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Contribution of the Council of Europe

Exchange of views on the question of abolition of capital punishment

A violation of fundamental rights

Europe has been a *de facto* death penalty free zone since 1997. This situation has largely come about due to the Council of Europe, which has been a pioneer in the abolition process. Death punishment is now regarded as an unacceptable form of punishment incompatible with the fundamental rights, the right to life and the right not to be subjected to cruel, inhuman or degrading treatment. *De jure* abolition of the death penalty in all Council of Europe member States, and in all circumstances, remains a central political objective of the Organisation.

The legal instruments outlawing the death penalty

When the European Convention on Human Rights (ECHR) opened for signature in 1950, it provided for the possibility of imposing the death penalty (original wording of Article 2§1: “*No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*”). From the late 1960s, a consensus began to emerge in Europe that the death penalty seemed to serve no purpose in a civilised society governed by the rule of law and respect for human rights.

In 1983, the Council of Europe adopted the first legally binding instrument providing for the unconditional abolition of the death penalty in peace time – Protocol No.6 to the ECHR. Its Article 2 provides that “*A state may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war*”. This text is currently ratified by 46 of our 47 member States, the remaining one being committed to ratification.¹

¹ As to date, the Russian Federation is the only member State not having ratified Protocol No. 6.

In 2002, the Council of Europe adopted Protocol No.13 to the ECHR concerning the abolition of the death penalty in all circumstances, in other words also in time of war or of imminent threat of war. Reservations to and derogations from the Protocol are not possible. The Protocol entered into force on 1 July 2003. It has to date been ratified by 44 member States (last ratification by Poland in 2014) and signed by one other State (Armenia).²

The abolition process is irreversible within the Council of Europe, thanks to the legal and political mechanisms which have been put into effect.

The case law of the European Court of Human Rights

In its case-law concerning States which had not yet ratified Protocol No. 6, the European Court of Human Rights considered that it would be contrary to the Convention to implement a death sentence following an unfair trial (*Öcalan v. Turkey*, application no. 46221/99, *A.L. (X.W.) v. Russia*, application no. 44095/14). The Court also found that the evolution towards the complete abolition of the death penalty, in law and in practice, within all 47 Council of Europe member States had demonstrated that Article 2 ECHR had been amended so as to prohibit the death penalty in all circumstances. In the light of this finding, the Court held that the death penalty as such involves the deliberate and premeditated destruction of a human being by the State authorities causing physical pain and intense psychological suffering as a result of the foreknowledge of death. It could therefore be considered also to be contrary to the prohibition of torture and inhuman and degrading treatment and punishment under Article 3 ECHR (*Al-Saadoon and Mufdhi v. the United Kingdom*, application no. 61498/08).

As regards extradition and expulsion issues, the Court has repeatedly stated that the extradition or expulsion of a person to a third country in which that person might face the death penalty, would give rise to violations of the right to life (Article 2 ECHR) and of the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 ECHR) (*Bader and Kanbor v. Sweden*, application no. 13284/04; *Jabari v. Turkey*, application no. 40035/98). Since the *Soering v. the United Kingdom* case (application no.14038/88), the Court has considered that States must require firm diplomatic assurances from retentionist countries that persons to be extradited or expelled will not be sentenced to death. This principle has been followed by courts in numerous countries, also outside Europe, including

² Two member States have not yet signed the Protocol: Azerbaijan and the Russian Federation. In this context, it is important to recall that in 2009, the Russian Constitutional Court confirmed the moratorium in place and held that a constitutional regime providing for firm guarantees of the right not to be subjected to the death penalty had been formed in Russia. It also found that an irreversible process of abolishing the death penalty was underway in Russia on the basis of its Constitution and its international obligations, including Protocol No. 6. It is also notable that the moratorium in force, as confirmed by the Constitutional Court, does not make an exception allowing imposition of the death penalty in time of war.

Canada and South Africa (for example, South African Constitutional Court judgment of 27 July 2012, *Tsebe and others* CCT 110/11 [2012] ZACC 16).

The principle was also taken up in the Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002. Guideline No. XIII, paragraph 2, provides that extradition of a person to a country where he or she risks being sentenced to the death penalty may not be granted unless certain guarantees have been obtained. A similar provision has been included in the Amending Protocol to the 1977 European Convention for the Suppression of Terrorism, which was opened for signature on 15 May 2003.

