



Promoting penal
reform worldwide

EU COHOM Task Force on the review of the EU Guidelines on Death Penalty

Submission by Penal Reform International (PRI)

21 December 2012

Brief about Penal Reform International

Penal Reform International (PRI) is an international NGO with Consultative Status at ECOSOC and the Council of Europe, and Observer Status with the African Commission on Human and People's Rights and the Inter-Parliamentary Union.

It aims to develop and promote international standards for the administration of justice, reduce the unnecessary use of imprisonment and promote the use of alternative sanctions which encourage reintegration while taking into account the interests of victims. PRI also works for the prevention of torture and ill-treatment and for a proportionate and sensitive response to women and juveniles in conflict with the law, and promotes the abolition of the death penalty and the implementation of humane alternative sanctions.

Introduction

In 1998 the European Union adopted the EU Guidelines on the Death Penalty as a tool towards strengthening their activities in opposition to the death penalty. The EU Guidelines are a fundamental tool in the fight towards abolition of the death penalty as they form the basis of EU action. The Guidelines provide criteria for making general or individual representations and outline the minimum standards to be applied in countries retaining the death penalty.

Penal Reform International (PRI) welcomes the review of the EU Guidelines on the Death Penalty. While the implementation of the death penalty has not changed fundamentally since the Guidelines were revised in 2008, emerging issues have arisen that should be addressed by the EU if it is to ensure that it upholds the highest standards in the promotion and protection of human rights. Such issues include changes in the

types of offences that warrant the death penalty, procedures used to sentence a person to death, methods used to impose a death penalty, and other legal and political issues surrounding the death penalty. Reviewing the Guidelines on a regular basis ensures that it reflects best practice and is a pragmatic instrument of EU human rights policy and a practical tool to help EU representations in the field.

Key Messages

UN General Assembly moratorium resolution

The EU Guidelines on the Death Penalty should include reference to the 2012 UN General Assembly moratorium resolution.¹

In particular, the Guidelines should highlight that the General Assembly calls on all States that still maintain the death penalty to:

- Respect international standards that provide safeguards guaranteeing the protection of those facing the death penalty, in particular minimum standards;
- To make available relevant information with regard to their use of the death penalty, inter alia, the number of persons sentenced to death, the number of persons on death row and the number of executions carried out, which can contribute to possible informed and transparent national and international debates, including on the obligations of States pertaining to the use of the death penalty;
- To progressively restrict the use of the death penalty, and not impose it for offences committed by persons below eighteen years of age and on pregnant women;
- To reduce the number of offences for which the death penalty may be imposed;
- To establish a moratorium on executions with a view to completely abolishing the death penalty.

The 2012 resolution also calls on States which have abolished the death penalty not to reintroduce it, and calls on all States to consider acceding to or ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty.

The EU Guidelines on the Death Penalty should also call on all EU Member States to make use of bi-lateral relations to advocate for other States to support and implement the moratorium resolution.

EU complicity in the imposition of the death penalty

Exports of goods and equipment used for capital punishment

On 20 December 2011, the European Commission extended the list of goods subject to export controls, to prevent their use for capital punishment. The export of certain anesthetics, such as sodium thiopental and pentobarbital, which are used in lethal injections, will now be controlled for all EU Member States under Council Regulation

¹ UN General Assembly resolution 67/176 (20 December 2012).

(EC) No. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

The EU Guidelines should make reference to the control in exports of goods or equipment that could be used for capital punishment, and highlight that no EU Member State will provide assistance – either directly or indirectly – to states wishing to carry out executions.

The EU should continue to regularly review Council Regulation (EC) No. 1236/2005 to ensure that any drugs or equipment used for capital punishment are controlled, and should consider closing remaining legal loopholes with an end-use catch-all provision to prevent European drugs of any type being used in executions.

EU assistance in drug enforcement programmes

A number of EU Member States provide technical assistance, legislative support and financial aid intended to strengthen drug enforcement activities in other countries. Much of this is channelled through the European Commission and the UN Office on Drugs and Crime (UNODC). Many of these drug enforcement projects are in retentionist countries, which retain the death penalty for drug-related offences.

