

BOFAXE

Trump's Deadly Legacy?

WHAT A NEW US RULE COULD MEAN FOR GLOBAL EFFORTS TO ABOLISH THE DEATH PENALTY

— As lethal injection drugs are more and more difficult to obtain in the United States, the Department of Justice (DOJ) released an [amendment](#) to the federal execution protocols on November 27 that no longer limits execution methods to lethal injection but expands them to allow for electrocution, death by firing squad and asphyxiation with nitrogen gas. These manners' compatibility with international human rights law (IHRL) is questionable. The new rule came into effect on December 24, which is remarkably cynical because the Trump-administration consists of politicians who allege to be conservative Christians. The willingness to expand death penalty practice is also shown by the fact that – if all five executions are carried out as planned – the Trump-administration [will have executed](#) the most federal inmates during a presidential transition since 1884. Two of the executions already took place in December 2020 and the rest of them are [planned](#) for the week just before the inauguration of President-elect Joe Biden on January 20.

After giving a brief overview of the status of the death penalty in international law, this post will discuss why the new rule by the DOJ violates Art. 6 and 7 of the [ICCPR](#) and is a potential setback for global efforts to abolish capital punishment.

International law and death penalty

While the death penalty *per se* is explicitly permitted under Article 6 (2) ICCPR, it finds strict boundaries within that same provision and is subject to the other provisions of the Covenant, most importantly the prohibition of torture and inhuman and degrading treatment, Article 7 ICCPR. Even further, Article 6 (6) emphasizes that no provision in the covenant must ever be understood as an impediment to the abolition of capital punishment. In line with this, in 1989, the [second Optional Protocol](#) to the ICCPR was adopted, prohibiting all forms of the death penalty for all ratifying parties. To this day, the protocol was [ratified](#) by 88 states, with the US not being one of them.

Similar developments towards the condemnation of the death penalty can be noted in some of the regional human rights systems: The European Convention on Human Rights (ECHR) explicitly forbids capital punishment in its Protocols [No. 6](#) (abolition of death penalty during peacetime) and [13](#) (complete abolition of death penalty), which were ratified by all but three member states of the Council of Europe and entered into force in 1985 and 2003 respectively. As a consequence of this development, the European Court of Human Rights stated in 2010 that although the wording of Article 2 (1) of the ECHR allows capital punishment just like Article 6 (2) ICCPR, it has been amended by customary law to “prohibit the death penalty in all circumstances” (see [Al-Saadoon and Mufdhi v. the United Kingdom](#), para 120). The American Convention on Human Rights (which the US is not a party to) has introduced a comparable Protocol regarding the abolition of the death penalty while the African Commission on Human and Peoples' Rights [referred](#) the Member States of the African Convention to the already existing ICCPR Protocol for the abolition of the death penalty. The [Arab Charter on Human Rights](#) in its Articles 10-12 imposes restrictions similar to those in Article 6 (2) ICCPR. However, it remains silent on the abolition of capital punishment and there are no protocols.

While the different systems vary in rigidity of their stances towards the death penalty, there is a general tendency towards condemning capital punishments in human rights systems around the world. From 1991 to 2017 alone, 58 states have [abolished](#) the death penalty. According to Amnesty International, 142 countries have [abolished](#) the death penalty in law or in practice. Consequently, the Human Rights Committee (HRC) even assumed that “considerable progress” has been made towards a customary agreement that the death penalty constitutes “a cruel, inhuman or degrading form of punishment” in its General Comment 36 on the right to life of 2018 (see [para. 51](#)).

Thus, it becomes clear that there is a global effort by several International Human Rights Bodies and Courts to abolish the death penalty.

Against this backdrop, there are two problems with the new rule introduced by the DOJ. Firstly, it violates the ICCPR's rules by re-introducing methods of execution that are incompatible with IHRL. Secondly, at a time when more and more populist governments have been trying to instrumentalize the death penalty for political advantage, the rule could deal a considerable blow to the global development towards the abolishment of the death penalty.

