COMPENDIUM OF CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE DEATH PENALTY AND EXTRAJUDICIAL EXECUTION

Jeremy McBride

Introduction by Robert Spano,
President of the European Court
of Human Rights

COUNCIL OF EUROPE
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Foreword

We should be extremely proud of the Council of Europe's achievement in leading the way to a death-penalty-free zone (in practice if not always in law) within its member states. This is thanks in large part to the European Convention on Human Rights and its two additional protocols on the death penalty: Protocol No. 6, which provides for abolition of the death penalty in peacetime, and Protocol No. 13, which provides for its abolition in all circumstances. It is also the result of the interpretation of those instruments by the European Court of Human Rights. Using the living instrument doctrine to interpret the European Convention on Human Rights in the light of present-day conditions, the Court has been able to promote a higher standard of human rights protection within Europe on this crucial issue of human dignity.

However, the decline in use of the death penalty worldwide in 2020[1] should not make us complacent about the continuing human rights work that is needed to ensure a complete *de facto* and *de jure* abolition of the death penalty across the world.

This essential compendium of case law of the European Court of Human Rights will provide ample material for that work to judges, legal practitioners and academics within the Council of Europe legal space. It will also provide inspiration to those further afield. This includes awareness of the use of extrajudicial execution or the risk of it occurring through proceedings for expulsion, extradition or other forms of removal or transfer, as the last chapter of this compendium demonstrates.

Numerous examples of the Court developing fundamental principles relating to capital punishment can be found in this compendium, from *Soering v. the United Kingdom* and *Öcalan v. Turkey* [GC] to *Al-Saadoon and Mufdhi v. the United Kingdom*.

The added value of this compendium – which includes extracts from the judgments in English and translations of those where the judgments are only in French, as well as any relevant dissenting or concurring opinions – is the structured approach by article of the Convention and theme. In particular, practitioners will be able to consult the extensive case law developed by the Court in extradition or deportation cases where a violation of Article 2 or 3 is alleged.

1. Amnesty International, "Death penalty in 2020: Facts and figures": www.amnesty.org/en/latest/news/2021/04/death-penalty-in-2020-facts-and-figures/.

Outlawing the death penalty is a work in progress for the Council of Europe. This can be seen by the very recent Recommendation CM/Rec(2021)2 of the Committee of Ministers to member States on measures against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment and the work of the Parliamentary Assembly's general rapporteur on the abolition of the death penalty, in particular as regards observer states.

This compendium of case law underlines how the European Convention on Human Rights and the European Court of Human Rights ensure respect for one of the basic values of humanity within our society.

Robert Spano, President

European Court of Human Rights

Chapter 1
Introduction

This compendium is intended to help judges, lawyers and prosecutors from Council of Europe member states deal with cases involving, in particular, expulsion, extradition or other procedures for removal and transfer, when it is considered that there is a risk of the death penalty being imposed in third countries, and cases involving a risk of extrajudicial execution or those in which this is considered to have occurred.

It also aims to enable legal professionals from countries where the death penalty still exists to develop arguments based upon the reasoning of the case law of the European Court of Human Rights ("the Court" or "the European Court"), as well as that of the former European Commission of Human Rights ("the former European Commission").[2]

In this case law, a number of different terms can be found to have been used where issues relating to the death penalty and extrajudicial execution have been raised.

Thus, in addition to the "death penalty", reference can be made in the case law to "capital punishment" and "death sentence" (or *condamné à mort*, *peine capitale* and *peine de mort*). Similarly, "extrajudicial execution" (also spelt with a hyphen) can also be referred to as "extrajudicial killing" (*exécution extrajudiciaire*).

Whatever the terminology used, the European Court, as well as the former European Commission, has been faced with implementing the European Convention on Human Rights ("the European Convention" or "the Convention") and its protocols in applications raising a wide range of issues concerned with the imposition and application of the death penalty and the practice of extrajudicial execution.

