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Enforcement of International Criminal Law and the Death Penalty - the European Regime Reconsidered

Magne Frostad*

In the aftermath of World War II, few questioned the legality or the legitimacy of authorizing the two international tribunals established by the Allies with the power to inflict the death penalty. Quite the opposite, such a sentence was considered most proper for the perpetrators of atrocities on a hitherto unknown scale. Since then, the popularity of this penalty has faded. Thus, neither the ad hoc tribunals established since the 1990s, nor the International Criminal Court is authorized to apply this penalty. During the negotiations of the latter, though, Art. 80 was included to cater for the needs of states still subscribing to this penalty.¹ Here, the states most strongly supporting the inclusion of the death penalty within the arsenal of the Court were largely drawn from the Arab/Islamic and the English-speaking Caribbean group, although some other states seem also to have been sympathetic to this view.² Consequently, to the extent that these negotiations and its concluding instrument are considered as evidence of an establishing prohibition on the use of the death penalty, as occasionally held, one would at least have to consider the possibility of status as persistent objector for those states having voiced their criticism of this development during the negotiations. However, although most states have also either ratified international instruments whereby they are obligated to abstain from applying this punishment, or have unilaterally adopted a moratorium on its use, it is submitted that the better view would nevertheless still be that the death penalty is not in breach of customary international law per se.

The crimes covered by the abovementioned instruments would seem to be prime candidates for this penalty should they instead be prosecuted before domestic tribunals in jurisdictions allowing for the use of death penalty. It is therefore of interest to consider the limitations which apply in relation to such domestic prosecutions.

That restrictions apply to the use of this punishment, is well illustrated by the 1989 Convention on the Rights of the Child Art. 37 (a) which prohibits the use of this penalty for offences committed by persons below eighteen years of ages.³ Likewise, the 1966 International Covenant on Civil and Political Rights Art. 6 limits i.a. its use to the most serious crimes and prohibits the use of capital punishment against pregnant women.⁴ A more wide ranging undertaking follows from the 1989 Second Optional Protocol to the said Covenant, which prohibits capital punishment generally, but allows under Art. 2 to some extent for exceptions in times of war.

Within the context of the 1950 European Convention on Human Rights, the death penalty is explicitly recognized by Art. 2, but the adoption of Protocols 6 and 13 have made it inapplicable for its parties in peacetime and at all times, respectively.⁵ Currently, all state parties have signed Protocol 6, but Russia has so far not ratified it, as of October 18, 2010, whereas all but Azerbaijan and Russia have signed Protocol 13, as of October 18, 2010. However, three of the states having signed Protocol 13 have not yet ratified it. Although the states which have not ratified these protocols seem to have settled for a moratorium on its use, they would in theory be entitled to reinstitute this penalty should they so decide, to the extent that they are not hindered by other international obligations. Admittedly, the reasoning of the Grand Chamber of the European Court of Human Rights in its 2005 Öcalan judgment shows some sympathy for a rereading of Art. 2, but the Court nevertheless abstained from reaching a firm conclusion on this issue since it would

unquestionably constitute a violation of Art. 2 to impose the death sentence after an unfair trial, which was the case there.⁶ Such states would nevertheless be hindered from applying this punishment for other than the most serious crimes, due to the principle of proportionality.⁷

At least, this was the state of affairs until the Chamber judgment in the Al-Saadoon and Mufdhi case earlier this year.⁸ Now, some prominent commentators seem to find that this possibility has been closed.⁹ Did this judgment really address Art. 2 to such an extent that this conclusion must follow? Strangely, the Court explicitly avoided making a decision on whether the transfer of the two applicants from the custody of the British forces in Iraq to Iraqi authorities amounted to a breach of Art. 2 and/or Protocol 13 Art. 1.¹⁰ What it did do, however, was to state the following:

"It can be seen, therefore, that the Grand Chamber in *Öcalan* did not exclude that Article 2 had already been amended so as to remove the exception permitting the death penalty. Moreover, as noted above, the position has evolved since then. All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 Â§ 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty (cf. *Soering*, cited above, Â§Â§ 102-104).¹¹

Thus, although this quote also refers to Art. 2, the case was explicitly considered only under Art. 3. Moreover, the Court merely states that different factors seem to be "strongly indicative" of an amendment of Art. 2. Here, it is submitted that the Court may have been guided by the fact that the relevant state party was a party to Protocol 13 and had as such abrogated Art. 2 (1) in relation to itself.¹² It would have been harder for the Court to reach this conclusion in relation to e.g. Russia, which is not a party to the relevant protocols.

