</sup>

The EU Foreign Ministers decided in June 2007 that the EU would introduce, in the framework of a cross-regional alliance within the United Nations, a resolution against the death penalty at the 62nd UN General Assembly.<sup>294</sup> Portugal, taking over the EU Presidency from Germany in the second semester of 2007, concerted the EU support to this cross-regional alliance, which eventually consisted of Albania, Angola, Brazil, Croatia, Gabon, Mexico, New Zealand, The Philippines, Portugal on behalf of the EU, and Timor Leste.<sup>295</sup> This landmark resolution 62/149 (2007), calling for a worldwide moratorium on the use of the death penalty, was successfully adopted by UNGA62 on December 18, 2007, with 104 Member States voting in favor, 29 abstaining, and 54 voting in opposition.<sup>296</sup>

The collective campaigns in the United Nations by the abolitionist governments, the EU, and other international organi-

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<sup>293</sup> European Parliament Resolution of 26 April 2007 on the Initiative for a Universal Moratorium on the Death Penalty, EUR. PARL. DOC. (C74 E/775) (2007).

<sup>294</sup> Press Release, Council of the European Union, General Affairs and External Relations, Luxembourg (June 18, 2007), *available at* [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/gena/94804.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/94804.pdf).

<sup>295</sup> *Id.*

<sup>296</sup> Moratorium on the Use of the Death Penalty, G.A. Res. 62/149, U.N. Doc. A/RES/62/149 (Dec. 18, 2007) (The Resolution, “1. Expresses its deep concern about the continued application of the death penalty; 2. Calls upon all States that still maintain the death penalty: (a) To respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984; (b) To provide the Secretary-General with information relating to the use of capital punishment and the observance of the safeguards guaranteeing protection of the rights of those facing the death penalty; (c) To progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed; (d) To establish a moratorium on executions with a view to abolishing the death penalty”). *See also* Roger Hood, *Introduction to AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS*, 1 (Jon Yorke ed., 2008).

zations, as well as, various non-governmental organizations such as Hands Off Cain, Ensemble Contre la Peine de Mort, and the Communita di San Egidio, finally brought about this historical United Nations decision.<sup>297</sup> One important element for success was the EU's ability to embed its efforts in a cross-regional alliance with a truly cross-regional character.

The Slovenian Presidency of the EU, in the first half of 2008, decided to build on the momentum created by the 2007 resolution and support the initiative to introduce a follow-up resolution in the 2008 General Assembly.<sup>298</sup> The subsequent French Presidency supervised the EU's contribution to the cross-regional alliance in their outreach to further increase the supporting votes.<sup>299</sup> On December 18, 2008, the 63rd UN General Assembly adopted resolution 63/168 (2008), reaffirming the 2007 resolution's call for a moratorium on the use of the death penalty with 106 in favor, 46 against, and 34 abstentions.<sup>300</sup> Accordingly, following the bi-annual review indicated in the 2008 resolution a further resolution was passed on December 21 2010.<sup>301</sup> The General Assembly adopted resolution 65/206 (2010), reaffirming previous Assembly resolutions 62/149 and 63/168, with 109 in favor, 41 against, and 35 abstentions.<sup>302</sup> The EU had significantly contributed to the outreach campaign by supporting a cross-regional alliance, and in a Joint Communication to the Parliament and Council, the EU stated it will:

increase its effectiveness at the UN, building cross-regional coalitions, supporting the UN system's human rights mechanisms and promoting better synchronization with its actions at bilateral and in other multilateral forums.<sup>303</sup>

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<sup>297</sup> See *UN Resolution 2008*, HANDS OFF CAIN, <http://www.handsoffcain.info/chisiamo/index.php?idtema=12300909>.

<sup>298</sup> Moratorium on the Use of the Death Penalty, G.A. Res. 63/168, U.N. Doc. A/RES/63/168 (Dec. 18, 2008).

<sup>299</sup> *International Campaign to Abolish the Death Penalty*, FRANCE AT THE UNITED NATIONS, <http://www.franceonu.org/france-at-the-united-nations/thematic-files/human-rights-rule-of-law/international-campaign-to-abolish/article/international-campaign-to-abolish> (last visited Oct. 17, 2013).

<sup>300</sup> *Id.*

<sup>301</sup> Moratorium on the Use of the Death Penalty, G.A. Res. 65/206, U.N. Doc. A/RES/65/206 (Dec. 21, 2010).

<sup>302</sup> *Id.*

<sup>303</sup> *Joint Communication to the European Parliament and the Council, Human Rights and Democracy at the Heart of the EU External Action – To-*

Most recently, in 2012, the General Assembly adopted resolution 67/176 (2012) with 110 votes in favor, 39 against, and 36 abstentions.<sup>304</sup> In the resolution, the General Assembly called upon all States to respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty and requested States to provide the Secretary-General with information in that regard.<sup>305</sup> It also requested States to make available relevant information with regard to their use of the death penalty, which can contribute to informed and transparent national debates, to progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed, and to establish a moratorium on executions with a view to abolishing the death penalty. The General Assembly also called upon States that have abolished the death penalty not to reintroduce it and encouraged them to share their experience in that regard.<sup>306</sup>

## VI. TRANSFER OF PERSONS IN SECURITY CIRCUMSTANCES

Since *Soering v. United Kingdom*,<sup>307</sup> European human rights law has acted as a vanguard for people being extradited to a receiving state, where they may face a death sentence and/or an execution.<sup>308</sup> Antonio Muñoz Auni3n observes that judicial scrutiny in extradition circumstances is a stronger mechanism than political diplomacy alone, for preventing a receiving state from imposing the punishment.<sup>309</sup>

In *Soering*, it was determined that when a suspect is extradited to a receiving state, assurances must be provided that

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*wards a More Effective Approach*, at 15, COM (2011) 886 final (Dec. 12, 2011).

