



Doc. 12456

3 January 2011

The death penalty in Council of Europe member and observer states: a violation of human rights

Report¹

Committee on Legal Affairs and Human Rights

Rapporteur: Ms Renate WOHLWEND, Liechtenstein, Group of the European People's Party

Summary

The Parliamentary Assembly is opposed to the death penalty in all circumstances. The European experience has shown conclusively that the death penalty is not needed to check violent crime.

The United States of America and Japan, as observer states, and Belarus, which aspires to membership of the Council of Europe are invited to join the growing consensus among democratic countries that protect human rights and human dignity by abolishing the death penalty.

The report addresses a series of specific recommendations to the United States, Japan and Belarus aimed at promoting a moratorium on executions followed by definitive abolition of the death penalty.

¹ Reference to committee: Doc 11606, Reference No. 3461 of 23 June 2008; Doc 11675, Reference No. 3481 of 29 September 2008.

A. Draft resolution²

1. The Parliamentary Assembly reiterates its principled opposition to the death penalty in any circumstances. It takes pride in its successful contribution to ridding almost all of Europe of this inhuman and degrading punishment, by having made abolition of the death penalty a condition for accession to the Council of Europe.
2. The European experience has shown conclusively that the death penalty is not needed to check violent crime and that political leaders who led the way towards abolition did not suffer any backlash from public opinion.
3. The Assembly urges the United States of America and Japan, as observer states, and Belarus, which aspires to membership of the Council of Europe, to join the growing consensus among democratic countries that protect human rights and human dignity by abolishing the death penalty.
4. As regards the United States of America, the Assembly:
 - 4.1. congratulates those American states which have recently abolished the death penalty (in particular, New Mexico, New Jersey and New York State) and invites others, as well as the federal jurisdiction, to follow their lead;
 - 4.2. regrets that the arbitrary and biased application of the death penalty in the United States and the public scandals surrounding the different methods of execution in use (lethal injection, electric chair, firing squad) have stained the reputation of this country, which its friends expect to be a beacon for human rights;
 - 4.3. considers that, particularly in the present time of budgetary constraints, scarce resources are better used to improve crime prevention and to increase the rate of clearance of serious crimes rather than to fight protracted legal battles in order to put to death individual perpetrators.
5. Also, as regards the *Avena* (Mexico v. United States of America) judgment of the International Court of Justice, the Assembly urges that:
 - 5.1. the federal legislature pass legislation enabling those Mexican nationals condemned to death without having been provided with the consular assistance mandated by the Vienna Convention on Consular Relations to be retried following the correct procedures;
 - 5.2. all judicial authorities in the United States be given the possibility to ensure that in future foreign nationals who may be subjected to the death penalty are provided with appropriate consular assistance, in compliance with the international obligations of the United States under the Vienna Convention.
6. As regards Japan, the Assembly:
 - 6.1. is deeply disappointed by the missed opportunity of the presence in recent governments of openly abolitionist ministers of justice. De facto moratoria were unfortunately followed by a continuation of the atrocious practice of executions carried out under a shroud of secrecy and taking the death row inmates and their families by surprise;
 - 6.2. expects the recent introduction of the jury trial system in Japan to contribute to increasing popular awareness both of the cruelty of the death penalty system and its fallibility, thus promoting its eventual abolition.
7. As regards Belarus, the Assembly, recalling its Resolutions 1671 (2009) and 1727 (2010):
 - 7.1. strongly condemns continued executions since 2008, which have caused much damage to the credibility of Belarus' bid to move closer to the family of democratic European states which protect human rights and human dignity;
 - 7.2. urges the competent authorities to declare a moratorium on executions without further delay and take the necessary steps to abolish the death penalty in law.

² Draft resolution adopted unanimously by the committee on 16 September 2010.

B. Explanatory report by Ms Wohlwend, rapporteur**Contents:**

	<i>Page</i>
1. Introduction	3
2. Developments in Europe: growing recognition of the death penalty as a violation of human rights.....	4
2.1. <i>The case law of the European Court of Human Rights</i>	4
2.2. <i>Developments in the Russian Federation</i>	5
2.3. <i>Belarus: the “black hole” in a generally abolitionist Europe</i>	6
2.4. <i>Abolition in all circumstances: Protocol No.13</i>	7
3. Developments in the United States	7
3.1. <i>Slow progress towards abolition</i>	7
3.2. <i>Persisting failure to implement the Avena (Mexico v. United States of America) judgment of the International Court of Justice</i>	9
3.2.1. <i>United States treaty obligations</i>	9
3.2.2. <i>The Avena case before the International Court of Justice</i>	10
3.2.3. <i>The United States Supreme Court case of Medellín and the position of the Bush Administration</i>	10
3.2.4. <i>Conclusion: legislation urgently needed to secure compliance with Avena</i>	10
4. Developments in Japan: disappointment despite the temporary presence in government of abolitionist ministers of justice.....	11
5. A brief reminder of key grounds for abolition	12
5.1. <i>Irreversibility of the death penalty</i>	12
5.2. <i>Arbitrary and biased application of the death penalty</i>	12
5.3. <i>Ineffectiveness of the death penalty</i>	13
5.4. <i>Cost</i>	13
5.5. <i>International obligations and opinion</i>	13
Appendix: Letter from Mrs Renate Wohlwend, rapporteur, and Mr Christos Pourgourides, Chairperson of the Committee on Legal Affairs and Human Rights, to the Honourable Hillary Rodham Clinton, United States Secretary of State	15

1. Introduction

1. On 23 June 2008, the Committee on Legal Affairs and Human Rights was seized for report on “The death penalty in Council of Europe member and observer countries – an unacceptable violation of human rights”.³ On 29 September 2008, the committee was seized for report on the related topic of “Compliance with the International Court of Justice decision in the Avena case”.⁴ At its meeting on 10 November 2008, the committee appointed me as rapporteur for both topics. On 29 January 2009, the Committee decided to treat the two subjects jointly in the framework of the present report. For the sake of brevity, the title of the report does not make express reference to the Avena case (and, in effect, the latter subject should be considered as an integral part of the report).

2. From 24 to 26 February 2010, I attended, together with an ad hoc sub-committee constituted for this purpose,⁵ the 4th World Congress for the Abolition of the Death Penalty in Geneva, delivering a keynote speech⁶ in the plenary and holding information meetings with parliamentarians and experts, in particular from the United States of America, Japan and Belarus. I met Ambassador Rafael Valle Garagorri, who had recently been appointed by the Spanish Prime Minister to lead a new diplomatic initiative to promote abolition. The International Commission against the Death Penalty is an initiative of the Spanish Government. The objective of the commission is to promote the abolition of the death penalty worldwide. It consists of a chairperson, former UNESCO Director General Federico Mayor Zaragoza, and a maximum of 10 commissioners, personalities of international standing, high moral authority and with recognised expertise in human rights.