In this context, it must also be pointed out that the state parties choose to adopt separate protocols for the progressive prohibition of capital punishment, and that the latter one was agreed upon as late as 3 May 2002. It is submitted that this indicates the intention of the state parties to adopt a more traditional amendment process to the Convention, but the Court has not found this to provide an obstacle to its progressive realization of fundamental human rights.¹³

Where does this leave us? Does this alleged reinterpretation only apply to findings under Art. 3, whereas Art. 2 itself is left untouched? Hardly, as the Court itself refers to the problem of having one article explicitly allowing for something, which is then banned by another provision of the same instrument.¹⁴ Does this alleged rereading only apply then when a person is sought transferred in some way or another outside of the "legal space" of the Council of Europe? The very wording of this judgment, especially para. 120, might be said to mitigate against such a conclusion. This interpretation would nevertheless restrict the blocking potential of Art. 2 (1)(2) in relation to other rights and freedoms under the Convention and at the same time signal a more gradual movement in the direction of a total prohibition of capital punishment.

The Court has shown on numerous occasions that it will apply the Convention in light of the current requirements of the European society, but one may legitimately ask whether it is proper for the Court to set a side clear language intentionally entered into the Convention. This is different from reading access to a court into the right to a fair trial under Art. 6, which the Court did in the classic *Golder* case from 1975.¹⁵ Is this pushing the object and context part of the 1969 Vienna Convention on the Law of Treaties Art. 31 (1) too much into the forefront to the corresponding detriment of the ordinary meaning of the terms used in the treaty? The Court is aware of this issue, but settles for applying its living instrument approach to the issue.¹⁶

As the Court might thus be seen as having reconsidered its former case law, it is puzzling that the Grand Chamber did not accept a referral of the case under Art. 43. One would expect that an apparent disregard for the very wording of a provision, even where this might have been foreshadowed by earlier Grand Chamber obiter dictums, would indeed raise "a serious question affecting the interpretation or application of

the Convention or the Protocols thereto, or a serious issue of general importance." Regretfully, we know little about the criteria used by the judges when identifying such issues, and this case provides additional ammunition for those who want these made public.¹⁷ Some might even consider this non-referral as an indication of no major change of law having been undertaken by the chamber and thus limit correspondingly the potential reach of this judgment.

There are many ways of arriving at your preferred destination, some better than others. Let us only hope that the remaining ratifications arrive soon so as to have the progressive terrain fit the linguistic map.

*Associate Professor Magne Frostad, Faculty of Law, University of Tromsø, Norway, magne.frostad@uit.no

¹ For a slightly different reading of the preparatory works, see William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), 891-7 and 918-26.

² *Ibid.*, at 920 and 925.

³ United Nations General Assembly Doc. A/RES/44/25 (12 December 1989) with Annex

⁴ 999 UNTS 171

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms CETS No. 005; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty CETS No. 114, and 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 CETS No. 187.

⁶ *Öcalan v. Turkey*, Application No. 46221/99, Grand Chamber judgment, 12 May 2005, paras. 162-5.

⁷ D. J. Harris, M. O'Boyle, E.P. Bates, C.M. Buckley, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, 2nd ed. (Oxford University Press, 2009), 60.

⁸ *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, Chamber judgment, 2 March 2010. The United Kingdom sought to bring the case before the Grand Chamber, but the case was not accepted for referral by the Grand Chamber's decision 18 October 2010.

⁹ See contributions of Marko Milanovic on <http://www.ejiltalk.org/al-saadoon-and-mufdhi-merits-judgment/> (accessed 19 October 2010) and William A. Schabas on <http://humanrightsdoctorate.blogspot.com/2010/10/victory-on-death-penalty-at-european.html> (accessed 19 October 2010).

¹⁰ Para. 145.

¹¹ Para. 120.

¹² See paras. 137 and 143. Furthermore, the territorial limitations of Protocol 13 Art. 4 would not seem to apply where the state acts abroad outside the context of Art. 56 territories.

¹³ See paras. 119-22.

¹⁴ Beyond the use of protocols providing new provisions which may stand in stead of the former less wide ranging ones. See para. 119.

¹⁵ *Golder v. the United Kingdom*, Application No. 4451/70, Plenary judgment of 21 February 1975.

¹⁶ See paras. 119-22.

[17](#) Robin C.A. White and Clare Ovey, Jacobs, White and Ovey: The European Convention on Human Rights, 5th ed. (Oxford University Press, 2010), 22.