

Dimension Implementation Conference

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Working Session 5: Rule of Law II

Contribution of the Council of Europe

Abolition of the death penalty

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 this process. Death as a punishment is now regarded as a violation of 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 its member States, and in all circumstances, remains a central political objective of the Council of Europe, and a core value 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 (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. 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.

The Council of Europe adopted, in 2002, 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 43 member States and signed by a further 2 (the last ratification being by Latvia on 26 January 2012).

This process within the Council of Europe is irreversible, thanks to the various 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 (which in its original wording of 1950 allows expressly for the imposition of a death sentence by a court) had been amended so as to prohibit the death penalty in all circumstances. Consequently, the Court held that the death penalty as such, which involved 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, could be considered inhuman and degrading and, as such, contrary to Article 3 of the Convention (*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 faces the death penalty would give rise to violations of the right to life (Article 2 ECHR) and of the prohibition of torture and inhuman and degrading treatment or punishment (Article 3 ECHR) (*Bader and Kanbor v. Sweden*, application no. 13284/04; *Jabari v. Turkey*, application no. 40035/98). In line with the principle laid down in the *Soering v. the United Kingdom* (1989) case, States must require firm assurances from the United States and other 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, it was very recently confirmed by the South African Constitutional Court on 27 July 2012 in the judgment of *Tsebe and others* (CCT 110/11 [2012] ZACC 16). That 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 admissibility decision of *Babar Ahmad and Others v. the United Kingdom* (application no. 24027/07) concerning the extradition of four persons suspected of Al-Qaeda membership to the United States, the Court considered that there was no reason to believe that the United States Government would breach the terms of its diplomatic assurances. There was

therefore no real risk that the applicants would be designated as enemy combatants with the consequence of imposition of the death penalty; hence this part of the complaint was declared inadmissible.

As to date, there is one case pending (*Rrapo v. Albania*, application no. 58555/10) concerning the extradition to a third country and the possible imposition of the death penalty.

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 (see Resolution 1044 and Recommendation 1246, 1994; Resolution 1097 and Recommendation 1302, 1996; as well as Resolution 1187, 1999). It has constantly exerted pressure in order to encourage abolition - and insists in the meantime 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.

Member States have 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".

The Committee of Ministers has recognised the need to make the public better aware that the death penalty is unacceptable and provide assistance and advice to interested States, notably through educational and awareness-raising activities. 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.

The Committee of Ministers also monitors the situation in member States to ensure compliance with their commitments. The subject continues to be considered regularly at meetings of the Ministers' Deputies "until Europe has become a de jure death penalty-free zone". The last exchange of this kind took place on 2 May 2012.

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 modern democratic society.

The Council of Europe, for its part, has also turned its attention to non-European states, more particularly those with observer status with the Organisation, since they are deemed to share the same fundamental values and principles as the Council of Europe. 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 this end, the Parliamentary Assembly has adopted a number of texts, for example on 1 October 2003, Resolution 1349, in which it found Japan and the United States once more in violation of their fundamental obligation to respect human rights due to their continued application of the death penalty and requiring Japan and the United States 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. Most recently, on 14 April 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 urges the United States 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.

During its last exchange of views on the death penalty on 2 May 2012, the Committee of Ministers issued a declaration in which the Ministers’ Deputies stated:

“The Committee of Ministers calls on all countries which still apply the death penalty, including those holding observer status with the Council of Europe, to immediately apply a moratorium on executions as a first step towards abolition. The Committee of Ministers reaffirms its commitment to continue its efforts to promote abolition in Europe and throughout the world.”

The organisation has also intervened, through the Committee of Ministers or its Secretary General, in a number of individual death penalty cases with a view to drawing attention to the need to respect international human rights standards, including relevant UN Resolutions. 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 death penalty case pending before the Constitutional Court of the Republic of Korea. On the occasion of recent executions in Belarus and Japan, both the Secretary General as well as representatives from the Parliamentary Assembly have issued 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 of the Council of Europe established the European Day against the Death Penalty. The European Day is a joint initiative with the European Union since 2008. 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, question and answer sessions hosted on the social networking site Twitter, and joint statements by both European organisations.