3. At the meeting of the Committee on Legal Affairs and Human Rights on 26 April 2010, I was authorised to write a letter to the United States Secretary of State concerning the implementation of the

³ Reference No. 3461 of 23 June 2008 (Doc. 11606).

⁴ Reference No. 3481 of 29 September 2008 (Doc. 11675).

⁵ Members: Andreas Gross (Switzerland, SOC), Franz Eduard Kühnel (Austria, EPP/CD) and Tugrul Türkes (Turkey, EDG).

⁶ Available at: http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=5309&L=2.

Avena judgment of the International Court of Justice (ICJ), jointly with the Committee's Chairperson, Mr Christos Pourgourides (see Appendix).

4. Throughout my mandate, I have intervened as rapporteur on the abolition of the death penalty in observer states in order to speak up against threatened executions in the Council of Europe observer states and in Belarus, and against executions anywhere in the world threatening Europeans.⁷

5. The Parliamentary Assembly has remained dedicated to the abolitionist cause, repeatedly inviting Council of Europe member states to sign and ratify – in addition to Protocol No. 6 which foresees the abolition of the death penalty in peacetime⁸ – Protocol No. 13,⁹ which binds signatories to abolition of the death penalty in all circumstances. It has continually lobbied the Council of Europe observer states, in particular the United States and Japan, to outlaw the death penalty.¹⁰ The Assembly has also made any reactivation of the special guest status for the parliament of Belarus conditional upon the prior introduction of a moratorium on executions.¹¹

6. The Council of Europe has increasingly based its arguments against capital punishment on the European Convention on Human Rights ("ECHR"), which lays down the right to life and the prohibition of cruel, inhuman, and degrading treatment.¹² As we will see,¹³ the European Court of Human Rights has come close to finding that the explicit recognition of the death penalty in Article 2 of the ECHR is now obsolete. Pointing to the state's positive obligation to protect life, and to the inhuman and physically and psychologically torturous conditions on death row and the equally inhuman and degrading methods of execution in use in retentionist states, the Council of Europe has made some headway in the last decade towards achieving abolition in Europe and promoting it world-wide, and in particular in its observer states and those applying for membership.¹⁴ However, much work remains to be done.¹⁵ In particular, the United States of America, Japan, and Belarus remain salient examples of states which continue to impose capital punishment.

7. This report will provide an overview of developments in these states since the Assembly last took stock of the situation regarding the death penalty, with a focus on the Council's observer states – the United States of America and Japan. It will also briefly recall why retentionist states stand to benefit from abolition. But to start with, I should like to review the state of affairs in Europe.

2. Developments in Europe: growing recognition of the death penalty as a violation of human rights

2.1. The case law of the European Court of Human Rights

8. The case law of the European Court of Human Rights has evolved in such a way that one can speak of a growing consensus in Europe that the death penalty is a violation of human rights.

9. In its 1989 judgment in *Soering v. the United Kingdom* the Court still found that it was not a violation of Article 2 (right to life) to extradite the applicant, accused of murder, to a country (the United States of America) where he faced the possibility of execution, due to the explicit reference to the death penalty as an exception from the right to life in Article 2, paragraph 1, second sentence. But the Court found that the conditions on death row in the United States rose to the level of cruel, inhuman, and degrading treatment:

⁷ See the declarations of 20 April 2010 ("PACE rapporteur calls on Hamas not to carry out further executions"); of 7 April 2010 ("Protest against the execution in China of a Japanese national"); of 29 December 2009 ("PACE Rapporteur strongly condemns the execution of Akmal Shaikh in China today"); of 6 May 2009 ("PACE rapporteur welcomes Laos authorities' promise to spare the life of Samantha Orobator") and of 19 March 2009 ("Renate Wohlwend congratulates New Mexico Governor on abolition of the death penalty"), available at <http://assembly.coe.int>.

⁸ The only member country that has still not ratified Protocol No. 6 is the Russian Federation.

⁹ Protocol No. 13, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/187.htm>.

¹⁰ See, for example, Recommendation 1760 (2006) on the position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty, Recommendation 1627 (2003) on the abolition of the death penalty in Council of Europe Observer states and Recommendation 1522 (2001) on the abolition of the death penalty in Council of Europe Observer states.

¹¹ See Resolution 1671 (2009), paragraphs 19.1 and 22.

¹² ECHR, Articles 2 and 3.

¹³ Paragraphs 9-12 below.

¹⁴ *Ending the Death Penalty: The European The European Experience in Global Perspective*, Andrew Hammel, 2010, Heinrich Heine University, Düsseldorf, Palgrave and MacMillan.

¹⁵ Other regional organisations such as the African Commission on Human and Peoples' Rights would like to benefit from the experience of the Council of Europe with a view to drafting a protocol on the abolition of the death penalty in Africa.

"[H]aving regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3."¹⁶

10. Sixteen years later, in *Öcalan v. Turkey*, the Court seemed poised to address the issue of the death penalty violating Article 2, despite the explicit reference in this article to the death penalty, given the evolving consensus against capital punishment in Europe. The Chamber judgment referred to the *Soering* case, considering that perhaps the time had come to recognise that state practice had changed with regard to the death penalty to the point of rendering the reference in Article 2 obsolete. But upon referral, the Court's Grand Chamber skirted the issue. Pointing to the "large number of States which had yet to sign or ratify Protocol No. 13 concerning the abolition of the death penalty in all circumstances", the Court could not yet find an "established practice of the Contracting States to regard the very implementation of the death penalty as inhuman and degrading treatment contrary to Article 3, since no derogation might be made from that provision, even in times of war". The Grand Chamber found that it was "not necessary to reach any firm conclusion on this point since it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial".¹⁷ Thus, given that Mr Öcalan, according to the Court, "was not tried by an independent and impartial tribunal (given the presence of a military judge on the bench of the State Security Court), that the judges were influenced by hostile media reports and that his lawyers were not given sufficient access to the court file to enable them to prepare his defence properly", the Court found a violation based on punishment following an unfair trial rather than because the death penalty inherently violated Article 2.¹⁸

11. In 2010, the Court took another step forward when it addressed the issue of the death penalty and Article 2 in *Al-Saadoon and Mufdhi v. the United Kingdom*. Charting the progress of treaty ratification and case law with regard to the death penalty since *Soering*, the Court found that

"the 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 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.