<sup>304</sup> Moratorium on the Use of the Death Penalty, G.A. Res, 67/176, U.N. Doc. A/RES/67/176 (Dec. 20, 2012).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A) 436 (1989); see also Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 HUM. RTS. L. REV. 57, 66-68 (2005).

<sup>308</sup> See William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 LOY. L.A. INT'L & COMP. L. REV. 581 (2003); Jon Yorke, *Europe's Judicial Inquiry in Extradition Cases: Closing the Door on the Death Penalty*, 29 EUR. L. REV. 546 (2004).

<sup>309</sup> See Antonio Muñoz Auni3n, *The European Union Responds to the Death Penalty With New Competencies*, in TOWARDS UNIVERSAL ABOLITION OF THE DEATH PENALTY (Luis Arroyo, Paloma Biglino & William A. Schabas eds., 2012).

the death penalty will not be administered.<sup>310</sup> The assurances must be “adequate,” as a state prosecutor’s mere declaration to a jury that Europe considers it inappropriate to impose a death sentence, would not comply with the prohibition against inhuman punishment in *ECHR* Article 3.<sup>311</sup> This human rights practice through judicial scrutiny has been extended to persons deported since the case of *Bader and Others v. Sweden*,<sup>312</sup> and to circumstances where prisoners are transferred from an occupying military power to the reformed national government in times of war as illustrated in *Al-Saadoon and Mufdhi v. United Kingdom*.<sup>313</sup>

Furthermore, *Charter* Article 19(2) also provides a prohibition on extradition in capital cases as it states:

[n]o one may be removed, expelled or extradited to a [s]tate where there is a serious risk that he or she would be subjected to the death penalty...or other inhuman or degrading treatment or punishment.<sup>314</sup>

This Article provides a complete restriction on Member States, as extradition is not allowed when the death penalty may be sought by the receiving state. Adán Nieto Martín, identifies that within Article 19(2):

The EU expresses one of its distinguishing marks which is abolitionism. It affirms that there is no room for judicial cooperation, with regard to extradition, when the criminal proceedings might lead to the imposition of the death penalty with some probability of it being applied or when extradition is requested to impose that penalty.<sup>315</sup>

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<sup>310</sup> *Soering*, Eur. Ct. H.R. ¶ 436; see also, European Convention on Extradition, art. 11, Dec. 13, 1957, C.E.T.S. No. 024; see also A.H. Robertson, *The Legal Work of the Council of Europe*, 1 INT’L COMP. L.Q. 10, 143, 151-52 (1961).

<sup>311</sup> *Talan v. Turkey*, App. No. 31096/02, Eur. Ct. H.R. (2006), ¶¶ 36, 98; see also *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 486 (1989) (De Meyer, J., concurring).

<sup>312</sup> *Bader & Others v. Sweden*, App. No. 13284/04, 46 Eur. H.R. Rep. 13 (2005).

<sup>313</sup> *Al-Saadoon & Mufdhi v. United Kingdom*, App. No. 61498/08, Eur. Ct. H.R. 282 (2010).

<sup>314</sup> *Charter of Fundamental Rights*, *supra* note 7.

<sup>315</sup> Adán Nieto Martín, *Judicial Cooperation in the EU as a Means of Combating the Death Penalty and the Expansion of Human Rights*, in *TOWARDS UNIVERSAL ABOLITION OF THE DEATH PENALTY* 51 (LUIS ARROYO, PALOMA BIGLINO & WILLIAM A. SCHABAS eds., 2010).

When death sentences are imposed, there is a real possibility that the inmate will suffer from adverse cognitive effects created by the “death row phenomenon,” which constitutes “inhuman and degrading treatment”<sup>316</sup>. These circumstances may be attributed to the age of the inmate, his mental state upon incarceration, the incarceration conditions on death row, treatment on death row, the length of the incarceration period, and method of execution.<sup>317</sup> Any receiving state’s capital judicial system is incompatible with the European Court of Human Rights’ jurisprudence on the death row phenomenon.<sup>318</sup>

## VII. PROHIBITION OF THE TRADE IN EXECUTION TECHNOLOGIES

Another example of the growing complexity of the EU’s strategy is demonstrated through the 2005 Council Regulation 1236/2005 on the prohibition of trade in equipment that may be used in the administration of the death penalty.<sup>319</sup> This is the first of its kind and is a unique piece of regional legislation.<sup>320</sup> Regulation 1236/2005 must be understood as part of a package of EU legislation dealing with security-related export controls, consisting namely of the Council Common Position 2008/944/CFSP of December 8 2008, defining common rules governing control of exports of military technology and equip-

<sup>316</sup> See, e.g., *supra* notes 94-101 for the decisions of the European Court of Human Rights.

<sup>317</sup> *Soering*, *supra* note 307 ¶¶ 106, 111.

<sup>318</sup> *Yorke*, *supra* note 15; see, e.g., *Al-Saadoon & Mufdhi v. United Kingdom*, App. No. 61498/08, Eur. Ct. H.R. 282 (2002); *Rrpo v. Albania*, App. No. 5855/10, ¶ 69 Eur. Ct. H.R. (2012); *Talan v. Turkey*, App. No. 31096/02, Eur. Ct. H.R. (2006); *Öcalan v. Turkey*, 41 Eur. H.R. Rep. 45 (2003); *Kotalla v. the Netherlands*, 14 Eur. Comm’n H.R. Dec. & Rep. 238 (1978); *Ilaşcu & Others v. Russia & Moldova*, App. No. 48787/99 (July 8, 2004) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886>; *Maksimov v. Azerbaijan*, App. No. 38228/05 (Feb 1, 2007) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94871>; *Hummatov v. Azerbaijan*, App. Nos. 9852/03 and 13413/04 (May 8, 2006) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83588>.

<sup>319</sup> 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 of 27 June 2005, 2005 O.J. (L 200) 1.