When the European Convention was adopted, the use of the death penalty was a feature of the criminal justice systems in some, but not all, Council of Europe member states. The possibility of imposing this penalty was, therefore, accommodated in paragraph 1 of Article 2 (right to life) of the European Convention.

However, although applications submitted to the former European Commission and the European Court have included those where the death penalty was imposed by the courts of some member states, there has never been a case in which either body has had to address a situation where the actual implementation by a member state of the death penalty had occurred or was even probable.

2. This body had a role in implementing the Convention until the coming into force of Protocol No 11, but its rulings on a number of important points relating to the death penalty remain authoritative. The compendium assumes a basic familiarity with the European Convention system.

Nonetheless, both the European Court and the former European Commission have been faced with many applications raising issues relating to the imposition and implementation of the death penalty that involve states other than those belonging to the Council of Europe. Such applications have been brought before these two bodies because of proceedings taken by member states with a view to expelling, extraditing or otherwise removing or transferring the applicants in circumstances where it was alleged that this would entail a violation of the European Convention.

Notwithstanding the limitation on the protection afforded by the right to life in Article 2, the ability to invoke the European Convention proved possible in the first place through reliance on other provisions, most notably the potential for the imposition or application of the death penalty to lead in some circumstances to inhuman and degrading treatment contrary to Article 3. In particular, this was so where the imposition of the death penalty would lead to the person concerned being subjected to the death row phenomenon – a prolonged period of time spent on death row in extreme conditions, with the ever-present and mounting anguish of awaiting implementation of the death penalty – or to the actual conditions on death row themselves.

This approach has been reinforced by the recognition that the imposition of the death penalty where there had been a flagrant denial of a fair trial would amount not only to a violation of the rights under Article 6 but could also be contrary to both the right to life under Article 2 and the prohibition of inhuman and degrading treatment under Article 3.

The approach taken in the case law has been an evolutionary one, reflecting the changing attitudes within Council of Europe member states and manifested in practice with the adoption of Protocols No. 6 and No. 13, which required the abolition of the death penalty, first with an exception in time of war or its imminent threat, and then in all circumstances.

These two protocols have reinforced the protection afforded by the European Convention such that the European Court could conclude that their extensive ratification, together with consistent state practice in observing a moratorium on capital punishment, was strongly indicative that Article 2 had been amended to prohibit the death penalty in all circumstances and that the wording of the second sentence of Article 2(1) could not, therefore, continue to act as a bar to its interpretation of the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty.[3]

While the protocols and commitments made on admission to the Council of Europe may have outlawed the use of the death penalty in its member states, the case law of the

3. *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, 2 March 2010, at paragraph 120.

European Court has underlined its unacceptability by reference to human rights other than the right to life that are accepted on a more universal basis, namely, the prohibition of inhuman and degrading treatment and the right to a fair trial.[4]

This case law is thus important in both resisting the use of the death penalty in countries that have undertaken to respect those rights and contesting expulsion, extradition or other forms of removal and transfer to another country where there is a real risk of that penalty being used against the person in question. Moreover, this case law provides useful guidance as to what is required to establish that such a real risk exists.

Although the European Court has not had to determine cases in which the death penalty has been used by Council of Europe member states, it has had to consider the potential for the European Convention to be violated through steps taken to comply with the fact that, subsequent to its imposition, this penalty has become unacceptable. In particular, where a sentence of life imprisonment has been substituted for the death penalty, there has been a need to bring such sentences into line with the requirement that all such sentences must not be irreducible.

Applications to the European Court raising issues related to the death penalty have been joined in more recent years by applications in which there are allegations about the use or risk of extrajudicial execution, both within member states of the Council of Europe and elsewhere. Such a measure – which is by no means a recent phenomenon – entails the imposition of a death penalty without even the pretence of a trial and it is clearly contrary to the right to life guaranteed by Article 2 of the European Convention.

