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Side Event "Combatting Torture and Abolishing Death penalty in the OSCE Region: two sides of the same coin?"

Panel contribution by the Council of Europe, Childerik Schaapveld, Head of CoE Office in Vienna

There appears to be a slow but nevertheless steady trend at the international level towards the abolition of the death penalty, despite what current statistics reveal. As Amnesty International has just concluded two weeks ago in its annual report on death sentences and executions for the year 2013, a small number of countries have recently triggered the global rise in the use of the death penalty. We can expect similar statistics for the year 2014 at least concerning the handing out of death sentences, given that in the same week in which the report was issued, an Egyptian court imposed the record number of 529 death sentences in a single day. It is to be hoped that none of them will ever be carried out. But such death penalty excesses by a very few states cannot change the fact that we see today a gradual but committed shift towards the abolition of capital punishment on a global level.

I have been asked to talk about whether the death penalty amounts to torture or inhuman and degrading treatment, and I will seek to answer this question from the perspective of the European Convention on Human Rights. The Convention remains the oldest and most prominent human rights treaty of the Council of Europe and is applied and interpreted, as you know, by the European Court of Human Rights.

When the Council of Europe was created after the end of the Second World War, most European states still retained capital punishment. And when the European Convention on Human Rights was drafted in 1950, the death penalty was generally

considered as a legitimate exception to the right to life which is reflected in Article 2 of the Convention.

But for several decades now, the Council of Europe has been one of the main driving forces behind the abolition of the death penalty in Europe. It crafted two international treaties which form the backbone of the capital punishment abolition: whereas Protocol No. 6 to the European Convention on Human Rights prohibits the death penalty in times of peace, Protocol No. 13 does so in all circumstances. In the past 17 years no death sentence has been carried out on the territories of the 47 Council of Europe member states. This makes the Council of Europe area a death penalty-free territory for more than 800 million citizens.

While we can therefore safely conclude that the death penalty is in violation of European human rights law, the question whether it violates Article 3 of the Convention – the prohibition of torture and inhuman and degrading treatment or punishment – is a bit more complex. While the answer today is “yes”, it must be borne in mind that human rights law is not static, but subject to developments and changing conceptions. We can see this clearly with regard to the case-law of the European Court of Human Rights in death penalty-related cases.

The European Court of Human Rights held in 1989 in the famous case of *Soering v. the United Kingdom* that the extradition of a suspected murderer to the United States was against the Convention. It did however not come to that result because the applicant in that case was likely to have received the death penalty *as such* upon his extradition. The United Kingdom had not ratified Protocol No. 6, and the Court found that the Convention had to be read as a whole. The prohibition of torture therefore had to be construed in harmony with the right to life in Article 2.

The Court found that the extradition would lead to inhuman and degrading treatment because the applicant was likely to suffer from the death row phenomenon. This phenomenon, which describes the anxiety and psychological distress experienced by a person who has to wait for a long period for his or her execution, was considered by the Court as inhuman and degrading treatment contrary to Article 3 of the Convention. And if you would ask Iwao Hakamada, who was released from prison two weeks ago in Japan to be retried after he had already spent 48 years

waiting for his execution – the longest period anyone has ever spent on death row -¹, he would quite certainly agree with the Court's finding.

But we can also take from the *Soering* judgment that, 25 years ago, the European Court was not yet prepared to find that the death penalty *as such* was inhuman and degrading treatment. Without the likelihood of the applicant being put on death row, the extradition would probably not have been considered to be a violation of the Convention at the time.

The *Soering* judgment has become the leading case with regard to any extradition or expulsion situation in Europe in which applicants face a real risk of being subjected to treatment contrary to Articles 2 and 3, and it certainly had a great influence on the drafting of Article 19, paragraph 2 of the EU Charter of Fundamental Rights more than a decade later, which states that:

“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

Subsequent to the *Soering* judgment, the Court found that a deportation to Iran with the possibility of the infliction of stoning for adultery would have violated Article 3.² Moreover, a number of extradition and expulsion cases concerned diplomatic assurances given by the receiving country that the death penalty would not be imposed, which the Court is only willing to accept after it is fully convinced that those assurances are credible.³

In 2005, the Court considered in the famous *Öcalan* judgment that the imposition of the death penalty after an unfair trial violated both the right to life and amounted to

¹ See Courrier International, *Libre après un demi-siècle dans le couloir de la mort*, 27 March 2014.

² *Jabari v. Turkey*, judgment of 11 October 2000.

³ *Babar Ahmad and Others v. the United Kingdom*, admissibility decision of 28 July 2010; *Rrapo v. Albania*, judgment of 25 September 2012; *Harkins and Edwards v. the United Kingdom*, judgment of 17 January 2012.

inhuman and degrading treatment.⁴ However, it reached no firm conclusion then as to the question whether the imposition of the death penalty in general amounted to inhuman and degrading treatment.