<sup>320</sup> See *id.* at introductory notes and in commenting on the “Guidelines to the EU policy toward third countries, on torture and other cruel, inhuman or degrading treatment or punishment,” (in ¶ 4 the Regulations noted that “capital punishment is not to be considered a lawful penalty under any circumstances”).

ment,<sup>321</sup> Council Regulation (EC) No 1334/2000 on dual-use goods (military and civil use),<sup>322</sup> and recast in 2009 as Council Regulation (EC) No 428/2009, setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.<sup>323</sup> The introductory note, paragraph 7, of Regulation 1236/2005 states:

These rules are instrumental in promoting respect for human life and for fundamental human rights and thus serve the purpose of protecting public morals. Such rules should ensure that Community economic operators do not derive any benefits from trade which either promotes or otherwise facilitates the implementation of policies on capital punishment or on torture and other cruel, inhuman or degrading treatment or punishment, which are not compatible with the relevant EU Guidelines, the Charter of Fundamental Rights of the European Union and international conventions and treaties.<sup>324</sup>

Article 3(1) states, “Any export of goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, listed in Annex II, shall be prohibited, irrespective of the origin of such equipment.”<sup>325</sup> Article 4(1) prohibits the import of such, “goods,” into Europe.<sup>326</sup> Article 5(1) states, “For any export of goods that could be used for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, listed in Annex III, an authorization shall be required, irrespective of the origin of such goods...”<sup>327</sup> In Annex II of the Regulation, “goods designed for the execution of human beings,” include gallows and guillotines, electric chairs, air-tight vaults made of steel and glass, which are designed for the purpose of the execution of human beings by the administration of a lethal gas or other substances

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<sup>321</sup> Council Common Position (EC) No. 2008/944/CFSP of 8 Dec. 2008, 2008 O.J. (L 335) 99, 100, 102-03 (replacing a preexisting Code of Conduct on the matter, and subsequently supplemented by Common Military List of the European Union, 2012 O.J. (C 85) 1).

<sup>322</sup> Council Regulation (EC) No. 1334/2000 of 30 June 2000, 2000 O.J. (L 159) 1.

<sup>323</sup> Council Regulation (EC) No. 428/2009 of 29 May 2009, 2009 O.J. (L 134) 1.

<sup>324</sup> Council Regulation (EC) No. 1236/2005, *supra* note 319.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

and automatic drug injection systems, designed for the purpose of execution of human beings by the administration of a lethal chemical substance.<sup>328</sup> Hence, this regulation makes it a legal requirement within the EU for Member States to examine goods to identify whether they are intended for use in an execution.

Regulation 1236/2005 was the subject of litigation in the British High Court case of *R (on the application of Zagorski and Baze) v. Secretary of State for Business, Innovation and Skills*.<sup>329</sup> The case concerned the export of sodium thiopental by Archimedes Pharma UK Ltd, a pharmaceutical company based in the UK to various prisons in the US.<sup>330</sup> The second litigant, Ralph Baze, had previously submitted a case before the U.S. Supreme Court, where he claimed the lethal injection protocol in Kentucky violated the Eighth Amendment of the United States Constitution.<sup>331</sup> Before considering the British High Court case, it is useful to consider the American litigation.

In *Baze v. Rees*, a 2008 case, the U.S. Supreme Court considered the constitutionality of lethal injection, which included a specific consideration of the substances used for the execution protocol.<sup>332</sup> In a detailed law journal article in 2002, Deborah Denno clearly set out the various lethal injection protocols across the United States,<sup>333</sup> and the lethal injection method in Kentucky was implemented through three drugs: sodium thiopental, which is an anesthetic, pancuronium bromide which prevent respiration, and potassium chloride, which induces cardiac arrest and ultimately causes death.<sup>334</sup> However, there

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<sup>328</sup> *Id.*

<sup>329</sup> *R (on the application of Zagorski and Baze) v. Secretary of State for Business, Innovation and Skills*, [2010] E.W.H.C. 3110 (Admin).

<sup>330</sup> *Id.* ¶¶ 22-23.

<sup>331</sup> U.S. Const. Art. VIII.

<sup>332</sup> *Baze v. Rees*, 553 U.S. 35 (2008).

<sup>333</sup> See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox behind State Uses of Electrocuting and Lethal Injection and what it Says about Us*, 63 OHIO ST. L.J. 63 (2002).

<sup>334</sup> *Baze*, 553 U.S. at 44 ("The first drug, sodium thiopental (also known as Pentothol), is a fast-acting barbiturate sedative that induces a deep, coma-like unconsciousness when given in the amounts used for lethal injection. The second drug, pancuronium bromide (also known as Pavulon), is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration. Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest. The proper administration of the first drug ensures that

was also an acceptance of the constitutionality of a single drug protocol, with the use of a barbiturate such as pentobarbital.<sup>335</sup>

At this time, the pharmaceutical company Hospira was the only company in the United States licensed by the Food and Drug Administration (FDA) to manufacture sodium thiopental for use in executions.<sup>336</sup> However, in 2009, Hospira stated it would discontinue its production of the substance.<sup>337</sup> This caused the supplies of sodium thiopental to diminish in the prisons of the individual states that impose executions, and some prisons ran out of the controlled substances, including in Tennessee and Arizona.<sup>338</sup> However, in 2010, following the obtaining of new sources of supplies of sodium thiopental, the state executed Jeffrey Landrigan.<sup>339</sup>

The UK human rights charity Reprieve<sup>340</sup> questioned the source of the new supplies, and after investigations it became evident that the substances were exported from within the EU.<sup>341</sup> The company exporting sodium thiopental to the United States was Archimedes Pharma UK Ltd.<sup>342</sup>

So Edmund Zagorski and Ralph Baze<sup>343</sup> petitioned the British High Court to rule that the Secretary of State for Business, Innovation and Skills, should prohibit the marketing and selling of sodium thiopental to the United States and impose a control order pursuant to the Export Control Act 2002. Furthermore, petitioners argued that the trading in pharmacological substances used for lethal injection was a breach of Regulation 1236/2005 and a violation of European human rights, specifically the *ECHR* Articles 2(1) and 3, *Protocol No. 13*, and the *Charter*.<sup>344</sup> In the case, Mr. Vince Cable, the Secretary of State, acknowledged that the “United Kingdom firmly opposes the death penalty in all circumstances as a matter of princi-

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the prisoner does not experience any pain associated with the paralysis and caused by the second and third drugs.”)

