

The International Implications of the European Consensus against the Death Penalty:

# The Obligation of the EU to Protect European Citizens Abroad from Execution

JOSÉ-MIGUEL BELLO Y VILLARINO

International Legal Program, Center for Reproductive Rights, New York

RAMONA VIJEYARASA

Ministry of Foreign Affairs and Cooperation – Diplomatic School, Madrid

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## Abstrak

Uni Eropa telah mencapai konsesus tentang penghapusan hukuman mati yang dianggap sebagai pelanggaran terhadap hak untuk hidup, sebuah bentuk kekejaman, hukuman yang tidak lazim dan menurunkan martabat. Sebaliknya, Indonesia, seperti juga beberapa negara Asia, tetap menerapkan hukuman mati secara kaku, khususnya dalam konteks pencegahan perdagangan obat-obat terlarang dan terorisme. Adanya perbedaan sikap ini membuat Uni Eropa harus mengambil langkah-langkah yang bijaksana untuk melindungi warganya dari hukuman mati dalam kasus kriminal yang terjadi di wilayah Asia. Uni Eropa mengusulkan penggabungan klausula HAM yang meminta tidak diberlakukannya hukuman mati bagi warga negara Uni Eropa, berkaitan dengan kesepakatan perdagangan luar negeri dan pembangunan yang dinegosiasikan dengan negara-negara Asia. Di bawah aturan tentang pengalihan narapidana, hukuman mati akan diubah menjadi hukuman seumur hidup, dan dilakukan di negara Eropa tempat asal narapidana. Idealnya, pendekatan ini akan menjadi katalisator bagi penghapusan hukuman mati secara global. Pada akhirnya, model yang diajukan merefleksikan kekuatan posisi Uni Eropa yang anti hukuman mati dan dukungannya terhadap HAM di negara-negara anggota Uni Eropa.

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*Kata kunci:* hukuman mati, Uni Eropa, abolisi, hubungan internasional, Asia, Uni Eropa, transfer sistem

\* The views expressed here are solely those of the authors and do not represent any government or organization.



apply the death penalty with rigour, often in the context of prohibitionist policies towards the drug trade or to thwart domestic and international terrorism. This reflects a region out-of-step with the international trend towards abolition.

Accordingly, the EU must defend the right to life and the non-application of the death penalty for any crimes committed in Asia by one of its nationals, for two key reasons. First, having asserted that the death penalty is directly contrary to human dignity, the European Union must defend this position and deem any execution of a European national, not just as contrary to this stance, but moreover offensive and unsustainable. Second, as a fundamental right attached to each individual person and central to human dignity, the EU is obliged to guarantee non-application of the death penalty for all Europeans, whether they are on EU soil or abroad. The authors contend therefore, that in light of Europe's abolition on the use of the death penalty, and the repressive, retentionist policies of a large number of countries in Asia, a negotiated approach must be taken to prevent the execution of a European national for a crime committed in any of the retentionist Asian countries.

### The Human Factor: The International Consensus Against the Death Penalty

The United Nations – *inter alia* under articles 6(1) and 6(2) of the International Covenant on Civil and Political Rights (ICCPR),<sup>5</sup> the Convention on the Rights of the Child (CRC), which forbids capital punishment for juveniles, and in the ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty<sup>6</sup> – has established strict standards under which the death penalty may be applied. The movement towards abolition is most strongly reflected in the The Second

5 Article 6 of the ICCPR provides: (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his 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 and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court. International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976

6 Economic and Social Council: "ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty", ECOSOC Resolution 1984/50, adopted on 25 May 1984.

Optional Protocol to the ICCPR,<sup>7</sup> an instrument enacted as a means to achieve global abolition of the death penalty. Adopted by the UN General Assembly in 1989 and entered into force in 1991, it has been (as of January 2008) ratified by 65 state parties and signed by a further 6 countries.<sup>8</sup> According to Amnesty International,<sup>9</sup> two-thirds of the countries in the world are abolitionists, in law or practice<sup>10</sup> yet, 62 countries retain the use of the death penalty.

