

African Commission on Human and Peoples' Rights

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'A comparative perspective from Africa: Protocols abolishing the death penalty in Europe and the Americas'

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There are several concerns surrounding the use of the death penalty and the implications that it holds for the right to life, as well as the right against torture and degrading treatment or punishment, and the right to dignity.

Significantly, article 6 of the International Covenant on Civil and Political Rights (ICCPR), recognising the right to life, was drafted in a manner which envisages the progressive dilution of the death penalty with a view to its eventual abolition. This can be seen not only from reading the history of the drafting of the provision, but also from the provision in the article according to which states that still apply the death penalty may do so only in the case of the "most serious crimes", a term which remained undefined so that over time the concept of what constitutes a "most serious crime" could become increasingly narrow.

This ICCPR, in my view, while not outlawing the death penalty with immediate effect, requires its progressive abolition. It requires the kind of process that we are gathered here to be involved in.

In addition to the type of crimes for which the death penalty may be imposed, constraints are placed upon the procedures to be followed prior to carrying out an execution, and it seems fair to say the standards are becoming stricter with time. Such constraints extend from the time of arrest, through to obtaining confessions, judicial proceedings, access to lawyers and the manner in which the sentence is to be carried out. With the higher standards that are increasingly being posed, it is progressively unlikely that the imposition of the death penalty

will be in compliance with international human rights. The day will come, not too far in the future, when I am convinced we will say to each other that the time for the death penalty has expired, also in legal terms.

There is the ever-present concern that an innocent individual may be executed. Recent cases have been overturned due to advanced forensic technology brings to light that the wrong person had been convicted serve as proof that death sentences could result in fatal mistakes.

The death penalty is an exceptional form of punishment and has been widely accepted as a cruel, inhuman and degrading form of punishment. It thus not only violates the right to life, but also the dignity of a condemned person which is inherent in all human beings.

Even once the sentence has been carried out there is the possibility of breaching international human rights law. Transparency surrounding the use of the death penalty is essential and is often not present.

There is clearly a progressive movement throughout the world towards abolition of the death penalty. Reasons put forward for needing the death penalty, such as that it serves as a deterrent to crime, are becoming more and more tenuous. The number of states that have formally or informally abolished the death penalty; the drop in the number of crimes for which it may be imposed; the steady and in some ways dramatic decrease in the number of people executed each year: all indicate that the death penalty may in a couple of years be a thing of the past.

As a result of the above I welcome and fully endorse the laudable efforts of the African Commission on Human and Peoples' Rights and its Working Group on the Death Penalty and extrajudicial, summary or arbitrary killings, to adopt a protocol to the African Charter on Human and Peoples' Rights to outlaw the death penalty in Africa. I want to commend the Government of Benin for hosting this important conference, and pay tribute to the African Commission and the Working Group, under the able leadership of Commissioner Sylvie Kayitesi, for taking this matter further. The protocol that will hopefully be finalised here will be a lasting testimony to your commitment to the protection of the right to life.

In Europe and the Americas, Protocols have been adopted which abolish the death penalty. I have been asked to provide some background information on their experience. To assess the impact a regional protocol could have on the death penalty in Africa, it is useful to consider the experiences of the Americas and Europe.

Americas

Often overshadowed by events elsewhere, it is worth noting that the Americas were the forerunners in the abolition of the death penalty. The first states to abolish the death penalty were Venezuela, Ecuador and Uruguay, all of which had abolished the death penalty before 1910.

The American Convention on Human Rights (the Convention), which protects the right to life, was adopted on 22 November 1969 and entered into force on 18 July 1978. Twenty-five countries have ratified or acceded to the Convention, eight countries (Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts & Nevis, S. Lucia, St. Vincent & Grenadines) have not signed or ratified the Conventions and one country, namely USA, has signed by not ratified the Convention.