<sup>335</sup> *Id.* at 56-57.

<sup>336</sup> Zagorski, *supra* note 329, ¶ 11.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* ¶¶ 11-12.

<sup>339</sup> See Brewer v. Landrigan, 131 S. Ct. 445 (2010).

<sup>340</sup> Zagorski, *supra* note 329, ¶ 15.

<sup>341</sup> *Id.* ¶¶ 40-45.

<sup>342</sup> *Id.* ¶¶ 20-23.

<sup>343</sup> *Baze*, 553 U.S. 35 (Mr. Ralph Baze was one of the petitioners in the British High Court).

<sup>344</sup> Charter of Fundamental Rights, *supra* note 7.

ple,”<sup>345</sup> but stated that there were no controls on exporting the drug, and that it was not appropriate for the Secretary of State to impose an export control order under sections 5(2) and (4) of the Export Control Act 2002.<sup>346</sup> In effect, although sodium thiopental was potentially being used in the United States to impose human rights violations through the imposition of lethal injection, it still was a “general anaesthetic and has a number of other legitimate uses.”<sup>347</sup> The British High Court held that “sodium thiopental” did not fall within Articles 3 and 5 of Regulation 1236/2005. The court held that because Annex II and III do not specifically include “sodium thiopental,” the export was not prohibited.<sup>348</sup> The court provided a literal interpretation of the Regulation, as it only referred to the, “automatic drug injection system,” and not to the contents, including the lethal pharmacological substances. So the Court thought that the Resolution only applied to the needle and syringe, but not the substance. The court also held that because of the territorial constraints placed by the *ECHR* Article 1, it could not be relied upon,<sup>349</sup> that the *Charter* only recognized the rights under the *ECHR* as they are limited by Article 1, and that Article 51(1) of the *Charter* was not violated by not imposing a ban.<sup>350</sup>

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<sup>345</sup> Zagorski *supra* note 329, ¶ 9.

<sup>346</sup> Export Control Act, 2002, c. 28 (U.K.). (Section 5(2) authorizes the Secretary of State to impose, “Controls of any kind may be imposed for the purpose of giving effect to any Community provision or other international obligation of the United Kingdom,” and in the Schedule 2(1) “export controls may be imposed in relation to any goods the exploitation or use of which is capable of having a relevant consequence”).

<sup>347</sup> Zagorski, *supra* note 329, ¶ 9. (“ . . . Sodium Thiopental is a medicine. Its primary use is as an anesthetic...I have considered the fact that an export restriction imposed by the United Kingdom is very unlikely to be effective in preventing any execution from taking place in the United Kingdom, given that the drug is generally available and traded globally”).

<sup>348</sup> *Id.* ¶ 46 (stating Regulation 1236/2005, “imposes precise prohibitions on the export of certain specified goods and a requirement to impose authorisation requirements on certain other specified goods.” It does not impose a general prohibition on the export of goods which “could be used” for the purpose of capital punishment nor does it require Member States to impose export controls on such goods.).

<sup>349</sup> *Id.* ¶¶ 51-59. *ECHR* Article 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”).

<sup>350</sup> *Id.* ¶¶ 60-76 (explaining how the export violated a common law protection of human rights that was also rejected in ¶¶ 77-84. *Charter* Article 51(1) stated “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and

However, following the British High Court's decision, the UK government changed its position. Mr Vince Cable made a statement to the High Court on November 29, 2010, indicating that the UK Department for Business Innovation and Skills would issue an order under s. 6 of the Export Control Act 2002, controlling the export of sodium thiopental to the United States. If the final use in the country receiving the products is for the death penalty then export will be denied.<sup>351</sup>

There had been concerns in the European Parliament, and within civil society, over the textual deficiencies of the Regulation, as *Zagorski* demonstrates.<sup>352</sup> It is evident by the decision of the British High Court that the Regulation can be easily bypassed through quixotic literal interpretation. An Amnesty International report, "From Words To Deeds: Making the EU Ban on the Trade in 'Tools of Torture' a Reality,"<sup>353</sup> published in February 2010, led to a European Parliament Resolution on June 17, 2010, demanding action by the Commission.<sup>354</sup> A particular plea had been that a "torture end-use catch all" clause, originally suggested to the European Commission by the United Kingdom in 2008,<sup>355</sup> should be adopted.<sup>356</sup> Civil society organizations mobilized, including The Omega Foundation, Amnesty International, Reprieve, and Penal Reform International,

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to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers").

<sup>351</sup> *Letter submitted to the High Court by Mr. Vince Cable, Secretary of State for Business, Innovation and Skills, see Government not Legally Required to Impose Export Controls on Sodium Thiopental, but Decides to Do So*, BRICK COURT CHAMBERS BARRISTERS (Nov. 29, 2010), <http://www.brickcourt.co.uk/news/29-11-2010---government-not-legally-required-to-impose-export-controls-on-sodium-thiopental--but-decides-to-do-so.asp>.

<sup>352</sup> *From Words to Deeds: Making the EU Ban on the Trade in 'Tools of Torture' a Reality*, AMNESTY INT'L (2010), available at <http://www.amnesty.org/en/library/asset/EUR01/004/2010/en/fb4ff4cc-9a20-44dc-8212-ebd9f4727f7b/eur010042010en.pdf>.