...

[The fact that a]ll but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it . . . [plus] consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances".

12. Thus, for the first time the Court based itself on Article 2 of the ECHR, notwithstanding its wording, to justify the duty not to expel or extradite a person who runs a serious risk of being subjected to the death penalty by the receiving country. The Court established that the European consensus against the death penalty had reached a point of maturity sufficient to override the explicit "death penalty exception" in Article 2 of the ECHR – right to life.

2.2. *Developments in the Russian Federation*

13. As regards the Russian Federation, the ratification of Protocol No. 6 and thus the abolition of the death penalty in law – in line with the specific commitment made by Russia before accession to the Council of Europe – is still outstanding. But the State Duma extended the moratorium on the death penalty in November 2006 until 2010, and at the end of 2009, the Russian Constitutional Court further extended it "until the ratification of Protocol No. 6 to the European Convention of Human Rights", thus effectively banning executions during peacetime.¹⁹

¹⁶ *Soering v. the United Kingdom*, Application No. 14038/88, judgment of 7 July 1989.

¹⁷ *Öcalan v. Turkey*, Application No. 46221/99, judgment of 12 May 2005 (Grand Chamber), paragraph 165.

¹⁸ *Ibid.*, paragraph 175.

¹⁹ Russian Federation: Death Penalty, Legislationline, www.legislationline.org/en/topics/country/7/topic/11.

2.3. Belarus: the “black hole” in a generally abolitionist Europe

14. The situation in Belarus is best described by the testimony of Oleg Alkaev, Director of remand prison (SIZO) No. 1 in Minsk from December 1996 to May 2001, speaking to Amnesty International in January 2009:²⁰

“The prisoner is blindfolded and his hands tied behind his back, and he is taken into the next room. He is told he will be held so that he doesn’t sit in the wrong place. He is forced to his knees, it only takes a second, and he is shot. I don’t remember any cases where the prisoner fought or struggled. Their will is broken. They are on the edge of madness. They know they are dying but they don’t know how much time is left, it could be five minutes or 15, but they think they still have time and they are pleased about that.”

15. I should like to recall that Oleg Alkaev is also a key witness as regards the alleged utilisation of the death penalty execution pistol in a series of extrajudicial executions which were the subject of an important report by Christos Pourgourides on high-profile disappearances in Belarus.²¹

16. Belarus aspires for membership of the Council of Europe. The country’s retention of the death penalty in violation of both the right to life and the prohibition on cruel, inhuman, and degrading treatment constitutes a major obstacle in the path of lifting the suspension of special guest status and eventual accession.

17. In February 2008, the then Secretary General of the Council of Europe, Terry Davis, condemned the executions of Syarhey Marozaw, Valery Harbaty, and Ihar Danchenka. “I am upset by an insistent intention of the Belarusian authorities to isolate their country from Europe”, Terry Davis noted. “By these death sentences they seem to be proud of defying human values common for other European countries.” In April 2008, the Assembly’s rapporteur on the situation in Belarus urged Belarus to abolish the death penalty in an open letter to the chairs of both houses of the Belarus parliament, which was published in the official media. In June 2009, the Assembly voted in favour of inviting its Bureau to lift the suspension of special guest status to the Belarusian Parliament on the condition – which was amended into the resolution on my initiative – that Belarus first declare a moratorium on the death penalty.²² But shortly thereafter, two more executions were carried out, those of Andrei Zhuk and Vasily Yuzepchuk.²³ Whilst the two men’s cases were still being examined by the United Nations Human Rights Committee, Belarus carried out their executions “in total secrecy”.²⁴ In Resolution 1727 (2010) the Assembly consequently decided to suspend high-level contacts with the Belarusian authorities.

18. At the 4th World Congress for the Abolition of the Death Penalty in Geneva in February 2010, I met with senior Belarusian officials, including Mikalai Samaseika, chair of the Belarusian Parliament’s recently established working group on the death penalty.²⁵ As the Assembly’s President, Mevlüt Çavuşoğlu, rightly said last February, the very establishment of the working group is a step in the right direction, and the Assembly is ready to assist the working group in launching an informed public debate aimed at creating the conditions for abolition.²⁶ I should like to recall in this context that the Belarusian Supreme Court had ruled already in March 2004 that the death penalty, under the Belarusian Constitution, is merely a temporary measure and that a moratorium on executions could be declared at any time by the President or by the parliament.²⁷ It is high time for this step to be finally taken. The time for contradictory “signals”, for blowing hot and cold air is definitely over.

²⁰ *Ending Executions in Europe: Towards Abolition of the Death Penalty in Belarus (2009)*, Amnesty International, 8, available at:

www.amnesty.org/en/library/asset/EUR49/001/2009/en/d3b9c42d-a356-4dee-ad16-5b05842ba01a/eur490012009en.pdf.

²¹ See Assembly Doc. 10062.

²² See Resolution 1671 (2009) and Doc. 11939 of the Assembly.

²³ Amnesty International condemns Belarusian firing squad (22 March 2010), available at:

<http://en.rian.ru/world/20100322/158281311.html>.

²⁴ See Assembly Doc. 12223 on the situation in Belarus (27 April 2010).

²⁵ See Office for a Democratic Belarus, National Assembly’s working group on death penalty abolition holds first meeting, 22 February 2010 at: <http://democraticbelarus.eu/node/8356>.

²⁶ I therefore welcome the technical seminar on the introduction of a moratorium organised in co-operation with the Council of Europe’s Directorate General of Legal Affairs and Human Rights with experts from Belarus and from neighbouring countries.

²⁷ See “Capital Punishment in Belarus and Changes of Belarus Criminal Legislation related thereto”, Embassy of the Republic of Belarus in the United Kingdom.

2.4. Abolition in all circumstances: Protocol No. 13

19. In addition to the situation in the Russian Federation and in Belarus described above, some other issues still need to be addressed in Europe. Latvia has kept the death penalty on its books for certain crimes under exceptional circumstances.²⁸ The Russian Federation and Azerbaijan have not signed, and Armenia, Latvia, and Poland have signed but not yet ratified Protocol No. 13 on the abolition of the death penalty in all circumstances.²⁹ Thus, there is still room for improvement regarding European-wide abolition of the death penalty in all circumstances.

