



Human Dimension Implementation Meeting

Warsaw, 22 September – 3 October 2014

Working Session 4: Rule of Law I

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.

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 May 2014) and signed by one other State (Armenia).

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). 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 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 a recent 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...’¹

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”.

¹ *Al Nashiri v. Poland*, no. 28761/11, judgment of 24 July 2014, para. 577.

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 April 2014 and included, for the first time, an invitation of the Belarusian government to discuss the situation of the death penalty in that country. The next one is scheduled for October 2014. The Committee of Ministers has recognised the need to make the public better aware that the death penalty is unacceptable in today’s societies. A number of projects have consequently been conducted by the Council of Europe to raise awareness against recourse to the death penalty (particularly among the media and the general public) and to provide assistance and advice to interested States (notably through educational and awareness-raising activities). The Council of Europe published a booklet called “Death is not Justice”, giving important factual answers to questions surrounding the death penalty.

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 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 USA and Japan, as the death penalty is not applied in the three other observer States – Canada, Mexico and the Holy See.

To the end of a universal abolition, the Parliamentary Assembly has adopted a number of texts, for example Resolution 1349 of the year 2003 in which it found the USA and Japan once more in violation of their obligation to respect human rights due to the continued application of the death penalty and 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 USA and Japan as observer States, and 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. It 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 two occasions in 2004, the Committee of Ministers decided to submit statements of interest in support of “*amicus curiae briefs*” prepared by the European Union for two significant cases in the United States. The first was for the case of Christopher Simmons (*Roper v. Simmons*), concerning the application of the death penalty in the United States against persons who were below 18 years of age at the time of the offence. The second was for the case of *Jose Medellin* and concerns the right of detained foreign nationals to be informed of the right to consular access (Article 36 of the Vienna Convention on Consular Relations). In 2009, the Secretary General provided the opinion of the Council of Europe on the death penalty in the context of a case pending before the Constitutional Court of the Republic of Korea.

On the occasion of executions in Belarus and Japan, the Committee of Ministers, the Secretary General as well as representatives from the Parliamentary Assembly have issued separate statements, deploring those events and urging those countries to join the growing majority of States which have abolished the death penalty.

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.