<sup>353</sup> *Id.*

<sup>354</sup> European Parliament Resolution on Implementation of Council Regulation, Concerning Trade in Certain Goods Which Could be Used for Capital Punishment, Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (EC) No. 1236/2005 of 17 June 2010, 2010 O.J. (C 236 E/17).

<sup>355</sup> *Review of Export Control Legislation (2007) - Government's End of Year Response*, U.K. DEP'T. FOR BUSINESS ENTERPRISE & REGULATORY REFORM 6 (2008), available at <http://www.berr.gov.uk/files/file49301.pdf>.

<sup>356</sup> Meeting of the Committee on Common Rules for Export Products on June 29, 2010.

and they led a drive in the European Commission to amend Regulation 1236/2005.<sup>357</sup> It was argued that such a clause would, “enable Member States to control the export of *any* goods which were destined for use in such acts as capital punishment, without creating onerous controls over legitimate business.”<sup>358</sup> In this context, “legitimate business,” is the trading in goods designed for use in healthcare, as one of the main uses of sodium thiopental is as an anesthetic before surgery.

In the proceeding European Parliament debate, Catherine Ashton, the EU High Representative, had promised that, “[a]ny shortcomings in the implementation of Regulation (EC) No 1236/2005 must – and will – be addressed.”<sup>359</sup> Following this commitment, December 20, 2011, the Commission extended Annexes II and III of Regulation 1236/2005 in response to concerns about use of medicines made in the EU for capital punishment by means of lethal injection in the USA.<sup>360</sup> As a result the Commission stated that, “trade of certain anaesthetics, such as sodium thiopental, which can be used in lethal injections, to countries that have not yet abolished the death penalty, will be tightly controlled,” and that, “exports of short and medium acting barbiturate anesthetic agents are subject to

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<sup>357</sup> *Submission to the European Commission on amending Council Regulation (EC) No. 1236/2005 to include drugs used in the ‘automatic drug injection systems for the purpose of execution of human beings by the administration of a lethal chemical substance,’* PENAL REFORM INT’L (Jan. 5, 2011), available at [http://www.penalreform.org/wp-content/uploads/2013/06/Joint\\_NGO\\_Submission\\_on\\_EU\\_Torture\\_Reg\\_sodium\\_thiopental.pdf](http://www.penalreform.org/wp-content/uploads/2013/06/Joint_NGO_Submission_on_EU_Torture_Reg_sodium_thiopental.pdf). (PRI’s submission was signed by international NGOs who work towards the abolition of the death penalty; Amicus, Amnesty International, Ensemble Contre la Peine de Mort, International Federation for Human Rights, International Federation of Action by Christians for the Abolition of Torture, International Harm Reduction Association, Murder Victims’ Families for Human Rights, National Association for Criminal Defense Lawyers, Omega Research Foundation, Reprieve, Texas Coalition to Abolish the Death Penalty, and World Coalition Against the Death Penalty).

<sup>358</sup> *Id.* at 4.

<sup>359</sup> Remarks of Vice President of the Commission Catherine Ashton, Annual Report on Human Rights (2008) – EU Policies in Favour of Human Rights Defenders – Trade in Goods Used for Torture, 2010 O.J. (Annex 13) 109-10 (June 16, 2010) (European Parliament Debates), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20100616+SIT+DOC+PDF+V0//EN&language=EN>.

<sup>360</sup> Press Release, European Commission, Commission Extends Control Over Goods Which Could Be Used for Capital Punishment or Torture, (Dec. 20, 2011), available at [http://europa.eu/rapid/press-release\\_IP-11-1578\\_en.htm](http://europa.eu/rapid/press-release_IP-11-1578_en.htm).

prior authorization by national authorities.”<sup>361</sup> This therefore, allows the Member States to have the final assessment of the export order. Whilst the use of barbiturate anesthetics is now regulated, the regional instrument still lacks specific textual amendment. However, another Amnesty International report was published in June 2012 entitled, “No More Delays. Putting an End to the EU Trade in ‘Tools of Torture,’”<sup>362</sup> arguing for a wider-ranging review of the regulation and its implementation, including the amendment of the Regulation itself.<sup>363</sup>

In addition, China has incorporated into its execution arsenal the lethal injection.<sup>364</sup> Yunnan was the first province in China to authorize the method in February 2003.<sup>365</sup> Yunnan had eighteen mobile execution vans with gurneys inside which are transported between prisons for executions. This is a new procedure adopted instead of the traditional Chinese method, which is a single bullet to the head.<sup>366</sup> This alternative method of execution is an attempt to make the execution procedure comply with supposed humane standards.<sup>367</sup> However, the Council regulation mandates that lethal injection is not a method that brings execution within the threshold of human rights standards. In the future EU dialogue with China and the United States, Regulation 1236/2005 may prove to be a useful ideological tool to develop arguments against the retentionist state’s legitimacy of lethal injection.

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<sup>361</sup> *Id.*

<sup>362</sup> See *No More Delays, Putting an End to the EU Trade in “Tools of Torture,”* AMNESTY INT’L (2012), available at <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/act300622012en?CMD=VEROBJ&MLKOB=31776832020> (last visited Oct. 10, 2013).

<sup>363</sup> *Id.*

<sup>364</sup> *The Death Penalty in China: A Baseline Document*, THE EUR. INITIATIVE FOR DEMOCRACY AND HUMAN RIGHTS, 34 (2003), available at [http://www.ecba.org/extdocserv/DP\\_Baseline.pdf](http://www.ecba.org/extdocserv/DP_Baseline.pdf); see also *Empty Promises: Human Rights Protections and China’s Criminal Procedure Law in Practice*, HUMAN RIGHTS IN CHINA (2001), available at [http://www.hrichina.org/sites/default/files/oldsite/pdfs/Empty\\_Promises\\_Text.pdf](http://www.hrichina.org/sites/default/files/oldsite/pdfs/Empty_Promises_Text.pdf) (last visited July 17, 2013).