The right to life is protected in article 4 of the Convention. Article 4 prohibits the arbitrary deprivation of life and provides that the death penalty may only be imposed for “most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.” Article 4 provides furthermore that the death penalty may not apply to offences which do not exist at the time of ratification, which has the effect that states cannot extend for the death penalty in relation to offences which were not on their statute books at the time of ratifying the Convention. Consequently, the death penalty can never be expanded. Article 4 also expressly states that the death penalty may not be reintroduced after it has been abolished.

Twelve years after the Convention entered into force, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty was adopted on 8 June 1990. This Protocol prohibits the death penalty in times of peace, but does allow for leniency in that should a state wish to do so, it may deliver a declaration at the time of accession or ratification in terms of which provision can be made to allow the death penalty in times of war “for extremely serious crimes of a military nature”. Of the thirteen states that have ratified or acceded to this Protocol, two have entered such declarations, namely Argentina and Chile. The Protocol to the American Convention does not place an obligation upon states to remove the death penalty as a sentence from their domestic laws. This means that *de facto* abolitionist countries are able to ratify the Protocol.

It is important to reiterate the unique aspect of the American Convention as noted above, namely that it prohibits the reintroduction of the death penalty once it has been abolished. Thus, states that have ratified the American Convention cannot reintroduce it, which to some extent has the same effect as the Protocol for those states party to the Convention that abolish the death penalty. Haiti is one such state, it ratified the Convention and abolished the death penalty in its constitution of 1987, Haiti is thus precluded from reintroducing the death penalty.

In the Americas it is mostly the English-speaking states that retain the death penalty, and some have suggested that this is a legacy of colonialism.

Europe

In Europe it is sometimes said that states were motivated to abolish the death penalty in order to benefit from joining the Council of Europe. However, several states had already embarked

upon a process of abolition before the European Parliamentary Assembly made imposing a moratorium on executions a precondition for membership to the Council of Europe in 1994 and certainly before abolition was made a precondition for membership to the European Union in 1998.

Article 2 of the European Convention on Human Rights protects the right to life and prohibits the arbitrary deprivation and whilst the death penalty was allowed in article 2(1) it is no longer a relevant provision and there have been calls to remove reference to the death penalty to bring the provision into line with reality.

On 1 November 1998, Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms which concerned the abolition of the death penalty entered into force. Like the Protocol to the American Convention, article 2 of Protocol 6 made it possible to allow for the use of the death penalty in relation to acts committed during times of war (or imminent threat of war). Protocol 6 has been ratified by 46 of the 47 member states of the Council of Europe, only Russia has signed, but not yet ratified it.

Five years later, on 1 July 2003, Protocol 13 which abolished the death penalty in times of peace and war entered into force. It is the complete abolition of the death penalty as no derogation or reservation can be made in terms of this Protocol. Today there are 43 out of 47 member states of the Council of Europe that have ratified Protocol 13 and 2 that have signed but not yet ratified it. Only Russia and Azerbaijan have not signed the protocol 13 and Armenia and Poland have signed but not ratified it. However, of the 4 that have not yet ratified Protocol 13, it is only Russia that has not abolished the death penalty in law, though it did introduce a moratorium on executions in August 1996, but continued to carry out executions until 1999. However, Russia has consistently voted in favour of a moratorium on the death penalty and was in fact a co-sponsor of the resolution in 2012. Furthermore, there are no persons on death row following a decision in 1999 by the Constitutional Court.

Europe is virtually a death penalty free region and the Council of Europe has gone to great lengths to ensure that the world becomes death penalty free, holding the view that the death penalty does not hold a place in Europe and should not do so in any other country - its abolition is seen as contributing “to the enhancement of human dignity and the progressive development of human rights”.¹

Africa

The provision on the right to life in the African Charter prohibits arbitrary deprivation of life and does not mention that the death penalty is a lawful exception. The Chair of the Working Group on the death penalty and extrajudicial, summary or arbitrary killings has stated that the death penalty violates the African Charter.

¹ EU Guidelines on the Death Penalty: revised and updated version, <http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf>

In Africa there are currently 16 abolitionist states for all crimes, 21 states that are *de facto* abolitionist and 17 retentionist states. Despite 17 states retaining the death penalty, in 2013 there were only 5 states in Africa that carried out executions.