20. As far as worldwide abolition is concerned, the World Coalition against the Death Penalty³⁰ initiated in 2009 a campaign in support of the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, which is the only international treaty of worldwide scope to prohibit executions and to provide for total abolition of the death penalty. The only Council of Europe member states among the target countries are Armenia, Latvia and Poland, which have abolished the death penalty but have not ratified the Second Optional Protocol to the Covenant.³¹

3. Developments in the United States

3.1. Slow progress towards abolition

21. Since 2006, when the Assembly last adopted a recommendation with regard to the abolition of the death penalty in member and observer states,³² there has been some progress in the United States, albeit slow. In the last three years, three states have outlawed capital punishment,³³ the recent financial crisis has made factions of the American public and state leadership more amenable to economic arguments in favour of abolition,³⁴ and the Supreme Court has demonstrated a willingness to re-open the question of the constitutionality of executions.³⁵

22. Numbers underpin the abolitionist trend in American society. Although the rate of executions has risen precipitously since the Supreme Court reinstated the death penalty in 1976,³⁶ the number has levelled off in recent years, hovering around 45 a year. While the figures charting the number of persons put to death on an annual basis are hardly encouraging (42 in 2007,³⁷ 37 in 2008³⁸ and 52 in 2009³⁹), looking to the number of death sentences handed down in the last three years is more indicative of recent trends. Death sentences have been on a steady downward path: the total of 106 death sentences estimated by the US Death Penalty Information Center as having been passed across the United States during 2009 would represent the seventh straight year of decline and the lowest annual total since executions resumed in 1977.⁴⁰ Furthermore, the last three years have seen the passing of legislation abolishing the death penalty in New York, New Jersey, and New Mexico, bringing the number of abolitionist states up to 15, plus the District of Columbia as a 16th (non-state) abolitionist jurisdiction. While the *de jure* abolition of the death penalty in these states may be seen as a mere formality, since the three jurisdictions had to varying degrees (New York and New Jersey strictly upholding and New Mexico loosely observing) a moratorium since 1976,⁴¹ the actual

²⁸ Death Sentences and Executions in 2009, Amnesty International (2010), 6 and 16, available at

www.amnesty.org/en/library/asset/ACT50/001/2010/en/17348b70-3fc7-40b2-a258-af92778c73e5/act500012010en.pdf.

²⁹ Protocol No. 13, ETS No. 187.

³⁰ www.worldcoalition.org/.

³¹ www.worldcoalition.org/modules/news/article.php?storyid=96.

³² Recommendation 1760 (2006) on the position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty – Doc. 10911 (Mrs Renate Wohlwend).

³³ *States with and without the Death Penalty*, Death Penalty Information Center, www.deathpenaltyinfo.org/states-and-without-death-penalty.

³⁴ Cristina Corbin, *Lawmakers Cite Economic Crisis in Effort to Ban Death Penalty*, Fox News (24 February 2009), www.foxnews.com/politics/2009/02/24/lawmakers-cite-economic-crisis-effort-ban-death-penalty/.

³⁵ See *Baze v. Rees*, 553 U.S. 35 (2008).

³⁶ Carol Steiker, *Capital Punishment and American Exceptionalism*, citing Hugo Adam Bedau, ed., *The Death Penalty in America: Current Controversies* 11, Table 1-3 (1997) (executions from 1950-1995); Amnesty International, *The Death Penalty in the U.S.: U.S. Executions by Year Since 1976* (updated 1 April 2002).

³⁷ *Death Sentences and Executions in 2007*, Amnesty International (2008), available at www.amnesty.org/en/library/asset/ACT50/001/2008/en/b43a1e5b-ffea-11dc-b092-bdb020617d3d/act500012008eng.pdf.

³⁸ *Death Sentences and Executions in 2008*, Amnesty International (2009), available at www.amnesty.org/en/library/asset/ACT50/003/2009/en/0b789cb1-baa8-4c1b-bc35-58b606309836/act500032009en.pdf.

³⁹ See footnote 28.

⁴⁰ See footnote 28, p. 16.

⁴¹ While New York and New Jersey have not executed any inmates since 1976, New Mexico executed one in the same time period.

repeal of capital punishment in these states made headlines throughout the United States and opened up room for debate regarding the morality, efficacy, and affordability of capital punishment.

23. This issue of the cost of the death penalty system has allowed the movement to make real headway in light of depressed state economies and dwindling funds for law enforcement and social programmes. As in New Mexico, where economic considerations were instrumental in Governor Bill Richardson's repeal of the death penalty, many governors and citizens in historically pro-capital punishment, yet cash-strapped, states are reconsidering their options. In Colorado, Kansas, Maryland, Montana, New Hampshire, Nebraska, in addition to New Mexico, the economic crisis and its impact on state funding have opened up debates on abolishing capital punishment as a way to cut costs. In such states, the electorate may prefer to use money currently being funnelled into legal battles on death row appeals for social programmes that will improve schools or stimulate development during the recession. Particular attention has been drawn to the fact that money spent to keep inmates on death row could be put to better use in Maryland, where studies estimated that the cost of one execution was an astronomical \$37 million.⁴² Surprisingly, in other states such as Texas and California – where the highest number of inmates are executed annually and where the highest number remain on death row, respectively⁴³ – the economic argument in favour of abolition has gained little ground.⁴⁴ California stands to gain the most, financially speaking, from repeal. The annual cost of the death penalty system in California is put at US\$137 million. The elimination of the death penalty and its replacement by lifetime incarceration would save nearly 92% or US\$125.5 million *per annum*.⁴⁵ These funds could be invested in additional police resources to boost the dismal clearance rate for violent crimes in California, which stands at well below 50%.⁴⁶

24. The United States Supreme Court may also be showing chinks in its retentionist armour. After the Court's temporary invalidation of the death penalty in *Furman v. Georgia* in 1972, it was unwilling to revisit the issue of the constitutionality of the death penalty until 2007. Then, in the three weeks following the decision in *Baze v. Rees* to consider an Eighth Amendment ("cruel and unusual punishment") challenge to execution by lethal injection,⁴⁷ the Court stepped in to block three more executions on Eighth Amendment grounds.⁴⁸ Although the Court eventually held in *Baze* that lethal injections did not violate the Eighth Amendment, it is encouraging to see that the Court has exhibited a certain trend over the last decade towards being more critical of the death penalty at least in some cases. The Court has outlawed, for example, the execution of a mentally retarded inmate in 2002 in *Atkins v. Virginia*⁴⁹ and the application of the death penalty to juvenile offenders in 2005 in *Roper v. Simmons*,⁵⁰ and its consideration of the legality of lethal injections brought about a temporary moratorium on executions across the nation.