<sup>365</sup> *Executed “according to law?” The Death Penalty in China*, AMNESTY INTERNATIONAL (2004), <http://www.amnesty.org/es/library/asset/ASA17/003/2004/es/3342bc0c-d642-11dd-ab95-a13b602c0642/asa170032004en.html>.

<sup>366</sup> *Id.*

<sup>367</sup> *Baze*, 553 U.S. at 66 (stating that lethal injection is not a per se violation of the Eighth Amendment of the United States Constitution).

## VIII. FUNDING OF ABOLITIONIST CIVIL SOCIETY ORGANIZATIONS

The EU's legal and political commitment is underpinned by financial support to civil society organizations fighting against the death penalty. The aim is to promote the EU's abolitionist agenda through political channels by facilitating strategic projects. The EU considers the close co-operation with civil society in the fight against the death penalty as crucially important.<sup>368</sup> The involvement of civil society is recognized as decisive both for the mobilization of expertise and the dissemination of knowledge required to develop public debate and accountability throughout the abolitionist process.<sup>369</sup> The EU funding for civil society organizations is channeled through the European Instrument for Democracy and Human Rights (hereinafter, "EIDHR"), which makes the EU the largest donor in this area worldwide.<sup>370</sup>

The EIDHR is an independent EU financing tool aimed at supporting democracy, the rule of law, and promoting and protecting all human rights and fundamental freedoms worldwide.<sup>371</sup> It has been specifically designed to complement EU assistance provided through bilateral development cooperation.<sup>372</sup> Overall, and beyond its support to abolitionist activities, under the EIDHR alone in 2007-2010, 1200 grants were made in 140 countries for over € 331 million.<sup>373</sup>

Abolition of the death penalty is one of the thematic priorities for assistance under the EIDHR.<sup>374</sup> Since 2000, it has funded around 50 projects worldwide (including in the USA), with an overall budget of more than € 23 million.<sup>375</sup> Funded

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<sup>368</sup> *EU Policy on Death Penalty*, EUR. UNION EXTERNAL ACTION, [http://www.eeas.europa.eu/human\\_rights/adp/index\\_en.htm](http://www.eeas.europa.eu/human_rights/adp/index_en.htm). (last visited Oct. 10, 2013).

<sup>369</sup> *Id.*

<sup>370</sup> *Death Has No Appeal*, EUR. COMM'N, available at [http://ec.europa.eu/europeaid/what/human-rights/documents/aid\\_6\\_0200\\_leaflet\\_en.pdf](http://ec.europa.eu/europeaid/what/human-rights/documents/aid_6_0200_leaflet_en.pdf).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> SEE EU ANNUAL REPORT ON HUMAN RIGHTS AND DEMOCRACY IN THE WORLD IN 2010, EUR. UNION EXTERNAL ACTION 21, available at [http://ec.europa.eu/europeaid/what/human-rights/index\\_en.htm](http://ec.europa.eu/europeaid/what/human-rights/index_en.htm).

<sup>374</sup> Council Regulation (EC) 1889/2006, of the European Parliament and of the Council of 20 Dec 2006 on Establishing a Financing Instrument for the Promotion of Democracy and Human Rights Worldwide, 2006 O.J. (L 386) 5.

<sup>375</sup> *The Abolition of the Death Penalty Worldwide*, EIDHR COMPENDIUM

activities include awareness-raising, monitoring of conditions of implementation of the death penalty and the application of minimum international standards, legal reform to limit the use of or abolish the death penalty, as well as the provision of legal assistance in cases of particular concern and the promotion of the *Second Optional Protocol* (or similar regional instruments).<sup>376</sup>

The geographical scope of the supported activities varies from project to project. Some projects focus on a thematic issue at a regional or global level. For instance, the EU supports the work of Murder Victims' Families for Reconciliation<sup>377</sup> (hereinafter, "MVFR"), a US based organization, founded in 1976, of family members of victims of both homicide and executions who oppose the death penalty in all cases.<sup>378</sup> The purpose of MVFR's work is to illustrate that the assumption is wrong that all survivors of murder victims are in favor of capital punishment.<sup>379</sup> In fact, many family members of murder victims around the world express exactly the opposite opinion claiming that it is possible to be both pro-victim and anti-death penalty and that the response to one human rights violation should not be another human rights violation. MVFR seeks to contribute to a criminal justice system that honors victims by preventing violence, not by perpetuating it.<sup>380</sup>

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2007-2010, (Oct. 14, 2010), available at [http://ec.europa.eu/europeaid/what/human-rights/documents/compendium\\_abolition\\_of\\_the\\_death\\_penalty\\_en.pdf](http://ec.europa.eu/europeaid/what/human-rights/documents/compendium_abolition_of_the_death_penalty_en.pdf).

<sup>376</sup> *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, GA Res. 44/128, December 15, 1989; *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty*, CETS 114, April, 28 1983; *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning abolition of the death penalty in all circumstances* CETS 187, May 3, 2002; *Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, OAS 73, Aug. 6, 1990.

<sup>377</sup> See generally MURDER VICTIMS' FAMILY FOR RECONCILIATION, <http://www.mvfr.org/> (last visited Oct. 10, 2013).