The ICCPR limits the use of the death penalty only for the “most serious crimes”. This has been interpreted as meaning intentional crimes with lethal or other extremely grave consequences. Over recent years, clear guidance has emerged from international human rights bodies and other parties within the UN system that drug offences do not meet the threshold of “most serious crimes” and that, as a consequence, executions solely for drug-related offences are in violation of international law.²

As such, EU Member States have the potential to undermine EU policies on abolition of the death penalty if they maintain support for drug enforcement programmes which result in the arrest of individuals ultimately sentenced to death or executed. International law forbids states and international organisations from aiding or assisting in internationally wrongful acts (i.e., those acts that breach an international obligation, including human rights law).³

² See for example: UN Human Rights Committee (CCPR/CO/84/THA, para. 14; CCPR/C/SDN/CO/3, para. 19.); UN Office on Drugs and Crime (UNODC (2010) Drug control, crime prevention and criminal justice: a human rights perspective. Note by the Executive Director (Commission on Narcotic Drugs, Fifty-third session, Vienna, 8–12 March) E/CN.7/2010/CRP.6*–E/CN.15/2010/CRP.1*.); UN Special Rapporteur on extrajudicial, summary or arbitrary executions (UN Commission on Human Rights (24 December 1996) Extrajudicial, summary or arbitrary executions: report by the Special Rapporteur, submitted pursuant to Commission on Human Rights Resolution 1996/74, E/CN.4/1997/60; UN Human Rights Council (29 January 2007) Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/4/20, paras. 51–52; HRC (18 June 2010) Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Communications to and from governments, A/HRC/14/24/Add.1, pp. 45–46); UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN Human Rights Council (14 January 2009) Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/10/44, para. 66.); UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (6 August 2010) A/65/255, para. 17).

³ See Article 16 of the Articles on the Responsibility of States for International Wrongful Acts.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has recommended that clear guidelines are needed to help States engage in cooperative drug enforcement programmes without departing from the human rights framework, including international standards on the death penalty.⁴

In keeping with Resolution 2007/2274(INI) of the European Parliament, the European Commission should develop guidelines governing international funding for country level and regional drug enforcement activities to ensure such programmes do not result in human rights violations, including the application of the death penalty.

The EU Guidelines on the Death Penalty should also confirm that the European Commission and EU Member States will not facilitate death sentences or subsequent executions, whether directly or indirectly, through the provision of financial or technical assistance to drug enforcement programmes.

Extradition

Abolitionist states are prohibited from transferring persons or providing other forms of legal assistance, if there is a real risk of imposition or implementation of the death penalty.⁵ This includes extradition, deportation, surrender, handover or any other form of enforced removal.

In these cases, states must obtain diplomatic assurances that remove completely the possibility that the person would face the death penalty in the receiving State.

The Special Rapporteur on extrajudicial, summary or arbitrary executions has recommended that abolitionist states should amend national laws on extradition and deportation to specifically prohibit the enforced transfer of persons to States where they face a genuine risk of the death penalty, unless adequate assurances are obtained.⁶

The EU Guidelines on the Death Penalty should encourage EU Member States not to extradite individuals to countries where they may face the death penalty, unless adequate assurances are given.

Strengthening consular assistance to foreign nationals from EU Member States

Article 36 of the Vienna Convention on Consular Relations provides that foreign nationals have a right to consular communications and assistance. Where foreign nationals are from EU Member States, consular assistance can greatly increase the chances of averting the use of the death penalty, as well as impacting profoundly on the political debate on abolition in these countries.

⁴ Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/67/275,9 August 2012, para. 84.

⁵ A/HRC/18/20, para. 45; Principle 5 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, set out in the annex to Economic and Social Council resolution 1989/65; and see jurisprudence of the UN Human Rights Committee, such as *Judge v. Canada* (Communication No. 829/1998), *ARJ v. Australia* (Communication No. 692/1996), *T v. Australia* (Communication No. 706/1996).

⁶ Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/67/275,9 August 2012, para. 126

Consulates may provide any form of assistance necessary to ensure that a national facing harsh punishment receives fair, equal and humane treatment, throughout the legal proceedings. Consulates are empowered to arrange for their nationals' legal representation and to provide a wide range of humanitarian and other diplomatic and political assistance, with the consent of the detainee. While embassies have provided some legal assistance through *amicus curiae* briefs and funds for defence representation, these tend to be the exception and states have been reticent to get involved in legal proceedings.

The EU Guidelines on the Death Penalty should encourage EU Member States to strengthen legal and other types of consular assistance to their nationals facing a death sentence or on death row abroad.

Regional initiatives on the death penalty

Europe has been a leader in developing regional initiatives on the death penalty, in particular Protocols No. 6 and 13 to the ECHR, and Article 2 of the Charter of Fundamental Rights of the European Union. These initiatives reflect Europe's strong and principled position against the death penalty.

Regional initiatives help to implement international human rights norms and standards on the death penalty, while reflecting the human rights concerns of that particular region.

