



Explanatory Report to Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances

Vilnius, 3.V.2002

The text of the Explanatory Report to Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances does not constitute an instrument providing an authoritative interpretation of the text of this Protocol although it may facilitate the understanding of the Protocol's provisions.

Introduction

1. The right to life, "an inalienable attribute of human beings" and "supreme value in the international hierarchy of human rights" is unanimously guaranteed in legally binding standards at universal and regional levels.
2. When these international standards guaranteeing the right to life were drawn up, exceptions were made for the execution of the death penalty when imposed by a court of law following a conviction of a crime for which this penalty was provided for by law (cf., for example, Article 2, paragraph 1, of the European Convention on Human Rights (hereinafter: "the Convention")).
3. However, as illustrated below, there has since been an evolution in domestic and international law towards abolition of the death penalty, both in general and, more specifically, for acts committed in time of war.
4. At the European level, a landmark stage in this general process was the adoption of Protocol No. 6 to the Convention in 1982. This Protocol, which to date has been ratified by almost all States Parties to the Convention, was the first legally binding instrument in Europe – and in the world – which provided for the abolition of the death penalty in time of peace, neither derogations in emergency situations nor reservations being permitted. Nonetheless, under Article 2 of the said Protocol, "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". However, according to the same article, this possibility was restricted to the application of the death penalty in instances laid down in the law and in accordance with its provisions.
5. Subsequently, the Parliamentary Assembly established a practice whereby it required from States wishing to become a member of the Council of Europe that they committed themselves to apply an immediate moratorium on executions, to delete the death penalty from their national legislation, and to sign and ratify Protocol No. 6. The Parliamentary Assembly also put pressure on countries which failed or risked failing to meet the commitments they had undertaken upon accession to the Council of Europe. More generally, the Assembly took the step in 1994 of inviting all member States who had not yet done so, to sign and ratify Protocol No. 6 without delay (Resolution 1044 (1994) on the abolition of capital punishment).

6. This fundamental objective to abolish the death penalty was also affirmed by the Second Summit of Heads of State and Government of member states of the Council of Europe (Strasbourg, October 1997). In the Summit's Final Declaration, the Heads of State and Government called for the "universal abolition of the death penalty and [insisted] on the maintenance, in the meantime, of existing moratoria on executions in Europe". For its part, the Committee of Ministers of the Council of Europe has indicated that it "shares the Parliamentary Assembly's strong convictions against recourse to the death penalty and its determination to do all in its power to ensure that capital executions cease to take place". The Committee of Ministers subsequently adopted a Declaration "For a European Death Penalty-Free Area".

7. In the meantime, significant related developments in other fora had taken place. In June 1998, the European Union adopted "Guidelines to EU Policy Toward Third Countries on the Death Penalty" which, *inter alia*, state its opposition to this penalty in all cases. Within the framework of the United Nations, a Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, was adopted in 1989. For a few years, the UN Commission on Human Rights has regularly adopted Resolutions which call for the establishment of moratoria on executions, with a view to completely abolishing the death penalty. It should also be noted that capital punishment has been excluded from the penalties that the International Criminal Court and the International Criminal Tribunals for the Former Yugoslavia and Rwanda are authorised to impose.

8. The specific issue of the abolition of the death penalty also in respect of acts committed in time of war or of imminent threat of war should be seen against the wider background of the above-mentioned developments concerning the abolition of the death penalty in general. It was raised for the first time by the Parliamentary Assembly in Recommendation 1246 (1994), in which it recommended that the Committee of Ministers draw up an additional protocol to the Convention, abolishing the death penalty both in peace – and in wartime.

9. While the Steering Committee for Human Rights (CDDH), by a large majority, was in favour of drawing up such an additional protocol, the Committee of Ministers at the time considered that the political priority was to obtain and maintain moratoria on executions, to be consolidated by complete abolition of the death penalty.