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> This argument was cogently made by Soad El Khmal, the President of the Morocco Association for the Victims of Terrorism, at the 5th World Congress Against the Death Penalty, Madrid, June 12-15, 2013, when she spoken on the panel, "Terrorism and Abolition." Khmal described how she lost her husband and son to a terrorist bombing in Casablanca in 2003, and she explained that she finds strength in helping victims of terrorist crimes,

The EIDHR has a particularly strong record in fighting the death penalty through capacity building in the judiciary. For instance, from 2003 to 2005, the EU funded a project by the British Institute of International and Comparative Law (hereinafter, "BIICL") for capacity building of the criminal justice systems in Commonwealth Africa.<sup>381</sup> The project provided training for African legal professionals. Firstly, a conference was convened in Uganda in May 2004, which identified specific areas required for the success of the project.<sup>382</sup> Subsequently, a legal training workshop was held in Malawi in October 2004, to train advocates and judges, which included a Judicial Colloquium in Kenya in 2005.<sup>383</sup> The project utilized the "train the trainers" concept and has proved an extremely successful enterprise.<sup>384</sup> Since the BIICL project was initiated, several remarkable developments have occurred in Africa: Cameroon established a decree to commute all death sentences, in Kenya President Mwai Kibaki commuted 195 death sentences to life imprisonment, in Malawi 79 death sentences were commuted, and in Uganda the mandatory death sentence was abolished.<sup>385</sup>

Other projects concentrate on the situation in one particular country. By way of example, the project, "Promoting Judi-

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and maintained that the death penalty for terrorists is not the answer to stop further terrorist attacks. On the same panel, Judge Hanne Sophie Greve, Vice President of the High Court in Bergen, Norway, member of the International Commission Against the Death Penalty, argued that the state must not reject the same dignity of the human being that terrorists destroy. She affirmed that to maintain the higher moral position "is not to kill to demonstrate a respect for the sanctity of life." See Jon Yorke, *Report on the Fifth World Congress Against the Death Penalty, Madrid, June 11-16, 2013*, BLOGSPOT (July 21, 2013), <http://jonyorkehumanrights.blogspot.co.uk/2013/07/the-fifth-world-congress-against-death.html>.

<sup>381</sup> *EIDHR Activities 2000 – 2006*, EUR. COMM'N 2 (2006), available at [http://ec.europa.eu/europeaid/what/human-rights/documents/eidhr\\_compendum\\_by\\_project\\_theme\\_final\\_15\\_09\\_08\\_en.pdf](http://ec.europa.eu/europeaid/what/human-rights/documents/eidhr_compendum_by_project_theme_final_15_09_08_en.pdf).

<sup>382</sup> For a full list of the developments in the BIICL project and Commonwealth Africa, see generally BIICL, [www.biicl.org/deathpenalty](http://www.biicl.org/deathpenalty) (last visited Oct. 7, 2013); Iya, Christou & Raymond, *The Application of the Death Penalty in Commonwealth Africa*, 13 AMICUS JOURNAL 17 (2005); HUMAN RIGHTS MANUAL AND SOURCEBOOK FOR AFRICA (Starmer & Christou eds., 2005).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> For a full list of the developments in the BIICL project and Commonwealth Africa, see generally BIICL, [www.biicl.org/deathpenalty](http://www.biicl.org/deathpenalty) (last visited Oct. 7, 2013); Iya, Christou & Raymond, *The Application of the Death Penalty in Commonwealth Africa*, 13 AMICUS JOURNAL 17 (2005); HUMAN RIGHTS MANUAL AND SOURCEBOOK FOR AFRICA (Starmer & Christou eds., 2005).

cial Discretion in the Restriction and Reduction of Death Penalty use,” run by the Great Britain-China Centre, is exclusively looking at the situation in China.<sup>386</sup> It aims at training local judges in judicial discretion and development of sentencing and evidence guidelines for trial procedures. With by far the highest execution rate in the world,<sup>387</sup> China is of course of specific interest to the global abolitionist movement.<sup>388</sup> The country has seen recent attempts to reduce the number of capital offences and the work undertaken by the Great Britain-China Centre can take some credit for influencing this process, by providing an important forum for research and debate on the death penalty in China.<sup>389</sup>

Of the 16 projects currently funded under the EIDHR, five have their activities in the USA.<sup>390</sup> The Death Penalty Information Center<sup>391</sup> is partly funded by the EU and provides an extremely useful resource for capital representation in the US. Witness to Innocence (hereinafter, “WTI”),<sup>392</sup> established in 2005, is composed of, by and for exonerated death row survivors and their loved ones in the US.<sup>393</sup> WTI had a prominent role in advocating the abolitionist position in Illinois in March 2011.<sup>394</sup> In 2010, a 10-day speaking tour was conducted by three exonerated death row survivors from Illinois in key legis-

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<sup>386</sup> See *Death Penalty Reform*, GREAT BRITAIN-CHINA CTR., <http://www.gbcc.org.uk/death-penalty-reform.aspx> (last visited Oct. 7, 2013).

<sup>387</sup> In 2011 Amnesty International identified China as the country that imposed the most executions, with an unknown precise figure but the organization estimate it to be over 1000, see *Top 5 Executioners*, AMNESTY INT’L, <http://www.amnesty.org/en/death-penalty/top-5-executioners-in-2011> (last visited Oct. 8, 2013).

<sup>388</sup> See Nicola Macbean, *The Death Penalty in China: Towards the Rule of Law*, in *AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS* (Jon Yorke ed., 2008).

<sup>389</sup> See also Roger Hood, *Abolition of the Death Penalty: China in World Perspective*, 1 CITY UNIV. OF HONG KONG L. REV. 1, 17 (2009).

<sup>390</sup> *Death Penalty*, EUR. COMM’N, <http://www.eidhr.eu/highlights/death-penalty> (last visited Oct. 17, 2013).

<sup>391</sup> See generally THE DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org> (last visited Oct. 7, 2013).

<sup>392</sup> *The Abolition of the Death Penalty Worldwide*, EIDHR COMPENDIUM 2007-2010, available at [http://ec.europa.eu/europeaid/what/human-rights/documents/compendium\\_abolition\\_of\\_the\\_death\\_penalty\\_en.pdf](http://ec.europa.eu/europeaid/what/human-rights/documents/compendium_abolition_of_the_death_penalty_en.pdf).