The EU has been instrumental in this international movement towards total abolition and has in fact moved

beyond the position of the UN.<sup>11</sup> Whilst many Eastern European countries are yet to ratify the Second Optional Protocol to the ICCPR, membership in the Council of Europe has been a central contributor to domestic abolition. This “regional” – as opposed to “global” – approach to fighting capital punishment is therefore multidimensional, having its internal effect by conditioning EU membership on ratification of Protocol 6, as well as its external (international) impact through the EU’s foreign policy. Since the Final Declaration of the 1997 Council of Europe Summit,<sup>12</sup> where the European Heads of Government—including all EU member states—called for universal

7 The Second Option Protocol provides for the total abolition of the death penalty but allows states parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. See Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989

8 Office of the High Commissioner for Human Rights, Status of Ratification, available at <http://www2.ohchr.org/english/bodies/ratification/12.htm>, as of January 25, 2008.

9 Amnesty International, Death Penalty: Abolitionists and Retentionist Countries, 2008 available at <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>.

10 We, nonetheless object to this terminology. It is hard to understand how a country can be called “abolitionist” if it accepts the application of the death penalty by other countries. If the term was analogously applied within the framework of slavery, its use would suggest

that a country could be deemed an “abolitionist” if there were no slaves within its territory, even if the country considered it to be an acceptable practice for other sovereign states to have slaves. An “abolitionist” is not one who has abolished something but rather one who advocates for and works towards the complete elimination of a given law that permits abhorrent behaviour.

11 See Protocol No. 6 (cited above) and Protocol No.13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11. Council of Europe, Vilnius, 3 May 2002

12 Available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(97\)169&Sector=secCM&Language=lanEnglish&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(97)169&Sector=secCM&Language=lanEnglish&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)

abolition,<sup>13</sup> fighting the death penalty has been a core element of European external policy in two ways. On the one hand, a number of European States and the EU institutions lobby actively for global abolition in multilateral and bilateral fora.<sup>14</sup> On the other hand, it represents a recent "watermark" of the "European way" of communicating its foreign policy as obviously distinct from that espoused by the United States.

The EU, as does the UN, presently provides a "carve-out," which the authors contend cannot persist if we are to achieve international abolition of the death penalty. Despite the EU's

strong stance, its Guidelines towards third countries that continue to apply the death penalty presently insist on minimum standards, with the death penalty not to be imposed for non-violent financial crimes or for non-violent religious practice or expression of conscience.<sup>15</sup> The UN has made a similar, though less specific statement of principle. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.<sup>16</sup> Rather, we assert that an even stronger position needs to be taken by the EU and consensus for total abolition conditionally agreed upon as discussed below.

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13 The authors note that under the European Convention on Human Rights states parties may retain the death penalty for crimes "in time of war or of imminent threat of war". Whilst such a legal option is meant to be completely removed by Protocol 13 to the ECHR (in force since 1st July 2003, cited above), only 25 countries have ratified Protocol 13, with 18 pending ratifications.

14 The EU has sponsored various UN resolutions on the issue. Just to mention two examples, see UN Commission on Human Rights, (56th Session): "Resolution on the Death Penalty" E/CN.4/RES/2000/65, 27 April 2000, Sponsored by the European Union or UN General Assembly (62nd Plenary 76th & 77th Meetings, AM & PM): "The draft resolution on a moratorium on the use of the death penalty" A/62/439/Add.2, 18 December 2007 sponsored by a cross-regional alliance, including the EU.

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15 Guidelines to EU policy towards third countries on the death penalty, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/Guidelines%20DeathPenalty.pdf>

16 Economic and Social Council: "ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty", ECOSOC Resolution 1984/50, adopted on 25 May 1984.

### Control Over Crime and Punishment: State Sovereignty, the Deterrent Effect and Regional Norms

The life of a human being is his or her inalienable human right. EU standards clearly deem the death penalty a violation of human dignity and a form of cruel and degrading punishment.<sup>17</sup> Given the right to life is a fundamental right in European law, the non-application of the death penalty to an EU citizen in foreign territory is non-negotiable.