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty provides for abolition of the death penalty except in wartime. The African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights make provisions for the right to life and provide restrictions on the use of the death penalty. However none of these regional instruments absolutely prohibit the application of the death penalty. Furthermore, there are no regional initiatives covering the death penalty in Asia.

The EU Guidelines on the Death Penalty should promote regional initiatives aimed at implementing a moratorium on executions or to abolish the death penalty.

Encourage and offer assistance to parliamentarians and key decision-makers

Parliamentarians have the knowledge and capacity to table and amend legislation, but many lack the technical expertise and skills for criminal justice reforms, and work under the constraints of perceived public opinion in favour of the death penalty. Therefore, parliamentarians need on-going support to take progressive but unpopular steps.

The EU Guidelines on the Death Penalty should promote the role of parliamentarians and other key decisions to take a more active role in the abolitionist process. Support should be encouraged through the European Parliament, the parliaments of Member States, or through other parliamentary bodies such as the Inter-Parliamentary Union.

Alternative sanctions to the death penalty

States that are in the process of taking legal and/or political steps towards abolition often struggle to identify an appropriate alternative sanction to the death penalty, which can be

a crucial hurdle in the abolitionist process as well as raising additional human rights concerns.

Many countries that institute a moratorium do not create humane conditions for prisoners held indefinitely on 'death row', or substitute alternative sanctions that amount to torture or cruel, inhuman or degrading punishment, such as life imprisonment without the possibility of parole, solitary confinement for long and indeterminate periods of time, and inadequate basic physical or medical provisions. Punitive conditions of detention and less favourable treatment are prevalent for reprieved death row prisoners. Such practices fall outside international minimum standards, including those established under the EU Charter of Fundamental Rights (Article 4 "no one shall be subjected to torture or to inhuman or degrading treatment or punishment").

Life imprisonment without the possibility of parole attracts many of the same objections as the death penalty: it undermines the inherent right to life. To lock up a prisoner and take away all hope of release is to resort to another form of death sentence. LWOP does not respect the inherent dignity of the offender or the prohibition of cruel and inhuman punishment.

Life imprisonment has also become unnecessarily punitive in many cases, especially for non-violent crimes, and does not satisfy the principles of proportionality. In fact in several countries it has been a major factor in producing increased rates of imprisonment in a way that bars no relationship to crime rates or reducing serious criminal behaviour in society.

The conditions of detention for lifers, compounded by the indeterminate nature of the sentences, typically have a profound sociological and psychological impact on prisoners, which negate the rehabilitative purpose of imprisonment.

International standards do not sufficiently reflect the phenomenon of life imprisonment. To date no international treaty or guidelines include provisions addressing the specific needs of those serving a life sentence.

While the EU has a strong and principled position against the death penalty, and promotes abolition globally, it lacks a strong and principled position on what are suitable alternative sanctions, and does not provide appropriate guidance to States on the cusp of abolition on how to identify and implement an appropriate alternative sanction.

The EU should engage in debate and dialogue as to how best to protect the rights of those sentenced to life or long-term imprisonment as a vulnerable category of prisoner, including upholding their rights to adequate living facilities, healthcare, and access to rehabilitation programmes.

Reference should be made in the EU Guidelines on the Death Penalty to the prohibition of life imprisonment without the possibility of parole, prolonged and indefinite solitary confinement, and the obligation to provide equal treatment for all prisoners including those serving a life sentence, in accordance with the Standard Minimum Rules for the

Treatment of Prisoners⁷, and other relevant international standards such as the Basic Principles for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).

The EU Guidelines should also encourage states going through the process of abolishing the death penalty to discuss with key stakeholders how to introduce an alternative sanction that is fair, proportionate and compatible with international human rights standards. Stakeholders should include parliamentarians, government officials, police, prosecutors, judges, lawyers, prison and probation officials, academics, civil society, victims and their families, and the public.

The European Commission should also consider drafting its own specific guidelines on life imprisonment which would complement its Guidelines on the Death Penalty.

Minimum Standards Paper

Most serious crimes definition

Under section (i) of the Minimum Standards Paper, the notion of “most serious crimes” could be extended as not including the following offences, in line with the UN Human Rights Committee and the Commission on Human Rights: economic or financial offences⁸, embezzlement by officials⁹, political offences¹⁰, theft or robbery by force¹¹, abduction not resulting in death¹², apostasy¹³, adultery¹⁴, drug-related offences¹⁵, abetting suicide¹⁶, corruption¹⁷, evasion of military service¹⁸, and homosexual acts or illicit sex¹⁹.