<sup>393</sup> See generally WITNESS TO INNOCENCE, <http://www.witnesstoinnocence.org/> (last visited Oct. 9, 2013).

<sup>394</sup> *Id.* at <http://www.witnesstoinnocence.org/exonerees/randy-steidl.html> (last visited Oct. 10, 2013).

lative districts throughout the state, reaching nearly 500 citizens in different venues. WTI's subsequent, "American DREAM Campaign," project also received EIDHR funds and aimed at raising awareness of millions of citizens – and to influence political leaders – on the abolition of death penalty in several target US states.<sup>395</sup>

#### IX. CONCLUSION: A HUMAN RIGHTS SUCCESS STORY

In 2010 at the 12<sup>th</sup> Annual EU-NGO Forum of Human Rights in Brussels, the EU's role in the worldwide abolition of the death penalty was a central theme and, Working Group 1 on EU Instruments in the Fight Against the Death Penalty, was formulated to draft focused EU policies, and strategies for the performance of the European External Action Service.<sup>396</sup> The working group identified four themes: (i) coherence and consistency, (ii) cooperation, (iii) education and awareness raising, and (iv) efficiency and effectiveness.<sup>397</sup> These themes set out the general abolitionist approach taken by the EU as reflected in this article. In the Policy Recommendations section, "Coherence and Consistency," 1 (d) it states,

[The EU should] deal with death penalty issues in connection with all other relevant human rights issues such as those relating to due process of law, right to a fair trial, the right to appeal, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment (in connection with methods of execution) and the basic human right to dignity. Human rights are interconnected and issues surrounding the death penalty should be viewed through the human rights lens.<sup>398</sup>

This review of the EU's internal and external policies for the abolition of the death penalty, has demonstrated that, on the whole, it is an identifiable success story of human rights and specifically in the evolution in the dignity of persons charged with crimes by the state. There is still a way to go, but the strengthening of the UNGA moratorium resolution will be the aim in the progress towards a world without the death penalty. The EU played a crucially important role in the suc-

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<sup>395</sup> *Focus on Innocence*, ILLINOIS COALITION AGAINST THE DEATH PENALTY, <http://www.icadp.org/content/focus-innocence> (last visited Oct. 17, 2013).

<sup>396</sup> *12th EU NGO Forum on Human Rights*, *supra* note 14.

<sup>397</sup> *Id.* at 2-4.

<sup>398</sup> *Id.* at 2.

cessful vote in 2007, and also the strengthening of the resolution in subsequent votes, with the most recent in December 2012.<sup>399</sup> Franklin Zimring observes that in Europe the abolition of the death penalty is both a human rights and a moral question which is now settled, when he states,

In an age dominated by negotiation and pragmatism, abolition is one of [the] very few issues that allows its adherents to hold on to a sense of transcendent virtue. This is no small matter in a world where so many rules and regulations are for sale.<sup>400</sup>

In 2012, the EU was awarded the Nobel Peace Prize, and the Peace Prize Committee highlighted the, “EU’s contribution for over six decades to the advancement of peace and reconciliation, democracy and human rights in Europe.”<sup>401</sup> For the EU, the abolition of the death penalty is a fundamental aspect of the promotion of peace, reconciliation, democracy, and human rights. William Schabas has confirmed that, “Europe signals that prohibition of capital punishment forms part of the central core of human rights. It now seems appropriate to consider abolition of the death penalty to be such a customary norm...within Europe.”<sup>402</sup> Schabas wrote this in 2002, and the norm has held strong and become a recognizable human rights success story of the European Union.

#### APPENDIX 1

EU Member States and Ratification of Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,<sup>403</sup> Protocol No. 6 Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty,<sup>404</sup> and No. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the

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<sup>399</sup> European and World Day against the Death Penalty, *supra* note 15.

<sup>400</sup> ZIMRING, *supra* note 174, at 40.

<sup>401</sup> *Nobel Peace Prize 2012 Awarded to the European Union*, EUR. COMM’N (Oct. 12, 2012), [http://ec.europa.eu/news/eu\\_explained/121012\\_en.htm](http://ec.europa.eu/news/eu_explained/121012_en.htm).

<sup>402</sup> Schabas, *supra* note 76, at 308-09.

<sup>403</sup> Protocol No. 6, *supra* note 53.

<sup>404</sup> *Id.*

abolition of the death penalty in all circumstances.<sup>405</sup>

Member State	Year of last execution	Year of ratification of the 2nd Optional Protocol to the ICCPR	Year of ratification of Protocol No. 6 (1983)	Year of ratification of Protocol No. 13 (2002)
Austria	1950	1993	1984	2004
Belgium	1950	1998	1998	2003
Bulgaria	1989	1999	1999	2003
Cyprus	1962	1999	2000	2003
Czech Republic	1989	2004	1992	2004
Denmark	1950	1994	1983	2003
Estonia	1991	2004	1998	2004
Finland	1994	1991	1990	2005
France	1977	2007	1986	2008
Germany	1981	1992	1989	2005
Greece	1972	1997	1998	2005
Hungary	1986	1994	1992	2003
Ireland	1954	1993	1994	2002
Italy	1947	1995	1988	2009
Latvia	1996	2013	1999	2012
Lithuania	1995	2002	1999	2004
Luxembourg	1949	1992	1985	2006
Malta	1943	1994	1991	2002
Netherlands	1952	1991	1986	2006
Poland	1988	Signed but not ratified	2000	Signed but not ratified
Portugal	1849	1990	1986	2003
Romania	1989	1991	1994	2003
Slovakia	No executions since independence	1999	1992	2005
Slovenia	No executions since independence	1994	1994	2003
Spain	1975	1991	1985	2009
Sweden	1910	1990	1984	2003
United Kingdom	1964	1999	1999	2003

<sup>405</sup> Protocol No. 13, *supra* note 10.