Yet, for retentionist countries like Indonesia, for whom deterrence is a central argument, the human rights element is overridden by an alleged

greater goal. In fact, there is a strong argument that the "Asian" consensus favours the death penalty. At the already mentioned 53rd session and 54th sessions, the UN Commission on Human Rights called on countries which maintain the death penalty to progressively restrict the number of offences for which it may be imposed, and to establish a moratorium on executions with a view to completely abolishing the death penalty.<sup>18</sup> Eleven member states voted against the resolution. Eight of the eleven countries were from the Asian region, including China, Indonesia, Japan, Malaysia and South Korea—the other three being Algeria, Egypt and the United States.<sup>19</sup> One of the exceptions in the Asian region is Cambodia, whose abolition in 1989<sup>20</sup> arguably reflects transitional reform after the Pol Pot regime.

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17 At odds with this was the decision, at a Council of Europe level, of the Grand Chamber of the European Court of Human Rights, not to reach any firm conclusion on this point in 2005 in the case of *Öcalan v. Turkey*, Application no. 46221/99 of 12 May 2005 (at paragraph 165) on the basis that "a large number of States had yet to sign or ratify Protocol No. 13". However, the Court did find that the proceedings leading to the sentence were in violation of article 3 on the basis that "the fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention." (at paragraph 169).

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18 See UN Commission on Human Rights (54th Session): "Question of the Death Penalty", Resolution 1998/8 ([http://www.unhcr.ch/Huridocda/Huridoca.nsf/2848af408d01ec0ac1256609004e770b/b91a2fa2d1dcf65280\\_2566c6003d7c88?OpenDocument#8](http://www.unhcr.ch/Huridocda/Huridoca.nsf/2848af408d01ec0ac1256609004e770b/b91a2fa2d1dcf65280_2566c6003d7c88?OpenDocument#8).)

19 Amnesty International, 4 April, 1997, [www.hartford-hwp.com-news](http://www.hartford-hwp.com-news) service.

20 Amnesty International, *Death Penalty: Countries Abolitionists for All Crimes*, 2008 available at <http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes>.

The natural question that follows is: what makes Asia special? Two particular reasons are offered to argue that the situation in Asia is unlike that existing in Europe and, as a result, requires a different response — i.e. the death penalty — to deal with it: the exceptional risk of terrorist attacks and drug trafficking; and the limitations in the resources available to deal with these two types of criminal activity, with being the deterrence considered effect a more effective (and less expensive) solution.<sup>21</sup>

The death penalty is applied with stark frequency for both those found responsible for terrorist attacks as well as drug-related offences in Asia. Of the convicted “Bali bombers,” responsible for the two 2002 bombings in Bali that killed 202 people, three were sentenced to the death penalty, whilst four received sentences of life in prison (in this case, Indonesian nationals).<sup>22</sup> As for the prevalence of the death penalty for drug-traffickers, Malaysia — a country that remains

relatively unreprimanded by the international community for its human rights abuses compared to its Asian neighbours — executed thirty-six people (out of its fifty-two executions) between July 2004 and July 2005 for drug trafficking.<sup>23</sup> According to a parliamentary report made by the Malaysian Internal Security Ministry in April 2005, 229 people had been executed for drug trafficking in the thirty years preceding.<sup>24</sup> In Singapore more than 420 prisoners were hanged between 1991 and the end of 2005, most of them for drug trafficking in an effort to stop the country becoming a narcotics hub.<sup>25</sup> Vietnam, with its close proximity to the Golden Triangle — a central heroin producing region — admitted in its 2003 state party report to the UN Human Rights Committee that the death penalty has been predominantly applied to persons found guilty of drug trafficking.<sup>26</sup>

21 See declarations of the Representative of Singapore after the approval of the AG resolution of 18 December 2007. Available at <http://www.un.org/News/Press/docs/2007/ga10678.doc.htm>.

22 “Indonesia cuts bombing sentences Australia protests amnesty for defendants in Bali attacks,” *International Herald Tribune*, August 18, 2005; See also “Death Penalty for Bali Bomber” *BBC News*, 2 October 2003.

23 Lines (2007) “The Death Penalty for Drug Offences: A Violation of International Human Rights Law” *International Harm Reduction Association*, citing C.S. Ling (2006) “Debate over the death penalty heating up”, *New Straits Times*, 26 March 2006.

24 “229 Executed for Drug Trafficking in Past 20 Years”, *Malaysiakini* 13 April 2005.