Not only will use of extrajudicial execution in any Council of Europe member state be a violation of the European Convention, but exposing someone to a real risk of such execution occurring through proceedings for expulsion, extradition or other forms of removal and transfer will also give rise to the same issues of compliance with the rights guaranteed by the Convention, as has been seen in respect of the risk of the death penalty being imposed. In addition, such executions will have the potential to violate the prohibition on inhuman and degrading treatment of those witnessing them. However, the extent of any duty to investigate alleged extrajudicial execution before the European Convention became binding on a member state is limited.

4. While the right to life in Article 6 of the International Covenant on Civil and Political Rights includes an exception allowing the imposition of the death penalty in countries that have not yet abolished it, this is qualified in the following manner: "sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court". The imposition of the death penalty in the absence of a fair trial will violate both Article 6 and the right to a fair trial under Article 14 of the International Covenant; see most recently the Views of the United Nations Human Rights Committee in *Mikhalenya v. Belarus*, communication No. 3105/2018, adopted 21 July 2021. Moreover, as under Article 3 of the European Convention, the manner of execution, the death row phenomenon and conditions on death row can violate the prohibition of cruel, inhuman or degrading treatment or punishment in Article 7 of the International Covenant. See further Human Rights Committee, General Comment No. 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019, paragraphs 32-51.

The compendium first sets out the text of the provisions of the European Convention relevant to cases involving the death penalty or extrajudicial execution. It then groups extracts from the rulings of the European Court, and the former European Commission, dealing with issues related to the death penalty and extrajudicial execution under five main headings: Imposition of the death penalty; Application of the death penalty; Substitution of the death penalty by life imprisonment; Expulsion/extradition/removal/transfer; and Extrajudicial execution. For each main heading a series of sub-issues are then addressed in order to illustrate the different dimensions of the case law and to enhance its usability.

The extracts of the cases selected – either taken from the original English versions or translated into English where a French-language version is the only one available – are set out in chronological order so that it is possible to see how the case law has evolved. This evolution, together with the different approaches that may be taken in respect of a particular issue, is reinforced by including any concurring or dissenting opinions, with the latter in some instances having influenced future rulings of the European Court.

In addition to the cases from which extracts have been taken, there are also references to other cases on the particular sub-issue concerned in which similar rulings have been given or, as in one instance, a different approach taken. There is also some cross-referencing where an extract may deal with more than one sub-issue.

Space constraints have allowed only limited extracts to be chosen, and as a result references to the case law, parts of sentences and even paragraphs have often been omitted (indicated by ellipses). Any footnotes in judgments have also been omitted and thus any footnotes in extracts are editorial ones, with one exception. This has been done in a manner which hopefully still gives a sense of the essential reasoning and the specific context of the ruling, while at the same time endeavouring not to misrepresent the stance of the European Court or the former European Commission.

The full text of all the rulings from which the extracts have been derived can be found on the HUDOC database of the European Court (www.echr.coe.int/ECHR/EN/hudoc), generally in both English and French but in some instances only in one of these languages. The case names of rulings that involve an admissibility decision rather than a judgment are followed by "(dec.)".[5] Where a case has more than one application number only the first one is included.

The extracts are from rulings up to 31 October 2021.

Jeremy McBride

5. In the one instance where a report of the former European Commission is involved, the case name is followed by "(Rep.)".

Chapter 2

Provisions of the European Convention on Human Rights

ARTICLE 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

PROTOCOL NO. 6, ARTICLE 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

PROTOCOL NO. 6, ARTICLE 2

Death penalty in time of war

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; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

PROTOCOL NO. 13, ARTICLE 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Chapter 3

Imposition of the death penalty

COMPATIBILITY WITH THE CONVENTION

Article 2

► *X. v. the United Kingdom* (dec.), Application No. 5712/72, 18 July 1974

(…) The applicant is a violent killer originally sentenced to death and it was only after his death sentence was commuted that it was decided to send him to the United Kingdom. The death sentence itself would not have been contrary to the provisions of the Convention – see Article 2 (…).