In the judgment *Rrapo v. Albania* of 25 December 2012 (application no. 58555/10) concerning the extradition of the applicant to the United States and the possible imposition of the capital sentence, the Court assessed the quality of assurances given and whether in light of the requesting State's practices they could be relied upon. The Court found that assurances given in this case were specific, clear and unequivocal and that there were no reported breaches of an assurance given by the United States to a Contracting State. Therefore the applicant's extradition would not give rise to a breach of Articles 2 and 3 ECHR and Article 1 of Protocol No. 13 on account of a risk of the death penalty being imposed. In several other cases decided in 2012, the Court found that previously given diplomatic assurances not to impose the death penalty following extradition were to be considered credible (admissibility decision in the case of *Babar Ahmad and Others v. the United Kingdom*, application no. 24027/07, *Harkins and Edwards v. the United Kingdom*, application no. 9146/07 and 32650/07, and admissibility decision in the case of *Kulevskiy v. Russia*, application no. 20696/12, in which the Court considered that the assurance obtained by the Russian authorities was such as to avert the risk of the applicant, a Belarusian national, being subjected to the death penalty in the event of his extradition to Belarus).

In a judgment of 24 July 2014 (*Al Nashiri v. Poland*), concerning a Saudi Arabian national currently detained in Guantanamo Bay due to the suspicion of his involvement in terrorist activities, the Court found, *inter alia*, a violation of Article 2 taken together with Article 1 of Protocol No. 6 and under Article 3 of the Convention because of the respondent's State assistance to the CIA to transfer the applicant from its territory despite the danger that he would be subjected to the death penalty. The Court held in particular:

“Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the member States of the Council of Europe. In the Preamble to Protocol No. 13 the Contracting States describe themselves as ‘convinced that everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings...’.”³

³ *Al Nashiri v. Poland*, no. 28761/11, judgment of 24 July 2014, para. 577.

Under Article 46 (binding force and execution of judgments), Poland was required to remove this risk by seeking the necessary assurances from the United States. The same application directed a very similar application against Romania (*Al Nashiri v. Roumania*, application no. 33234/12), which is currently still pending before the Court).

Abolition in Europe: political action

The Parliamentary Assembly of the Council of Europe has been a driving force in the movement to abolish the death penalty. It was at the origin of Protocol No. 6 and has since adopted successive texts to outlaw the death penalty (for example, 1994: Resolution 1044 and Recommendation 1246; 1996: Resolution 1097 and Recommendation 1302; 1999: Resolution 1187). The Parliamentary Assembly constantly exerts pressure in order to encourage abolition and insists on moratoria in individual countries, both in the context of examining candidatures for membership and in its procedures for monitoring the compliance of existing member States' commitments. All new member States are required to ratify Protocol No. 6 within a fixed time scale.

Governments of member States have also strongly committed themselves to abolition. At their 2nd Summit in 1997, the Heads of State and Government of the Council of Europe called for universal abolition and insisted on the maintenance in the meantime of existing moratoria on executions in Europe. This thinking was carried further in 1998 when the Foreign Ministers of member States stressed that priority should be given to obtaining and maintaining a moratorium on executions, to be consolidated as soon as possible by complete abolition of the death penalty. In 2000, the Committee of Ministers further adopted a Declaration "For a European Death Penalty-Free Area".

Every six months, the Committee of Ministers debates the situation of the death penalty on the European continent. The subject will continue to be considered regularly "*until Europe has become a de jure death penalty-free zone*". The last exchange of views took place in October 2016. (NB : *the exchange initially foreseen on 27 April 2016 was postponed "after the Sofia Ministerial session", also in the light of upcoming discussions on a new CoE "DP-strategy" foreseen this autumn*) At those occasions, the Committee of Ministers considers information by and encourages those countries which have not yet ratified the protocols to the European Convention on Human Rights which provide for the abolition of the death penalty. Moreover, the Committee of Ministers regularly reiterates its strong call on Belarus to establish without delay a formal moratorium on executions as a first step towards abolition of the death penalty. The Committee also regularly reiterates its readiness to provide that country with the assistance that may be needed for such a formal moratorium to be introduced, possibly in the framework of the Council of Europe activities in Belarus and in cooperation with the Council of Europe Information Point in Minsk. This segment will continue to be a priority for the CoE's cooperation activities in 2016.