25 Amnesty International, 15 January 2004.

26 Comments by the Government of Viet Nam on the concluding observations of the Human Rights Committee: “A large number of countries still retain the death

However, when assessing the alleged unique risk of these major crimes, it would be a fallacy to claim that any country, let alone a European one, is a stranger to drug trafficking or terrorism. Ireland (Air India bombing 1985), the United Kingdom (Lockerbie 1988) and Spain (Madrid, 2004) have suffered some of the most lethal terrorist attacks in the world in the last 25 years.<sup>27</sup> Spain has traditionally been the entrance route for cocaine and cannabis derivatives (mainly hashish) into Europe. If anything, a better approach is needed in South-East Asia to combat those

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penalty and this is in the interest of the majority of the people. In Viet Nam, over the last years, the death penalty has been mostly given to persons engaged in drug trafficking since it has become a very serious problem for the development of Viet Nam and has posed a direct threat to every family." UN Human Rights Committee: Concluding observations of the Human Rights Committee. Follow-up Response by State Party - Viet Nam. 24 July 2003, CCPR/CO/75/VNM/Add.2.

<sup>27</sup> In particular the abolition of the death penalty in the United Kingdom and Spain, was undertaken while there existed extremely active terrorist campaigns in both countries (IRA and ETA respectively). In fact, foreign support for the political demands of these terrorists groups was actually bolstered by the application of capital punishment, as the death penalty was considered reflective of a repressive regime or, at least, disrespectful of fundamental human rights principles. Hence, abolition was useful as a mean of undermining foreign support for these terrorist causes.

crimes for which the threat of an execution is clearly not acting as a successful deterrent.<sup>28</sup>

The individual human right cannot be sacrificed for the unproven benefit of societal good.<sup>29</sup> Intuitively it is probably reasonable to believe that the risk of being executed has a very marginal effect on someone's decision to engage in a terrorist act (especially when the expected reward for those

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<sup>28</sup> According to CIA data Southeast Asia—the most significant producer of the opium outside Afghanistan and responsible for 9% of global opium—saw in 2006 marginal increases in production. Available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2086.html>. Additionally note that in China, police data shows that the number of drug users grew 35 percent in the five years since 2000. In Viet Nam, the BBC quoted an official who said in 2005 the quantity of drugs seized by customs had increased 400 percent year-on-year, despite its use of the death penalty Amnesty International in Asia & the Pacific, Asia-Pacific: Death sentences for drug-related crimes rise in region, available at [http://asiapacific.amnesty.org/apro/aproweb.nsf/pages/adpan\\_ap\\_anti-drug\\_ASA010032007](http://asiapacific.amnesty.org/apro/aproweb.nsf/pages/adpan_ap_anti-drug_ASA010032007).

<sup>29</sup> Most of the recent scientific literature on the issue focuses on the USA which might not be adequately extrapolated to the international context. For an econometric analysis (mostly favourable to the existence of a deterrence effect) and its critics (mostly considering the foundations of those analysis flawed and opposed to its existence) see John J. Donohue and Justin Wolfers (2005) "Uses and Abuses of Empirical Evidence in the Death Penalty Debate", Available at SSRN: <http://ssrn.com/abstract=259538>; Cass R.



acts is death and paradise itself). Nonetheless, it could be the case that it would have a significant deterrent effect if capital punishment was applied to very minor offences, such as speeding or shop-lifting, in which the person is acting not on the grounds of superior motives<sup>b</sup> – or huge amounts of money within an organised crime structure – but, more likely, on the basis of a cost-benefit analysis.

Yet, the rate of supporters of executions spectacularly decreases when these groups are polled on its application to minor offences, leading to the so-called “proportionality argument” or recognition of the “value of human life”. Hence, it appears to us that the only rational and honourable option for those supporting the death penalty on “deterrence effect” grounds should be to favour its application for those crimes in which the capital punishment would have the highest rate of success and not to those in which its real effect could not be proved. Otherwise, they should better look for justification on retributive “eye for an eye” grounds.<sup>30 31</sup>Re-