► *Kaboulov v. Ukraine*, Application No. 41015/04, 19 November 2009

99. The Court observes that, in the context of extradition and positive obligations under Article 2 of the Convention, in complying with their obligations in the area of international legal cooperation in criminal matters, the Contracting States must have regard to the requirements enshrined in that provision of the Convention. Thus, in circumstances where there are substantial grounds to believe that the person in question, if extradited, would face a real risk of being liable to capital punishment in the receiving country, Article 2 implies an obligation not to extradite the individual … Furthermore, if an extraditing State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be near certainty, such an extradition may be regarded as "intentional deprivation of life", prohibited by Article 2 of the Convention (…).

Article 3

► *Ilaşcu and Others v. Moldova and Russia* [GC], Application No. 48787/99, 8 July 2004

429. The Court has previously held that, regard being had to developments in the criminal policy of the member States of the Council of Europe and the commonly accepted standards in that sphere, the death penalty might raise an issue under Article 3 of the Convention. Where a death sentence is passed, the personal circumstances of the condemned person, the proportionality to the gravity of the crime committed and the conditions of detention pending execution of the sentence are

examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (see *Soering v. the United Kingdom* … § 104, and *Poltoratskiy v. Ukraine* ... § 133 …).

► *Öcalan v. Turkey* [GC], Application No. 46221/99, 12 May 2005

a) Legal significance of the practice of the Contracting States as regards the death penalty

162. The Court must first address the applicant's submission that the practice of the Contracting States in this area can be taken as establishing an agreement to abrogate the exception provided for in the second sentence of Article 2 § 1, which explicitly permits capital punishment under certain conditions. In practice, if Article 2 is to be read as permitting capital punishment, notwithstanding the almost universal abolition of the death penalty in Europe, Article 3 cannot be interpreted as prohibiting the death penalty since that would nullify the clear wording of Article 2 § 1 (see *Soering* … § 103).

163. The Grand Chamber agrees with the following conclusions of the Chamber on this point (see paragraphs 190-96 of the Chamber judgment):

> "... The Court reiterates that it must be mindful of the Convention's special character as a human rights treaty and that the Convention cannot be interpreted in a vacuum. It should so far as possible be interpreted in harmony with other rules of public international law of which it forms part (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], No. 35763/97, § 55, ECHR 2001-XI, and *Loizidou v. Turkey*, judgment of 18 December 1996, Reports 1996-VI, p. 2231, § 43). It must, however, confine its primary attention to the issues of interpretation and application of the provisions of the Convention that arise in the present case.
>
> ... It is recalled that the Court accepted in *Soering* that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (ibid., pp. 40-41, § 103). It was found, however, that Protocol No. 6 showed that the intention of the States was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. The Court accordingly concluded that Article 3 could not be interpreted as generally prohibiting the death penalty (ibid., pp. 40-41, §§ 103-04).
>
> ... The applicant takes issue with the Court's approach in *Soering*. His principal submission was that the reasoning is flawed since Protocol No. 6 represents merely one yardstick by which the practice of the States may be measured and that the evidence shows that all member States of the Council of Europe have, either *de facto* or *de jure*, effected total abolition of the death penalty for all crimes and in all circumstances. He contended that as a matter of legal theory there was no reason why the States should not be capable of abolishing the death penalty both by abrogating the right to rely on the second sentence of Article 2 § 1 through their practice and by formal recognition of that process in the ratification of Protocol No. 6.

... The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see *Selmouni v. France* [GC], No. 25803/94, § 101, ECHR 1999-V).

... It reiterates that in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field (see *Soering*, cited above, p. 40, § 102). Moreover, the concepts of inhuman and degrading treatment and punishment have evolved considerably since the Convention came into force in 1953 and indeed since the Court's judgment in *Soering* in 1989.

... Equally the Court observes that the legal position as regards the death penalty has undergone a considerable evolution since *Soering* was decided. The *de facto* abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a *de jure* abolition in forty-three of the forty-four Contracting States and a moratorium in the remaining State that has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia. It is further reflected in the policy of the Council of Europe, which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.

... Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1, particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No. 6 by the three remaining States before concluding that the death penalty exception in Article 2 § 1 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable ... form of punishment that is no longer permissible under Article 2."

164. The Court notes that, by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances, the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. At the date of this judgment, three member States have not signed this Protocol and sixteen have yet to ratify it. However, this final step towards complete abolition of the death penalty – that is to say both in times of peace and in times of war – can be seen as confirmation of the abolitionist trend in the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.

165. For the time being, the fact that there is still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of

the Convention, since no derogation may be made from that provision, even in times of war. However, the Grand Chamber agrees with the Chamber that it is not necessary for the Court to reach any firm conclusion on these points since, for the following reasons, it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE GARLICKI

I. Article 3

1. I am writing this separate opinion because I feel that, in this case, the Court should have decided, in the operative provisions of its judgment, that Article 3 had been violated because any imposition of the death penalty represents *per se* inhuman and degrading treatment prohibited by the Convention. Thus, while correct, the majority's conclusion that the imposition of the death penalty following an unfair trial represents a violation of Article 3 seems to me to stop short of addressing the real problem.

2. It is true that the majority's conclusion was sufficient to establish a violation in the instant case and that it was not absolutely necessary to produce any firm conclusion on the – more general – point of whether the implementation of the death penalty should now be regarded as inhuman and degrading treatment contrary to Article 3 in all circumstances. I accept that there are many virtues in judicial self-restraint, but am not persuaded that this was the best occasion to exercise it.

I am fully aware that the original text of the Convention allowed capital punishment provided the guarantees referred to in Article 2 § 1 were in place. I am also aware that in *Soering v. the United Kingdom* … this Court declined to hold that the new international context permitted it to conclude that the exception provided for in the second sentence of Article 2 § 1 had been abrogated. Today the Court, while agreeing that "it can be said that capital punishment in peacetime has come to be regarded as an unacceptable ... form of punishment which is no longer permissible under Article 2" (see paragraph 163 of the judgment), seems to be convinced that there is no room for the death penalty even within the original text of the Convention. But, at the same time, it has chosen not to express that position in a universally binding manner. In my opinion, there are some arguments suggesting that the Court could and should have gone further in this case.

3. First of all, there seems to be no dispute over the substance of the problem. The Court was clearly right in observing that, over the past fifteen years, the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment and that such a development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1. It is not necessary to recapitulate here all the relevant developments in Europe; it seems sufficient to quote the 2002 opinion of the Parliamentary Assembly of the Council of Europe in which it recalled that in its most recent resolutions "it reaffirmed its beliefs that the application of the death penalty constitutes inhuman and degrading punishment and a violation of the most fundamental right, that to life itself, and that capital punishment has no

place in civilised, democratic societies governed by the rule of law". Thus, today, in 2005, condemnation of the death penalty has become absolute and even fairness of the highest order at trial cannot legitimate the imposition of such a penalty. In other words, it is possible to conclude that the member States have agreed through their practice to modify the second sentence of Article 2 § 1. The only problem is: who shall have the power to declare, in a binding manner, that such modification has taken place? So, this is a problem not of substance, but of jurisdiction (competence). In consequence, the only question that remains is whether the Court has the power to state the obvious truth, namely that capital punishment has now become an inhuman and degrading punishment *per se*.

4. In answering this question, it is necessary to bear in mind that the Convention, as an international treaty, should be applied and interpreted in accordance with general rules of international law, in particular Article 39 of the Vienna Convention. This suggests that the only way to modify the Convention is to follow the "normal procedure of amendment" (see paragraphs 103-04 of *Soering*, cited above, and paragraphs 164-65 of the present judgment).