25. An additional portent of progress toward abolition comes from another powerful legal body, the American Law Institute (ALI). Charged with the task of creating restatements and model codes of law, the ALI is able to craft its own version of legislation. The ALI's restatements and codes are cited as persuasive authorities in practically every jurisdiction and area of law in the United States, and rather than simply "restating" existing judge-made law, these promulgations are forward-looking and -thinking in nature. This body voted in October 2009 to withdraw Section 210.6 of its Model Penal Code, recommending that the Code no longer include the death penalty, "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment".⁵¹

26. The Council of the ALI, in its report to its members, stated that "[u]nless we are confident we can recommend procedures that would meet the most important of the concerns, the Institute should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the

⁴² *Financial Facts: Information on Costs of the Death Penalty from DPIC*, <http://deathpenaltyinfo.org/costs-death-penalty>, citing John Roman, Aaron Chalfin, et al., *The Cost of the Death Penalty in Maryland* (2008), available at: <http://deathpenaltyinfo.org/CostsDPMaryland.pdf>.

⁴³ State by State Database, Death Penalty Information Center, www.deathpenaltyinfo.org/state_by_state.

⁴⁴ Corbin, see footnote 34.

⁴⁵ Report of the California Commission on the Fair Administration of Justice (2008), 10, available at: www.deathpenalty.org/downloads/FINAL%20REPORT%20DEATH%20PENALTY%20ccfaj%20June%2030.2008.pdf.

⁴⁶ See statistics published by the Attorney General's office at:

<http://ag.ca.gov/cjsc/publications/candd/cd06/tabs/2006Table15.pdf>.

⁴⁷ *Baze*, 553 U.S. 35.

⁴⁸ USA: Pause for thought: Another lethal injection halted by US Supreme Court, Amnesty International, 18 October 2007.

⁴⁹ 536 U.S. 304 (2002).

⁵⁰ 543 U.S. 551 (2005).

⁵¹ *Death Sentences and Executions 2009*, pp. 16-17, see footnote 28.

Model Penal Code".⁵² According to the Death Penalty Information Center, "[t]his move essentially withdraws ALI from any attempt to fashion an acceptable death penalty because the system has proven to be unworkable".⁵³

27. On the public opinion front, however, recent developments appear less hopeful. An October 2009 Gallup poll reveals that, on the federal level, 65% of the population still support the death penalty for a person convicted of murder.⁵⁴ This figure has shown no signs of decline over the last decade, hovering between 64 and 70%. In fact, 80% of Americans believe that the death penalty is not imposed frequently enough or is imposed at the right frequency, despite the fact that most Americans believe that at least one innocent person has been executed in the United States in the last five years.⁵⁵ Although American legislators and politicians may point to strong backing for capital punishment as an obstacle to abolition, it is important to note that the death penalty enjoyed popular support in all current abolitionist states at the time of abolition.⁵⁶

3.2. *Persisting failure to implement the Avena (Mexico v. United States of America) judgment of the International Court of Justice*

3.2.1. *United States treaty obligations*

28. Ratified by over 170 countries, the Vienna Convention on Consular Relations (of 1963 regulates the establishment and functions of consulates worldwide. Article 36 of the Vienna Convention governs consular communication and contact with foreign nationals. Whenever foreigners are detained, arrested or imprisoned, the authorities must inform them without delay of their right to communicate with the consulate and to have the consulate notified of their detention. At the request of the foreign national, the consulate must then be notified without delay. Article 36 also confers on consulates the right to communicate with, visit and offer assistance to their detained nationals, including the right to arrange for their legal representation. The article further requires that local laws and regulations must enable full effect to be given to the rights accorded to detained foreigners and their consular representatives. Timely access to consular assistance is crucially important whenever individuals face prosecution under a foreign and often unfamiliar legal system.

29. Article 36 rights and obligations are reciprocal in nature. As Secretary of State Madeleine Albright stated in 1998,⁵⁷ the ability of American consulates to provide such assistance is heavily dependent on the extent to which foreign governments honour their consular notification obligations to the United States. At the same time, the United States must be prepared to accord other countries the same scrupulous observance of consular notification requirements that they expect them to accord the United States and its citizens abroad.

30. The United States ratified the Vienna Convention without reservations in 1969, but compliance with Article 36 obligations has long been deficient – even in cases where foreign nationals would face the death penalty if convicted.

31. In 1969, the United States also unconditionally ratified the Optional Protocol to the Vienna Convention concerning the Compulsory Settlement of Disputes, whereby disagreements over the interpretation or application of Article 36 fall under the compulsory jurisdiction of the International Court of Justice. Under Article 59 of the ICJ Statute, its decisions in such cases are binding on the parties to the dispute; under Article 94 (1) of the United Nations Charter, each member nation undertakes to comply with any ICJ decision to which it is a party. The United States was in fact the first country to successfully bring a case under the Optional Protocol to the Vienna Convention, in response to the seizure of American diplomatic and consular personnel in Iran in 1979.

⁵² ALI Council Votes to Remove Death Penalty from Model Penal Code, American Constitutional Society Blog (27 October 2009), WWW.ACSSLAW.ORG/TAXONOMY/TERM/994.

⁵³ Ibid.

⁵⁴ The poll was conducted via phone interviews with 1 013 adults.

⁵⁵ Frank Newport, In U.S., Two-Thirds Continue to Support Death Penalty, Gallup (13 October 2009), available at: WWW.GALLUP.COM/POLL/123638/IN-U.S.-TWO-THIRDS-CONTINUE-SUPPORT-DEATH-PENALTY.ASPX.

⁵⁶ Carol Steiker, *Capital Punishment and American Exceptionalism* at 11; Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda*.

⁵⁷ See *New York Times* of 8 December 1998, Rick Lyman, Aliens' rights are issues in Texas death row case.

3.2.2. *The Avena case before the International Court of Justice*

32. In January 2003, Mexico brought a case before the ICJ on behalf of a group of Mexican nationals who had been sentenced to death without being advised of their consular rights. Mexico asked the Court to consider whether these Mexican nationals were entitled to a legal remedy for the violation of Article 36 of the Vienna Convention on Consular Relations. The United States participated fully in the case, which was entitled *Avena and Other Mexican Nationals*.

33. In those proceedings, Mexico sought to ensure that its nationals received the protections to which they were entitled under domestic and international law.