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Sunstein and Adrian Vermuele (2005) “Is Capital Punishment Morally Required? Acts, Omissions and Life-Life Trade-offs”, *Stanford Law Review*, 58, p.703; Hashem Dezhbaksh, Paul H. Rubin and Joanna M. Shepherd (2003) “Does Capital Punishment Have a Deterrent Effect? New Evidence From Post-moratorium Panel Data”, Available at SSRN: <http://ssrn.com/abstract=259538> ; Joanna Shepherd (2005) “Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States”, *Michigan Law Review* Forthcoming Available at SSRN: <http://ssrn.com/abstract=781504>; Lawrence Katz, Steven D. Levitt and Ellen Shustorovich (2003) “Prison Conditions, Capital Punishment and Deterrence”, *American Law and Economics Review*, 5(2), pp.318-343; H. Naci Mocan and R. Kaj Gittings (2003) “Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment”, *Journal of Law and Economics*, 5(2), pp.318-343; and Jeffrey Fagan, Franklin E. Zimring and Amanda Geller (2006) “Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty”, *Texas Law Review*. Forthcoming Available at SSRN: <http://ssrn.com/abstract=928649>.

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30 See discussion of proportionality and the debate between execution and life imprisonment in Brian Calvert (1992) “Retribution, Arbitrariness and the Death Penalty”, *Journal of Social Philosophy* 23(3) pp. 140-165; see also Andrew von Hirsch (1981) “Doing Justice: The Principle of Commensurate Deserts,” in, H. Gross and A. von Hirsch eds. (1981) *Sentencing*. New York, Oxford University Press.

31 One commentator when discussing the application of the death penalty for drug-related crimes cynically reflects upon the inappropriate fit of the “eye-for-an-eye” retributive rationale for drug offenses: “...killing one’s customers is bad for business. It is difficult therefore to make a reasonable case that the use, sale or trafficking of narcotics is intended to have a lethal outcome.” Rick Lines (2007) “The Death Penalty for Drug Offences: A Violation of International Human Rights Law,” International Harm Reduction Association. Available at <http://www.ihra.net/>

garding the deterrence argument, we must concede that an execution certainly avoids the risk of re-incidence,<sup>32</sup> but so does a life sentence at a lower cost, both the cost of life and the economic cost of its application.<sup>33</sup> Therefore, the often-relied-upon deterrence argument remains an empty justification.

### An Alternative Model for European Nationals

Following the absence of a clear societal benefit for the country or the region in which the criminal action takes place, the authors believe that the EU must protect its citizens from the risk of execution by a non-member state, and thus, propose an alternative model centered on a bilateral or multilateral agreement. The suggested agreement would parallel prisoner

transfer agreements, which most Asian and European States already have in place, but be specifically directed at preventing the application of the death penalty to European nationals found guilty of crimes in any given Asian country.

On the basis of territorial sovereignty, there is no question that individuals who break the law in foreign countries should be subject to punishment according to the laws of those countries. Yet, EU countries have clearly stated their common position against the use of executions, according to which the death penalty is a form of cruel and unusual punishment.<sup>34</sup> Hence, EU countries would not duly protect their own nationals if they permitted the execution of Europeans abroad. Executions are an outright violation of human rights, which, when carried out by a State, demand a reaction from those responsible for guaranteeing respect for their human rights.<sup>35</sup> Following an analo-

<sup>32</sup> Quoting from the official webpage of the Thai government "It is believed that to enforce the death penalty is an effective way to prove credibly that any heinous wrongdoers is unacceptable and should be removed from the society." Available at [http://www.correct.go.th/eng/death\\_penalty.htm](http://www.correct.go.th/eng/death_penalty.htm)

<sup>33</sup> See e.g., Stephen B. Bright (1995) "The death penalty as the answer to crime: costly, counterproductive and corrupting", *Santa Clara Law Review*, 35; Richard C. Dieter (1995) "What politicians don't say about the high costs of the death penalty", *Studies in Prolife Feminism* 11(1); Robert L Spangenberg and Elizabeth Walsh (1989) "Capital punishment or life imprisonment? Some cost considerations", *Loyola of Los Angeles Law Review* 23(45).