But the Convention represents a very distinct form of international instrument and – in many respects – its substance and process of application are more akin to those of national constitutions than to those of "typical" international treaties. The Court has always accepted that the Convention is a living instrument and must be interpreted in the light of present-day conditions. This may result (and, in fact, has on numerous occasions resulted) in judicial modifications of the original meaning of the Convention. From this perspective, the role of our Court is not very different from the role of national Constitutional Courts, whose mandate is not only to defend constitutional provisions on human rights, but also to develop them. The Strasbourg Court has demonstrated such a creative approach to the text of the Convention many times, holding that the Convention rights and freedoms are applicable to situations which were not envisaged by the original drafters. Thus, it is legitimate to assume that, as long as the member States have not clearly rejected a particular judicial interpretation of the Convention (as occurred in relation to the expulsion of aliens, which became the subject of regulation by Protocols Nos. 4 and 7), the Court has the power to determine the actual meaning of words and phrases which were inserted into the text of the Convention more than fifty years ago. In any event, and this seems to be the situation with regard to the death penalty, the Court may so proceed when its interpretation remains in harmony with the values and standards that have been endorsed by the member States.

5. This Court has never denied that the "living-instrument approach" may lead to a judicial imposition of new, higher standards of human rights protection. However, with respect to capital punishment, it adopted – in *Soering* – "a doctrine of pre-emption". As I have mentioned above, the Court found that, since the member States had decided to address the problem of capital punishment by way of formal amendments to the Convention, this matter became the "preserve" of the States and the Court was prevented from applying its living-instrument doctrine.

I am not sure whether such an interpretation was correct in *Soering* or applicable to the present judgment.

The judgment in *Soering* was based on the fact that, although Protocol No. 6 had provided for the abolition of the death penalty, several member States had yet to ratify it in 1989. Thus, it would have been premature for the Court to take any general position as to the compatibility of capital punishment with the Convention. Now, the majority raises basically the same argument with respect to Protocol No. 13, which, it is true, remains in the process of ratification.

But this may only demonstrate a hesitation on the part of certain member States over the best moment to irrevocably abolish the death penalty. At the same time, it can no longer be disputed that – on the European level – there is a consensus as to the inhuman nature of the death penalty. Therefore, the fact that governments and politicians are preparing a formal amendment to the Convention may be understood more as a signal that capital punishment should no longer exist than as a decision pre-empting the Court from acting on its own initiative.

That is why I am not convinced by the majority's replication of the *Soering* approach. I do not think that there are any legal obstacles to this Court taking a decision with respect to the nature of capital punishment.

6. Such a decision would have universal applicability; in particular, it would prohibit any imposition of the death penalty, not only in times of peace but also in wartime or other warlike situations. But it should not stop the Court from taking this decision today. It may be true that the history of Europe demonstrates that there have been wars, like the Second World War, during which (or after which) there was justification for capital punishment. I do not think, however, that the present interpretation of the Convention should provide for such exceptions: it would be rather naïve to believe that, if a war of a similar magnitude were to break out again, the Convention as a whole would be able to survive, even if concessions were made with regard to the interpretation of capital punishment. On the other hand, if there is a war or armed conflict of a local dimension only – and this has been the experience of the last five decades in Europe – the international community could and should insist on respect for basic values of humanity, *inter alia*, on the prohibition of capital punishment. The same reasoning should apply to other "wars", like – in particular – the "war on terror", in which there is today no place for capital punishment (see Article X § 2 of the Committee of Ministers of the Council of Europe's "Guidelines on human rights and the fight against terrorism" issued on 11 July 2002).

Furthermore, it is notable that, as the Statute of the recently established International Criminal Court shows, the international community is of the opinion that even the most dreadful crimes can be dealt with without resorting to capital punishment.

7. In the last fifteen years, several Constitutional Courts in Europe have been invited to take a position on capital punishment. The courts of Hungary, Lithuania, Albania and Ukraine had no hesitation in decreeing that capital punishment was no longer permitted under the Constitutions of their respective countries, even if this was not clearly stated in the written text of those documents. The Constitutional Courts have, nevertheless, adopted the position that the inability of the political branches of government to take a clear decision on the matter should not impede the judicial branch from doing so. A similar approach was taken by the Constitutional Court of South Africa.