34. The ICJ issued its judgment on 31 March 2004. It found Article 36 violations in 51 of the 52 cases that it reviewed. The Court held that American courts must provide "review and reconsideration" of the convictions and sentences to determine in each case if the Article 36 violation was harmful to the defendant.

3.2.3. *The United States Supreme Court case of Medellín and the position of the Bush Administration*

35. In 2004, in the case of *Medellín v. Dretke*, the United States Supreme Court agreed to consider whether the *Avena* Judgment should be enforced by domestic courts. Before the Court heard oral argument in the case, however, the President issued a memorandum addressed to the United States Attorney General stating:

"I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States of America, that the United States will discharge its international obligations under [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

36. In a brief filed with the Supreme Court, the United States Solicitor General explained that compliance with *Avena* "serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law".

37. The Supreme Court decided not to rule on the merits of the case and instead found that Mr Medellín's newly-filed state *habeas* petition based on *Avena* and the Presidential memorandum should first be considered by the Texas courts.

38. After the Texas courts found that neither *Avena* nor the Presidential Memorandum was binding federal law that would prevail over state procedural bars regarding the filing of new *habeas* petitions, the Supreme Court again agreed to review Mr Medellín's case.

39. In their briefings to the Supreme Court, all parties – including Texas – agreed that United States compliance with *Avena* is a binding international obligation; the only dispute between the parties was over the appropriate means of securing its domestic enforcement.

40. The Supreme Court issued its decision in *Medellín v. Texas* on 25 March 2008. The Court held that *Avena* is not directly enforceable in the domestic courts in the absence of implementing legislation and that the President did not have the authority to implement *Avena* unilaterally.

41. While the majority, concurring and dissenting opinions differed widely in their approaches to the legal questions presented, there was unanimous agreement that compliance with *Avena* is an international legal obligation of the United States and that Congress has the authority to implement that obligation. The Court was also unanimous in recognising the importance of securing compliance with *Avena*.

3.2.4. *Conclusion: legislation urgently needed to secure compliance with Avena*

42. Legislation is urgently needed in order to secure compliance with the *Avena* judgment. This was recalled in a letter to the Secretary of State and the Attorney General dated 15 October 2009 from a group of United States senators. Whilst the reply received by the Department of Justice dated 1 April 2010 recognises that legislation would be the "optimal" way to implement *Avena*, the Secretary of State has yet to react to the senators' letter. Meanwhile, Texas appears to be moving to execute another Mexican national covered by *Avena*.

43. Following a discussion on this topic in the Committee on Legal Affairs and Human Rights on 26 April 2010, I therefore wrote a letter (see Appendix), together with the Committee's Chairperson, to the Secretary of State urging the United States Department of State to recommend to Congress the passage of legislation to bring the United States into compliance with Avena, in line with the recent recognition by the Assistant Attorney General that legislation would be an optimal way to give domestic legal effect to this judgment.

44. Being strongly attached to the rule of law, a value generally shared by the United States, we made it clear that we are deeply troubled that the United States has thus far failed to implement the judgment, which was pronounced six years ago. This threatens to set a dangerous precedent which certain governments may rely upon, to the detriment of citizens of all our countries. To date, no reply has been received to this letter.

4. Developments in Japan: disappointment despite the temporary presence in government of abolitionist ministers of justice

45. The situation in Japan is complex. Shifts in the political and judicial system paint an ambiguous picture, while conditions on death row show few signs of improvement, and public support for capital punishment has actually increased, reaching an all-time high just as the possibility of abolition appeared on the horizon.

46. On the political front, the glimmer of hope provided by Prime Minister Yukio Hatoyama's appointment of abolitionist Keiko Chiba as Minister of Justice appears to have been extinguished. Between September 2009, when she was appointed, and June 2010, which saw the end of the Hatoyama administration, Japan upheld a *de facto* moratorium on the death penalty.⁵⁸ Keiko Chiba has remained Justice Minister under the new Prime Minister Naoto Kan, but the executions of two persons⁵⁹ on 28 July 2010 in the presence of the Minister brought the *de facto* moratorium to a brutal end. Furthermore, despite Chiba's anti-death penalty stance, there remain 107 people on death row in Japan.⁶⁰ The hopes of abolitionists around the world that Chiba could reform the Japanese penal system and achieve the abolition of capital punishment have so far been disappointed, even if the Minister, after the executions which she attended, announced the creation of a working group tasked with reviewing the issue of the death penalty and stated that a thorough discussion on this subject was needed. If history is any indication, it is unlikely that abolition could result from the brief political term of one abolitionist minister of justice. Between 1989 and 1993, for example, four successive ministers refused to authorise executions, but to no avail. Their terms were followed by a particularly cruel period under former Minister of Justice Kunio Hatoyama (referred to by death penalty opponents as the "grim reaper," for signing 13 death warrants in less than a year, thus authorising more executions in Japan than occurred in any other year since 1975⁶¹) and his two successors, Okiharu Yasuoka and Eisuke Mori, who reversed the tide against abolition in the country.

47. In recent years, public support of the death penalty in Japan has even been on an upward trend, reaching 85.6%, a jump of four percentage points from 2004.⁶² Moreover, the shroud of secrecy that has obscured the execution process in Japan continues to obscure the truth, with the Japanese citizenry remaining altogether uninformed about conditions on death row and the judicial process. As has been the case for many years, information about death row is limited by the fact that the condemned are forbidden from speaking to anyone outside of their immediate families and their lawyers. Even communication with other prisoners or guards is prohibited. In addition to being subjected to solitary confinement, death row prisoners are forced to sit still and are watched by cameras 24 hours a day. They are not informed of the date of their execution until the day comes, and their families are only told afterwards.⁶³ Amnesty International has carried out important research on the mental health of the inmates of Japanese death rows.⁶⁴

48. The Japanese people remain largely uninformed about the execution system in their own country. This lack of transparency is particularly troublesome since in a new system – established in 2008 – lay judges can condemn a convicted person to death. Such "citizen judge" panels consist of six laypersons and three

⁵⁸ Richard Lloyd Parry, *Japan's Death Penalty Effectively Scrapped with Arrival of Keiko Chiba*, *The Times* (19 September 2009), available at: www.timesonline.co.uk/tol/news/world/asia/article6840248.ece.

⁵⁹ They are Kazuo Shinozawa, aged 59 and Hidenori Ogata, aged 33.

⁶⁰ Matt Kelley, *Japanese Support for the Death Penalty Grows*, Change.org (9 February 2010), available at: <http://criminaljustice.change.org/blog/view/japanese-support-for-the-death-penalty-grows>. See also BBC news of 28 July 2010.