<sup>34</sup> See for example, amicus curiae submission of the European Union to Supreme Court of the United States in *Roper v Simmons*, available at <http://www.eurunion.org/legislat/DeathPenalty/SimmonsAmiciCuriae.pdf>

<sup>35</sup> In fact, protection of nationals abroad has a long tradition in International Public Law. In the British Claims in the Spanish Zone of Morocco affair (1923-1925), the (sole) arbitrator Max Huber determined consider that a country's right to protect its nationals has always existed and the only thing which was subject to discussion

gous reasoning, European countries would never tolerate torture of Europeans abroad or a collective confiscation of their properties against international standards. Members of the Council of Europe in general and EU Member States in particular, should undertake the necessary actions, within the limits of international relations, to prevent the execution of a European national, within or outside the territorial limits of the EU.

Any action to enforce that policy against the will of foreign States (such as military interventions or embargoes) could be tantamount to a violation of their sovereignty and would necessarily need the support of the UN Security Council acting within the framework of Chapter VII of the UN Charter. Therefore, the model we propose here has to be implemented through agreements negotiated with those countries that still apply the death penalty. We suggest the signing of joint EU-Member States agreements<sup>36</sup> with those countries for the transfer of sentenced persons, following the model of the Council of Europe's Convention on the Transfer of Sentenced Persons, which provides

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was its limits. See Ole Spiermann (2007) "Judge Max Huber at the Permanent Court of International Justice", *European Journal of International Law*, 18, pp.115-133.

36 Or even "pure" EU agreements on the basis of the new Article 188N of the Treaty on the Functioning of the European Union.

for the transfer of prisoners if certain conditions are met.<sup>37 38</sup> The agreement would be put into effect at the request of the country of citizenship of the European sentenced to death. The transfer would then be compulsory for the third country on the condition that the European state which requested it immediately converts the capital sentence into a life-term to be served in that European state.<sup>39</sup>

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37 Signed in Strasbourg on 21 March 1983 and open for signature by both EU and non-EU members, the Council of Europe's Convention on the Transfer of Sentenced Persons permits transfer if: that prisoner is a national of a European State; the relevant judgment is final; if, at the time of receipt of the request for transfer, the sentenced European national still has at least six months of the sentence to serve or if the sentence is indeterminate; if the prisoner consents or his physical or mental condition deems it necessary; if the crime also constitutes a criminal offence in the European country according to the law of the administering State or would constitute a criminal offence if committed on its territory; and if both countries agree. As of March 31 2008, this agreement had 63 ratifications, including the United States, Trinidad and Tobago, Japan and the Bahamas, all of which retain the death penalty.

38 Australia has negotiated similar Prisoner Transfer Treaties with other countries in the Asian region, including Thailand and Cambodia.

39 Whilst some may argue that the comparably low standards of hygiene and sanitation in some Asian prisons make the argument in favour for prisoner transfer schemes more compelling, these considerations take away from the core argument, the protection of the fundamental right to life

This proposal is not significantly different from the demands currently made by any EU country when a state that applies the death penalty requests extradition from Europe of a non-European for an executable offence.<sup>40</sup> The normal procedure in those cases is to grant extradition (on the basis of reciprocity or a bilateral agreement) on the condition that the alleged criminal will not be sentenced to death. The moral argument behind this practice is simple: European countries shall not execute criminals and shall never allow other countries to do so in relation to a person who, at some stage, has been under the jurisdiction of a European court.<sup>41</sup> However, the EU country recognises the legal importance of trying the alleged criminal in the jurisdiction most closely connected to the crime, and hence grants the extradition under the abovementioned conditions. Our model will also achieve both goals.

Two legal problems may arise with this suggested scheme. On the one

hand – regarding mainly European countries such as Spain<sup>42</sup> – some constitutions forbid the possibility of life-time imprisonments, stating that the aim of all corrective measures should be the re-integration of the criminal in the society. However, given that the sentence would remain a foreign one and only the location of the confinement would change, we consider that there should not be any constitutional challenge to these agreements, primarily because a superior goal is achieved. On the other hand – affecting mainly Asian states, such as Indonesia<sup>43</sup> – such an agreement would require some countries to amend their Criminal Codes, which stipulate that foreigners convicted of a crime in that country serve their sentences in the same country. However, amending those rules does not pose a real hurdle to the proposed model.