The most recent UN draft resolution on a moratorium on the use of the death penalty of 2012 was adopted by a recorded vote of 111 in favour to 41 against, and 34 abstentions. From the African states, there were 22 states that voted in favour of the moratorium, only 8 votes against, 18 that abstained and 5 that were absent. Whilst the number of states that voted against stayed the same from 2010, the number of states in favour of the moratorium increased by 6 (from 17 to 23). This is a significant increase and clearly shows a move away from the death penalty.

Africa as a continent has largely done away with the death penalty. A protocol abolishing the death penalty will send a message to the world that Africa is not afraid to commit itself to one of the most fundamental of rights – the right to life and the right not to be subjected to cruel, inhuman and degrading treatment. It is the testament of a commitment to human rights, that states no longer sanction executions and serve as examples to their citizens that executions on a horizontal plane will also no longer be tolerated. A protocol to abolish the death penalty will send out a powerful message that the continent is now ready to focus its attention on the further protection of the right to life, and indeed all the other human rights.

Process of abolition

Whilst international pressure has played a role in states abolishing the death penalty, this is not the only role player. In some instances, states have abolished the death penalty at moments that signify a break from a repressive past. NGOs and churches have also played significant roles.

Marc Ancel, a French jurist, has argued that generally abolition of the death penalty had followed from long processes which involved abolishing the death penalty for ordinary crimes, leaving only murder and crimes against the state as capital offences, after which states had introduced *de facto* moratoria. The last step in the process would be the abolition of the death penalty for murder and lastly crimes against the state. Roger Hood, on the other hand, has argued that the main factor was not international pressure, but rather that states were influenced by the realisation that there was a lack of need for capital punishment.

Abolition need not follow a specific trend; in a recent example Benin ratified the Second Optional Protocol to the ICCPR before changing its domestic laws. A treaty to abolish the death penalty may serve as a natural progression for states that have already abolished the death penalty. It could represent a realisation on the part of states that the death penalty is not a tool to fight crime, but rather a punishment which goes contrary to fundamental human rights and whatever its short term attractions may be, in the long run serves to brutalise

society. Additionally, ratifying such a treaty could serve a purely political purpose, showing a commitment that states will not go back on their word or to garner international applause.

The re-introduction of the death penalty by a small number of states over the last couple of years – sadly, also on the African continent, including the abrupt re-introduction of the penalty in the The Gambia in 2012 - does not entail a reversal of the strong global trend away from the death penalty: It is a clear exception which draws the attention of the rest of the world due to the fact that it is so out of step with the developing trend of abolition.

Although States face serious challenges in addressing the high levels of killings and violence it is emphasised that the death penalty is not the answer to this situation. Over time it has become accepted that the death penalty does not have deterrent power and humanity has thus moved away from accepting state-inflicted death as a way to combat crime. Effective solutions to high crime levels are found in it the often overlooked yet core issues of improving policing, development and education.

Africa is well positioned to play a leadership role in ending a practice that has now become obsolete, and together with slavery, foot binding, public torture and other violations of the human person belong in pages of history books, not in the pages of our laws.

I would like to conclude by emphasising the importance of the right to life in Africa. One need not adhere to any particular ideology to recognise its importance – all our cultures have emphasised its importance since time immemorial. Life in Africa, as in other parts of the world, is however often cheap. My impression is that we sometimes give up a little bit, and see wars and homicide on our continent as a part of life, that has to be accepted and endured, like the weather, not as something that we can change. And yet, all the figures that I have seen indicate that the incidence inter-personal violence worldwide – like the use of the death penalty - is going down. We may not always recognise this, but we may slowly be turning the tide against arbitrary killing. We are on the right track with the work of the African Commission, progressive governments, and civil society. But we need to do much more. Every unwarranted loss of life is the loss of something of infinite value.

If we can make significant movement with the abolition of the death penalty we can move to the better protection of the right to life in general, and with all other rights. It is a cause worth pursuing, and this conference is an important step in that direction.