In July 2016, following Turkey's temporary derogation from the ECHR, the Secretary General clearly spelt out its member States' obligations and responsibilities, recalling that "in no circumstances a State can derogate from Article 2 : the right to life, Article 3: prohibition of torture and inhumane or degrading treatment or punishments and Article 7 : no punishment without law.

Universal abolition

There has been an inexorable trend towards universal abolition over the last years, reflected not only in the growing number of international and national legal instruments and norms, but also in an increasing recognition by governments and politicians that the death penalty has no place in a civilised democratic society. The global decline in the number of executions however contrasts with some setbacks and new worrying trends, illustrating the need to remain vigilant: with countries such as Indonesia, Singapore, India and Pakistan resuming executions, Asia remains the top retentionist region in the world with more than 50% of death sentences, also in the framework of the fight against terrorism or for drug-related offence, with executions being applied to minors in the latter case.

The Council of Europe has turned its attention also to non-European States, more particularly those with observer status with the organisation, since they are deemed to share the common fundamental values and principles. In practice this concerns the United States and Japan, as the death penalty is not applied in the three other observer States – Canada, Mexico and the Holy See.

The Parliamentary Assembly has adopted a number of texts, for example Resolution 1349 (2003) in which it requested the two countries to make more efforts to take the necessary steps to institute a moratorium on executions with a view to abolishing the death penalty. Moreover, the Parliamentary Assembly has adopted Recommendation 1760 (2006) on its position as regards the Council of Europe member and observer States which have not abolished the death penalty. In 2011, the Parliamentary Assembly adopted "Resolution 1807 on the death penalty in Council of Europe member and observer States: a violation of human rights", in which it urged the United States and Japan as observer States, as well as Belarus, which aspires to become a member State of the Council of Europe, to join the growing consensus of democratic countries that protect human rights and human dignity by abolishing the death penalty.

The Committee of Ministers has also issued general declarations on the death penalty condemning executions in Council of Europe observer States. In their decisions following the last biannual exchanges of views on the abolition of the death penalty, the Ministers' Deputies called on the authorities of those observer States "to promote a public debate towards the abolition of the death penalty, in the meantime ensuring that minimum international standards are met with respect to executions including that they should not be carried out on persons with mental illnesses and intellectual disabilities, not shrouded in

secrecy and without prior notification to prisoners' relatives and lawyers". The Committee of Ministers has also expressed grave concern where neighbourhood partners of the Council of Europe, such as Jordan, have resumed executions after a hiatus of several years, and called on their authorities to reconsider their positions. Finally, the Committee of Ministers also regularly calls for support to the UN General Assembly resolutions on a worldwide moratorium on the use of the death penalty, and encourages member States to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.

The Organisation has also intervened, through the Committee of Ministers or the Secretary General, in a number of individual death penalty cases with a view to drawing attention of national authorities to the need to respect international human rights standards.

On the occasion of recent new death sentences in Belarus, the Committee of Ministers, the Secretary General as well as representatives from the Parliamentary Assembly have issued separate statements, deeply deploring those developments and calling on the authorities of Belarus to fully guarantee the right of appeal of the convicted. With several European citizens being recently either executed or on death row for drug-related crimes in those States which use capital punishment for such offences both in law and in practice, respective statements by Council of Europe bodies were also made. In addition to that, the Secretary General regularly comments on topical death penalty issues (concerning minors, persons with mental disabilities, prisoners who have been on death row for a very low time as well as cases where the fairness of the trial was called into question) through social media.

Aiming at increasing both the impact and the consistency of the CoE's continuous and proactive action against the Death penalty, the Secretary General has recently requested a thorough strategic analysis of this policy, of which the outcomes are meant to address possible weaknesses and threats with appropriate policy responses. The draft policy analysis has been completed this summer and its conclusions will be discussed at political level in autumn 2016.

The European Day against the Death Penalty

In 2007, the Committee of Ministers established the European Day against the Death Penalty. Since 2008 the European Day is a joint initiative with the European Union and is marked by a joint statement. It coincides with the World Day against the Death Penalty on 10 October. Past events were marked with activities such as a live talk show with European experts screened via the internet and "question and answer" sessions hosted on the social networking site Twitter, poster exhibitions, round tables and podcasts