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— The incompatibility of the DOJ's new regulation with IHRL

Although permitted by Article 6 (2) ICCPR, the death penalty finds strict limits in Article 7 ICCPR which prohibits 'cruel, inhuman or degrading treatment or punishment'. If an execution violates Art. 7 ICCPR, this "would inevitably render the execution arbitrary in nature and thus also in violation of Art. 6" (see [para. 40, General Comment No. 36](#)). In recent years, voices around the world grew louder which argued that the death penalty *per se* constitutes a cruel punishment (e.g. see [here](#), [here](#) and [here](#)), although this view is not universally accepted. However, the manners of execution now authorised in the US do not comply with the criteria set out by the HRC. When a state applies the death penalty, it must, *inter alia*, be "carried out in such a way as to cause the least possible physical and mental suffering" (see [para. 6, General Comment No. 20](#)). It is already doubtful whether the US met these standards with regard to lethal injections. After the [refusal](#) of pharmaceutical companies to provide drugs for executions, there have been several reports about executions where untested drug cocktails led to complications that caused excruciating agony for the inmates (see [here](#), [here](#) and [here](#)). The execution of [Joseph Wood](#) in Arizona for example took almost two hours of painful gasps for breath and [Clayton Lockett's](#) suffering from an 'exploding' vein during his execution only came to an end as he died from a heart attack after 43 minutes.

The alternative manners approved by the DOJ cannot be classified as more humane. In fact, in its General Comment 36, the HRC already deemed untested drug cocktails and execution by gas asphyxiation as cruel punishments as they may cause prolonged suffering and do not result in death as swiftly as possible (see [para. 40, General Comment No. 36](#)). The same arguments apply to executions by electric chair and firing squads. There are for example several [reports](#) from executions using the electric chair where the inmates were spewing blood and their heads were catching fire.

The DOJ's new regulation is a setback for the growing global consensus

With its new regulations effective on December 24, the US are – figuratively speaking – taking two steps back from the global development described above while already being one behind. While doubts have been growing amongst the international community as to whether even the 'most humane' form of execution is consistent with human rights as such and several bodies of the United Nations have repeatedly [called](#) for a moratorium, the Trump-administration has [reintroduced federal execution](#) after a seventeen-year long hiatus in July 2019 and now permits the use of long obsolete methods. What does this mean for the global efforts to abolish the death penalty?

One might argue that a violation of the ICCPR as the one committed by the US does not necessarily need to have a negative impact on the overall compliance with human rights. In fact, it could lead to a bolstering of the international efforts to abolish the death penalty if it prompted backlash by the international community, urging the US to meet its human rights obligations. When Viktor Orbán in 2015 stated he wanted the death penalty to be "[put on the agenda in Hungary](#)", his suggestion was sharply rejected by European politicians who argued that a reintroduction of capital punishment was "[non-negotiable](#)" and even thought about excluding Orbán's Fidesz party from the European People's Party. Arguably, this has led to a reinforcement of the condemnation of the death penalty in the European Union and if the international community would react similarly, the US' move might bolster such a condemnation on the global level too.

However, the international community is not the European Union and comparable reactions did not occur in recent weeks. Unfortunately, it is thus more likely that the violation by the US will weaken global efforts to abolish capital punishment.

In the words of first US President George Washington, "[e]xample, whether it be good or bad, has a powerful influence". And indeed, in the past, leaders of populist autocratic regimes such as Turkish President [Recep Tayyip Erdoğan](#) and Philippine President [Rodrigo Duterte](#) have used the continued application of the death penalty in the US as an example to follow. They even used it as justification for trying to reintroduce the death penalty into their respective states, going as far as trying to [pressure other states](#) into executing certain convicts.

In the future, the acts of the Trump administration may therefore provide additional arguments and legitimacy for populist governments seeking to legalize the death penalty once again with comparably cruel methods of execution. These possible developments would make it harder for other (international) courts to follow the [European Court of Human Rights](#) and acknowledge customary law as prohibiting the death penalty altogether.

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