A quarter of a century after the *Soering* judgment, we can now conclude that this is the case, if we look at the judgment of *Al-Sadoon and Mufdhi v. the United Kingdom* from the year 2010.⁵ This case concerned the transfer of two Iraqi nationals by the British authorities into Iraqi custody which put them at a real risk of execution by hanging. The Court found that all but two Council of Europe member states had signed Protocol No. 13 and all but two states which had signed had also ratified it. The Court found that these numbers demonstrated that Article 2 had been amended so as to prohibit the death penalty in all circumstances. Even more important in our present context, the Court held that the wording of the explicit exception for the death penalty in Article 2 no longer continued to act as a bar to its interpreting the words “inhuman or degrading treatment or punishment” in Article 3 as including the death penalty.

We see therefore that the categorisation of the death penalty as inhuman and degrading treatment very heavily depends on the number of ratifications of the protocol to a human rights treaty which seeks to abolish the death penalty.

This is why it is difficult to transfer this finding by the European Court of Human Rights into a more global context. The Court was certainly not the only one to find that the death penalty amounted to inhuman and degrading treatment, given for example that the South African Constitutional Court already came to this conclusion in 1995, and several Eastern European constitutional courts did so.⁶ Both the Inter-American Court of Human Rights and the US Supreme Court have found that mandatory death sentences without the possibility for discretion and consideration of mitigating circumstances amount to inhuman treatment. Moreover, it is now agreed in international law that the executions of persons with mental disabilities, pregnant women or juveniles would constitute inhuman treatment. And there are important

⁴ *Öcalan v. Turkey*, judgment of 12 May 2005 (Grand Chamber).

⁵ *Al-Sadoon and Mufdhi v. the United Kingdom*, judgment of 2 March 2010.

⁶ Constitutional Court of South Africa, *S v. Makwanyane and Another* (CCT 3/94), p. 95. The courts in Eastern Europe were those of Albania, Hungary, Lithuania and Ukraine (see *Öcalan v. Turkey*, para. 159).

voices at the global level, such as the United Nations Special Rapporteur on Torture who noted in 2012 an evolving standard to generally consider the death penalty as inhuman treatment⁷, and an increasingly changing perception of whether the death penalty is lawful in light of the United Nations Convention against Torture.⁸

But if the United Nations Human Rights Committee is not yet in a similar position to come to a result as the Court did in the *Al-Sadoon* judgment, it is because the International Covenant on Civil and Political Rights provides for a similar exception from the right to life for the death penalty, but its Second Optional Protocol which provides for the abolition of the death penalty has only been ratified by 78 states (out of 167 having ratified the Covenant). One possible answer to the question “How can we achieve this result also at the global level?” is to encourage and convince as many states as possible to ratify the Second Optional Protocol. As this year marks the 25th anniversary of the adoption of that Protocol, now is a good time to do this. Our Committee of Ministers has done so in the past when debating the situation of the death penalty in Europe on a biannual basis. Moreover, raising support for the upcoming General Assembly resolution on a moratorium of the death penalty may help to form a new norm of customary international law to prohibit capital punishment in all circumstances.

A good starting point is to convince those states which are part of our organisations and still retain the death penalty. In the OSCE, three States - Kazakhstan, Russia and Tajikistan - retain the death penalty in law but have in place moratoriums on executions. Two States - Belarus and the United States - continue to impose the death penalty. The Council of Europe has repeatedly called on the United States (as well as Japan) as observer states to put an end to this inhuman practice. The Parliamentary Assembly of the Council of Europe adopted in 2011 a report and a Resolution on “The death penalty in Council of Europe member and observer States” where it made important recommendations to the Japanese and American

⁷ J.E. Mendez, Special Rapporteur on Torture (since 2010), “Death penalty increasingly viewed as torture, UN rapporteur finds”, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LangID=E>

⁸ See M. Nowak, Special Rapporteur on Torture, “The Death Penalty in the Light of the Prohibition of Cruel, Inhuman and Degrading Punishment”, 14 January 2009 (A/HRC/10/44).

authorities which have committed themselves to share common values and to make a positive contribution to the work of the Council of Europe when receiving the observer status. We do indeed see hopeful signs in the United States, not least the recent moratorium in the State of Washington this February.

As to Belarus, the country remains the only European state that still carries out capital punishment. The Council of Europe has been involved in various initiatives towards abolition in Belarus in the past and hopes that the country will join the moratorium on executions with a view to complete abolition.

A few final words about the Council of Europe's cooperation with other organisations towards the abolition of the death penalty. We are very happy to participate in today's event, and have done so in previous side events to OSCE meetings. Moreover, the Council of Europe cooperates with the European Union through the European Day against the Death Penalty, which is held every year on 10 October, in connection with the World Day against the Death Penalty. We also maintain close relations and cooperation with the International Commission against the Death Penalty and the World Coalition against the Death Penalty, by participating in events and expert meetings to discuss possible steps towards universal abolition.

We are well aware that all countries have their own cultures and traditions, which also affect their legal systems, and that the death penalty was at one time practised in most countries of the world. We should thus be conscious that the process of abolition requires time. But every little step counts and adds up. This "snowball effect" has worked at the European level, and I am convinced it will also work in the long run on a global scale.