⁶¹ [Nao Terai](http://www.reprive.org.uk/2010_03_29ray_of_hope_deathpenalty), *Shining a light on Japan's machinery of death*, *Reprive* (29 March 2010), www.reprive.org.uk/2010_03_29ray_of_hope_deathpenalty.

⁶² *Ibid.*

⁶³ *Death Sentences and Executions in 2008*, footnote 38.

⁶⁴ www.amnesty.org/en/library/info/ASA22/005/2009/en

professional judges.⁶⁵ There is some hope, however, that these new developments in the court system will give the Japanese public some insight into the complexities of the penal system and that “citizen judges” will demand more transparency in order to be able to take truly informed decisions.

5. A brief reminder of key grounds for abolition⁶⁶

5.1. Irreversibility of the death penalty

49. As fallible human beings, we cannot claim to be able to fashion a penal system that is free of error. Given the probability of convicting and sentencing the innocent, it is unacceptable to impose a punishment that is permanent and irreversible. A system that wrongfully convicts and imprisons a person can take steps, however inadequate they may be, to atone for the error, but once a state has executed an innocent person, there is no way to right the wrong. The figures from the United States system prove that such errors run rampant: 139 individuals on death row have been found innocent and exonerated since 1973,⁶⁷ most commonly on the basis of eyewitness error, negligent or even intentional misconduct by police and prosecution officials, incompetent defence counsels, scientific errors, snitch testimony and false confessions.⁶⁸

50. Further room for error exists in the practical application of the United States Supreme Court’s judgment in *Atkins v. Virginia*, which held that no mentally retarded person can be subjected to the death penalty. Despite the *Atkins* holding and in contravention of the Eighth Amendment prohibition on cruel and unusual punishment, there is evidence that many states continue to execute individuals with mental illnesses because there are discrepancies among states’ standards as to what constitutes mental retardation for the purposes of “justifiable” execution.

5.2. Arbitrary and biased application of the death penalty

51. Numerous studies, concerning in particular the United States, show that the death penalty is applied in a biased way depending on the racial or social belonging of the perpetrators or victims⁶⁹ and their gender.⁷⁰

52. United States Supreme Court Justice Harry Blackmun observed that the death penalty experiment has failed. After two decades of struggling to fashion a capital justice system that would be consistent, fair, and error-free, Blackmun said he would no longer “tinker with the machinery of death”.⁷¹ Arbitrary factors like the race of the defendant and victim, the adequacy of the defendant’s legal representation, the jurisdiction where the defendant is sentenced, and whether the governor in that jurisdiction is up for re-election, are most highly correlated with the imposition of the death penalty. In particular, race is a prime determining factor in whether the death penalty will be ordered. A report from the General Accounting Office concluded that “in 82% of the studies [reviewed], race ... was found to influence the likelihood of being charged with capital murder or receiving the death penalty”⁷² especially where black defendants exhibit stereotypically “black” facial

⁶⁵ Terai, footnote 61.

⁶⁶ Due to the closed nature of the Japanese penal system, significantly less data is available on Japan, and thus this section makes repeated reference to available figures from the United States. Many of the same arguments against the death penalty apply, however, to Japan.

⁶⁷ Defendants must have been convicted, sentenced to death and subsequently either: a) their conviction was overturned and i) they were acquitted at re-trial or ii) all charges were dropped; or b) they were given an absolute pardon by the Governor based on new evidence of innocence. *The Innocence List*, Death Penalty Information Center, www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

⁶⁸ Innocence and the Death Penalty, Death Penalty Focus, <https://death.rdsecure.org/article.php?id=49>.

⁶⁹ See Death Penalty Information Center, Race and the Death Penalty, at: www.deathpenaltyinfo.org/race-and-death-penalty; Race and the Death Penalty, ACLU, 26 February 2003, at: www.aclu.org/capital-punishment/race-and-death-penalty; Amnesty International, Death by Discrimination, The Continuing Role of Race in Capital Cases, at: www.amnesty.org/en/library/info/AMR51/046/2003; even though black and white people are murder victims in nearly equal numbers of crimes, 80% of people executed since the death penalty was reinstated have been executed for murders involving white victims. More than 20% of black defendants who have been executed were convicted by all-white juries.

⁷⁰ See Death Penalty Information Center, Women and the Death Penalty, at: www.deathpenaltyinfo.org/women-and-death-penalty; statistically, women account for about 1 in 10 (10%) murder arrests; 1 in 50 (2%) death sentences imposed at the trial level; 1 in 67 (1.5%) persons presently on death row; and 1 in 100 (1%) persons actually executed in the modern era; see also Earl Ofari Hutchinson, Quirky Gender Bias in the Death Penalty, in: The Huffington Post, 6 March 2010.

⁷¹ USA: Pause for Thought, footnote 48.

⁷² U.S. General Accounting Office. (1990). Death penalty sentencing: Research indicates pattern of racial disparities. Washington, DC; Floyd D. Weatherspoon African-American males and the law: cases and materials, 190.

features.⁷³ Another main factor, the quality of legal counsel is often wholly outside of the defendants' control, as almost all death row inmates cannot afford private legal counsel and must be defended by a court-appointed attorney. An examination of 461 capital cases by *The Dallas Morning News* found that nearly one in four condemned inmates has been represented at trial or on appeal by court-appointed attorneys who have been disciplined for professional misconduct at some point in their careers.⁷⁴ In Washington state, one fifth of the 84 people who have faced execution in the past 20 years were represented by lawyers who had been, or were subsequently, disbarred, suspended or arrested. Overall, the state's disbarment rate for attorneys is less than 1%.⁷⁵ A democratic society dedicated to human rights cannot allow completely arbitrary factors to determine whether a person lives or dies at the hands of the state.

5.3. *Ineffectiveness of the death penalty*

53. Death penalty supporters cite two main reasons for the imposition of capital punishment: deterrence and retribution. However, data shows that neither of these ends is achieved when a state puts individuals to death.⁷⁶ Criminologists overwhelmingly agree that the death penalty does not add deterrent effects to those already achieved by lengthy imprisonment, and, in particular, a high clearance rate.⁷⁷ Nor does the state killing provide retributive justice. The prolonged duration of the death row appeals process can reopen old wounds for victims' families without providing a satisfying conclusion.⁷⁸ An additional death, far from avenging the death of innocent victims, simply creates more suffering, particularly for the executed individual's family and loved ones. Furthermore, where the death penalty is likely to or must⁷⁹ be imposed for particular crimes, culpable individuals can be acquitted and freed if anti-death penalty jurors are reluctant to return with a guilty verdict in light of the chance that their guilty verdict will be tantamount to a death sentence for the accused.⁸⁰ Thus, the death penalty can lead to inappropriate levels of punishment at both extremes.