10. A significant further step was made at the European Ministerial Conference on Human Rights, held in Rome on 3-4 November 2000 on the occasion of the 50th anniversary of the Convention, which pronounced itself clearly in favour of the abolition of the death penalty in time of war. In Resolution II adopted by the Conference, the few member States that had not yet abolished the death penalty nor ratified Protocol No. 6 were urgently requested to ratify this Protocol as soon as possible and, in the meantime, respect strictly the moratoria on executions. In the same Resolution, the Conference invited the Committee of Ministers "to consider the feasibility of a new additional protocol to the Convention which would exclude the possibility of maintaining the death penalty in respect of acts committed in time of war or of imminent threat of war" (Paragraph 14 of Resolution II). The Conference also invited member States which still had the death penalty for such acts to consider its abolition (*ibidem*).

11. In the light of texts recently adopted and in the context of the Committee of Ministers' consideration of the follow-up to be given to the Rome Conference, the Government of Sweden presented a proposal for an additional protocol to the Convention at the 733rd meeting of the Ministers' Deputies (7 December 2000). The proposed protocol concerned the abolition of the death penalty in time of war as in time of peace.

12. At their 736th meeting (10-11 January 2001), the Ministers' Deputies instructed the CDDH "to study the Swedish proposal for a new protocol to the Convention [...] and submit its views on the feasibility of a new protocol on this matter".

13. The CDDH and its Committee of Experts for the Development of Human Rights (DH-DEV) elaborated the draft protocol and the explanatory report thereto in the course of 2001. The CDDH transmitted the draft protocol and explanatory report to the Committee of Ministers on 8 November 2001. The latter adopted the text of the Protocol on 21 February 2002 at the 784th meeting of the Ministers' Deputies and opened it for signature by member states of the Council of Europe, in Vilnius, on 3 May 2002.

Commentary on the provisions of the Protocol

Article 1 – Abolition of the death penalty

14. This article, which must be read in conjunction with Article 2 of the Protocol, affirms the principle of the abolition of the death penalty. This entails the obligation to abolish this penalty in all circumstances, including for acts committed in time of war or of imminent threat of war. The second sentence of this article aims to underline the fact that the right guaranteed is a subjective right of the individual.

Article 2 – Prohibition of derogations

15. Article 15 of the Convention authorises the Contracting Parties, "in time of war or other public emergency threatening the life of the nation", to take measures derogating from their obligations under the Convention. This Protocol aims precisely at the abolition of the death penalty also in time of war or of imminent threat of war. In view of the very object and purpose of this Protocol, the applicability of Article 15 of the Convention has been excluded.

Article 3 – Prohibition of reservations

16. This article specifies, as an exception to Article 57 of the Convention, that states may not make a reservation in respect of the Protocol.

Article 4 – Territorial application

17. This is the territorial application clause contained in the Model Final Clauses adopted by the Committee of Ministers in February 1980. Its wording follows closely that of Article 5 of Protocol No. 6 to the Convention. This clause was included only to facilitate a rapid ratification, acceptance or approval by the States concerned. The purpose of paragraph 3 is merely to make allowance for formal withdrawal or modification in case the State Party ceases to be responsible for the international relations of a territory specified in such a declaration and not to allow in any way states to re-introduce the death penalty in such territory.

Article 5 – Relationship to the Convention

18. The purpose of this article is to clarify the relationship of this Protocol to the Convention by indicating that all the provisions of the latter shall apply in respect of Articles 1 to 4 of the Protocol. These provisions of course include the protection machinery established by the Convention. This means, *inter alia*, that a declaration made under Article 4, paragraphs 1 or 2, of the Protocol *ipso facto* entails the extension of the Court's competence to the territory concerned.

19. As an additional Protocol, it does not, as far as the Parties to the Protocol are concerned, supersede Article 2 of the Convention, since the first sentence of paragraph 1 and the whole of paragraph 2 of that article still remain valid, even for those states. It is clear that the second sentence of paragraph 1 is no longer applicable in respect of the States Parties to this Protocol. To the extent that these States Parties have also ratified Protocol No. 6 to the Convention, they will no longer be able to avail themselves of the possibility provided for in Article 2 of Protocol No. 6. In accordance with Article 32 of the Convention, any questions concerning the precise relationship between these Protocols and between this Protocol and the Convention fall within the jurisdiction of the European Court of Human Rights.

Article 6 – Signature and ratification

Article 7 – Entry into force

Article 8 – Depositary functions

20. The provisions of Articles 6 to 8 correspond to the wording of the Model Final Clauses adopted by the Committee of Ministers of the Council of Europe.