⁷ Adopted by the first UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the ECOSOC by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁸ UN document CCPR/C/79/Add.101, 6 November 1998, para. 8; UN document CCPR/C/79/Add.85, 19 November 1997, para. 8; Resolution 2005/59 of the Commission on Human Rights, para. 7 (f).

⁹ UN document CCPR/C/79/Add.85, para. 8.

¹⁰ UN document CCPR/C/79/Add.101, 6 November 1998, para. 8. In relation to political offences the Committee has, in particular, expressed concern about “very vague categories of offences relating to internal and external security” (UN document CCPR/CO/69/KWT, 27 July 2000, para. 13); about vaguely worded offences of opposition to order and national security violations (UN document CCPR/CO/75/VNM, 26 July 2002, para. 7); and about “political offences... couched in terms so broad that the imposition of the death penalty may be subject to essentially subjective criteria” (UN document CCPR/CO/72/PRK, 27 August 2001, para. 13).

¹¹ UN document CCPR/CO/83/KEN, 29 April 2005, para. 13.

¹² UN document CCPR/CO/72/GTM, 27 August 2001, para. 17.

¹³ UN document CCPR/C/79/Add.85, 19 November 1997, para. 8.

¹⁴ UN document CCPR/C/79/Add.25, para. 8.

¹⁵ UN document CCPR/CO/84/THA, para. 14; UN document CCPR/C/SDN/CO/3, para. 19; A/50/40, para. 449; A/55/40, para. 464.

¹⁶ A/50/40, para. 449.

¹⁷ UN document CCPR/C/79/Add.25, para. 8.

¹⁸ UN document CCPR/C/79/Add.84, para. 11.

¹⁹ UN document CCPR/C/79/Add.85, para. 8.

Prohibited categories

Under section (iii) reference is made to “persons who have become insane”. The word “insane” is decidedly negative, and language should focus on internationally acceptable medical terminology such as “mental illness”, which encompasses specific defined medical conditions.

Death row phenomenon

The European Court of Human Rights has given legitimacy to the doctrine of death row phenomenon²⁰, identifying it as a combination of circumstances:

1. The very long period of time spent on death row.
2. The extreme harsh conditions of death row.
3. The ever present and mounting anguish of awaiting execution.

The combination of these circumstances has been found to produce severe mental trauma and physical deterioration in prisoners under sentence of death²¹, and has therefore been found to amount to a violation of Article 7 of the ICCPR. Examples of current death row conditions around the world include:²²

- Prolonged and indefinite solitary confinement for up to 23 hours a day in small, cramped, airless cells, often under extreme temperatures.
- Inadequate nutrition and sanitation arrangements.
- Limited contact with family members and/or lawyers.
- Excessive use of handcuffing or other types of shackles or restraints.
- Physical or verbal abuse.
- Lack of appropriate health care (physical and mental).
- Being denied access to books, newspapers, exercise, education, employment, or any other type of prison activities.

States that retain the death penalty should ensure that the conditions on death row are in accordance with the Standard Minimum Rules for the Treatment of Prisoners (SMR), and other relevant international standards such as the Basic Principles for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).

Section (x) of the Minimum Standards Paper makes specific reference to the length of time spent after having been sentenced to death. As per the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, “prolonged delay is, however, only one cause of the death row phenomenon and, considered alone, may be harmful to a prisoner’s rights.”²³

The EU Guidelines should therefore make reference to the conditions of imprisonment, including where a State is not implementing the SMR or practices prolonged or indefinite solitary confinement for those on death row.

²⁰ *Soering v. The United Kingdom* (1989) 11 EHRR 439 (Series A, No 161; Application No 14038/88).

²¹ For example, Patrick Hudson, “Does the death row phenomenon violate a prisoner’s rights under international law?”, *European Journal of International Law*, vol. 11, No. 4 (2000), pp. 834-837.

²² Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/279, 9 August 2012, para. 42.

²³ *Ibid*, para. 47.

Indiscriminate use of the death penalty

Section (xii) makes reference to the death penalty being imposed as an act of political revenge; however there are other groups that are arbitrarily targeted through the death penalty. The EU Guidelines should call on states not to impose the death penalty discriminately, with particular reference to race and sexual orientation.

For more information, please contact:

Ms Jacqueline Macalesher
Death Penalty Project Manager
Penal Reform International
60-62 Commercial Street, London E1 6LT, UK
jmacalesher@penalreform.org
+44(0) 207 247 6515
www.penalreform.org