5.4. *Cost*

54. The cost of keeping an inmate on death row is extremely high. In the United States, where the Constitution demands a long and complex judicial process in capital cases, the funds the state expends on battling death row appeals could be better used for other endeavours, and in particular for increasing deterrence by boosting the clearance rate for serious crimes.⁸¹

5.5. *International obligations and opinion*

55. While 139 countries have abolished the death penalty in law or in fact, the United States' and Japan's retention of capital punishment puts them in the company of such states as China, Saudi Arabia, North Korea, Somalia, and Iran, which are still applying the death penalty on a large scale.⁸²

56. Furthermore, the retention of the death penalty by the United States and Japan conflicts in my view with their duties as Council of Europe observer states. Under Statutory Resolution (93) 26 on observer status, a state wishing to become a Council of Europe observer state has to be willing to accept the principles of democracy, the rule of law, and the enjoyment by all persons within its jurisdiction of human

⁷³ Jennifer L. Eberhardt, 1 Paul G. Davies et al., Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, *Psychological Science* Vol.7 No. 5, 383-86, available at www.psychologicalscience.org/pdf/ps/deathworthy.pdf.

⁷⁴ Quality Of Justice, *Dallas Morning News*, 10 September 2000.

⁷⁵ Inadequate Legal Representation, *Death Penalty Focus*, <https://death.rdsecure.org/article.php?id=83m>, citing Seattle Post-Intelligencer, 6-8 August 2001.

⁷⁶ *10 Reasons to Oppose the Death Penalty*, *Death Penalty Focus*, <https://death.rdsecure.org/section.php?id=24>.

⁷⁷ Michael L. Radelet and Traci L. LaCock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, available at www.deathpenalty.org/downloads/RadeletDeterrenceStudy2009.pdf.

⁷⁸ Death Penalty Can Prolong Suffering for Victims' Families, *Death Penalty Focus*, <https://death.rdsecure.org/article.php?id=56>.

⁷⁹ Mandatory death sentences were ruled unconstitutional in the United States in *Furman v. Georgia*, 408 *U.S. 238* (1972), but such mandatory sentencing still exists in Japan, India, Taiwan, Singapore and Malaysia. Furthermore, where the death penalty is available as punishment within the range of judicial discretion, American juries are informed of the possibility of the accused's being sentenced to death before they are granted time to deliberate and settle on a verdict.

⁸⁰ This has been shown to occur despite the fact that, in the United States, jurors must be "death qualified," meaning that they cannot be opposed to the death penalty in principle.

⁸¹ See paragraph 23 above.

⁸² *Abolitionist and Retentionist Countries*, Amnesty International www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries.

rights and fundamental freedoms.⁸³ As shown above, the imposition of the death penalty has been recognised in Europe as being contrary to these ideals, violating Article 2 of the ECHR, the right to life, and Article 3, the prohibition of inhuman and degrading treatment. Whilst two states having observer status – Canada and Mexico – have abolished the death penalty, Japan and the United States still implement it as a mode of punishment. The Assembly has thus found Japan and the United States in violation of their duties under Statutory Resolution (93) 26.⁸⁴

57. Given the developing international consensus against capital punishment, at least among countries with a strong tradition of respect for human rights, the imposition of the death penalty increasingly comes into conflict with international legal obligations. For example, in executing José Ernesto Medellín following the ruling in *Medellín v. Texas*,⁸⁵ the United States ignored the ruling of the International Court of Justice in the case concerning *Avena and other Mexican nationals (Mexico v. the United States of America)*⁸⁶ and found itself in violation of the United Nations Charter and the Vienna Convention.⁸⁷

⁸³ Abolition of the death penalty in Council of Europe Observer states, Assembly Resolution 1253 (2001).

⁸⁴ *Ibid.*

⁸⁵ 552 U.S. 491 (2008).

⁸⁶ 2004 I.C.J. 12.

⁸⁷ See paragraphs 28-44 above.

Appendix

Letter of 26 April 2010 from Ms Renate Wohlwend, rapporteur and Mr Christos Pourgourides, Chairperson of the Committee on Legal Affairs and Human Rights, to the Honourable Hillary Rodham Clinton, United States Secretary of State

...

As Chair of the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly, and, respectively, as the Assembly's rapporteur on the death penalty in the Council of Europe's observer states, we the undersigned warmly invite the United States to implement the decision of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals*. Our Committee of 83 lawmakers from the Council of Europe's 47 member states discussed the implementation of the *Avena* judgment at its meeting on 26 April 2010 in Strasbourg (France) and unanimously decided to address this letter to you.

The United States has a duty under the United Nations Charter and other international instruments, including the Vienna Convention on Consular Relations (VCCR) and its Optional Protocol, to comply with *Avena* by providing the Mexican nationals affected by the judgment with review and reconsideration of their convictions and sentences. As we are strongly attached to the rule of law, a value generally shared by the United States, we are deeply troubled that the United States has thus far failed to implement the judgment, which was pronounced six years ago. This threatens to set a dangerous precedent which certain governments may rely upon, to the detriment of citizens of all our countries.

We understand that Senators Leahy, Kerry, Feingold, Cardin, and Franken have asked for the guidance of the Obama Administration regarding the means by which the United States can best comply with *Avena*. Following the decision of the U.S. Supreme Court in *Medellín v. Texas*, legislation is clearly necessary in order to enforce the ICJ's judgment in U.S. courts. We therefore strongly encourage the Department of State to recommend to Congress the passage of legislation to bring the U.S. into compliance with *Avena*, in line with the recent recognition by the Assistant Attorney General that legislation would be an optimal way to give domestic legal effect to this judgment.

The Mexican nationals affected by the United States' ongoing violation of international law have been convicted of capital crimes without being given the consular assistance they were entitled to. One of the *Avena* plaintiffs, José Medellín, was executed without judicial review and reconsideration of his case as required by the ICJ – an outcome that we find unacceptable. Unless the United States acts quickly and decisively to promote required legislation, other executions may follow.

We therefore warmly invite the Obama Administration to exercise leadership on this issue. Independently of the Council of Europe's general stance against capital punishment, which we share, we expect that the United States will honour its international obligations, particularly when lives are at stake.

...