The conversion into life sentences completely addresses the fear of re-incidence that is often seen as an advantage of execution, eliminates the potential costs for the state in which the crime occurred in detaining the

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<sup>40</sup> The general rule is that European States would never extradite a national of the country from which the extradition was requested to a third country because the former will generally try that person itself on the grounds of personal jurisdiction

<sup>41</sup> See a similar reasoning in the landmark case of the Constitutional Court of South Africa *Mohamed and another v President of Republic of South Africa and others*, Case CCT 17/00, decided on 28 May 2001.

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<sup>42</sup> See Article 25 (2) of the Constitution of Spain. BOE 28-29 December 1978.

<sup>43</sup> See "Prisoner exchange requires Indonesian law change" *Sydney Morning Herald*, 6 June 2005, available at <http://www.smh.com.au/news/National/Prisoner-exchange-requires-Indonesian-law-change/2005/06/06/1117910228237.html>

felon until execution, guarantees that European governments assume the political and economic costs of the transfer in order to preserve its espoused human rights stance, and avoids the political cost for the Asian government of applying different standards to its own convicted nationals (which would be attributed instead to the necessity of complying with previously negotiated agreements). Moreover, it will unquestionably aid efforts to create a favourable public opinion in the Asian region towards the elimination of the death penalty altogether or, at least, for prosecutors to plea for life terms instead.

In order to effectively achieve the support and signature of the proposed agreements, the EU should apply the same stance towards capital punishment as it does with any other systematic violation of human rights. In future co-operation agreements between the EU and non-member states, the EU's standard "Human Rights clause"<sup>44</sup> will explicitly extend

to a prohibition on the execution of EU citizens. This approach may be seemingly paternalistic or even unrealistic, but human rights clauses, introduced for the first time in 1992 in the EU's agreement with Brazil, have been, since 1995, systematically included as an "essential element" of EU external agreements, giving the EU the ultimate right to suspend all or part of an agreement if a partner country does not fulfill its human rights obligations.

The authors contend that the EU, in future negotiations with third countries—and especially with Asian ones—should demand the ratification of the proposed convention on the transfer of persons sentenced to death as a condition of the EU's signature of those external agreements and that any withdrawal from that convention or its violation would give the EU the right to suspend or terminate the relevant treaty. It could be argued that such a position poses an insurmountable barrier to achieving the signature of some of these external agreements. However, disagreement over conditional human rights terms have already blocked past attempts to negotiate agreements with China or Australia and New Zealand.<sup>45</sup> The EU should be ready to assume that

<sup>44</sup> For a general comment on this clauses see Lorand Bartels (2005) *Human Rights Conditionality in the EU's International Agreements* in Paul Craig and Grainne de Búrca (general editors) (2005) *Oxford Studies in European Law*, Oxford, New York, Oxford Univ. Press. For a more practical analysis see The House of Commons Research Paper (2004) "The Human Rights Clause in the EU's External Agreements" Paper 04/33, 16 April 2004, available at <http://www.parliament.uk/commons/lib/research/rp2004/rp04-033.pdf>.

<sup>45</sup> See pages 56-59 of the The House of Commons Research Paper cited above.

potential economic and/or political cost of failed negotiation, but its unmoving position would establish a significant increase in its moral authority regarding human rights, delivering a clear and strong message of opposition to capital punishment.

### Conclusion

Whilst the ideal outcome of the proposed model is the world-wide abolition of the death penalty, the authors do not intend to implicate the sovereign right of each Asian state to apply the death penalty to its own nationals. However, by incorporating a human rights clause, that requires the non-application of the death penalty to EU nationals, into all of the EU's external trade and development agreements, the EU is not only defending its abolitionist stance, but also its sovereign right to protect its own nationals from cruel, unusual and degrading punishment. Obviously, it is hoped that this new model for the EU's international cooperation with non-abolitionist countries will act as a catalyst for the global abolition of death penalty and set a precedent for the primacy of human rights. This model in fact prioritises human rights at the risk of a failed negotiation, but in doing so, reflects the strength with which the EU espouses its anti-death penalty stance. It also has the additional benefit of strengthening the

commitment of all member states to human rights in internal EU policy, whilst emphasizing the EU's position, compared to other non-abolitionist state parties, as the foremost defender of human rights. □

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