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Contribution of the Council of Europe

The abolition of capital punishment

Europe continues towards a continent-wide ban on the death penalty. As of 1 September 2006, Protocol No. 6 to the European Convention on Human Rights (ECHR), which outlaws the death penalty in times of peace, has been ratified by 45 of the 46 Council of Europe member States and signed by the one remaining state, Russia. To illustrate the increasing acceptance of abolition, the Council of Europe has published a brochure "The Council of Europe and the death penalty: death is not justice", which aims to provide a succinct overview about abolition, with a question and answer section on issues pertaining to the death penalty as well as a country survey of Council of Europe member States, applicant States and observer States. This brochure was updated in March 2004.

The seriousness that is now attached to the abolition of the death penalty is one of the major achievements of the international community in the 50 years of its existence, and the Council of Europe has been a pioneer in this process. Firstly, it laid down the first ever binding legal instrument on the death penalty – Protocol No 6 to the ECHR. Secondly, it has exerted political and other pressure to ensure that countries which keep the death penalty on the statute books observe a moratorium on executions. Thirdly, it has insisted that countries move towards abolition of the death penalty and ratification of Protocol No 6 of the ECHR within a fixed time scale. Today, this is one of the core commitments that membership of the Council of Europe implies, and it is relevant for candidate States, as well as member States – both new and old. In addition the Council of Europe adopted, in 2002, Protocol No. 13 to the ECHR, concerning the abolition of the death penalty in all circumstances. The Protocol was opened for signature to member States that are signatories to the ECHR in Vilnius, 2-3 May 2002 and entered into force on 1 July 2003. It has, to date, been ratified by 36 member States and signed by a further 8. The purpose of the Protocol is to abolish the death penalty also in time of war, prohibiting derogations from the Protocol. This process within the Council of Europe is irreversible, thanks to the various legal and political mechanisms which have been put into place, and abolition of the death penalty remains a central political objective of the Council of Europe, and a core value of the Organisation.

The Role of the Parliamentary Assembly of the Council of Europe

The Parliamentary Assembly of the Council of Europe has been a driving force in the movement to abolish the death penalty. It was at the origin of Protocol No 6 in 1983, and the proponent of Protocol 13 banning the death penalty not only in peacetime but also in time of war – as many member States have done in recent years. The Parliamentary Assembly has

adopted successive statements to outlaw the death penalty¹, and perhaps more importantly, has constantly exerted pressure in order to encourage abolition – and insist in the meantime on moratoria in individual countries. It has done this both in the context of examining new candidatures for membership and in its procedures for monitoring the compliance of existing member States with commitments undertaken when joining the Organisation.

In May 1999, the Parliamentary Assembly adopted a Resolution on “Europe: a death penalty-free continent”² in which it states that the Parliamentary Assembly is unwilling to reconsider the commitments of member States with regard to the abolition of the death penalty, and that “[On] the contrary, the Assembly will use all means at its disposal to ensure that commitments freely entered into are honoured.”

For this reason the Parliamentary Assembly was particularly vigilant in ensuring that Ukraine, for example, not only maintained the moratorium put into place upon accession to the Organisation, but fulfilled her commitment to abolish the death penalty and ratify Protocol No. 6, which she did on 4 April 2000. It also adopted the same approach with Armenia issuing repeated warnings until it ratified Protocol No. 6 on 29 September 2003. Likewise, the Assembly has closely followed developments in the Russian Federation which might undermine the de facto abolition which is currently in place. In Recommendation 1760 adopted on 28 June 2006, the Assembly recalls Resolutions 1455 (2005), 1277 (2002) and 1187 (1999) and urges the Russian authorities to immediately ratify Protocol No. 6, pointing out that “the deadline initially set for honouring this commitment passed in 1999”.

The Role of the Executive Branch of the Council of Europe

The Council of Europe has also been active on the death penalty issue at executive level. At the 2nd Summit of Heads of State and Government in 1997, the Heads of State and Government of the Council of Europe called for universal abolition and insisted on the maintenance in the meantime of existing moratoria on executions in Europe. This thinking was carried further in May 1998 (at the 102nd session of the Committee of Ministers) when the Foreign Ministers of member States « stressed their conviction that priority should be given to obtaining and maintaining a moratorium on executions, to be consolidated as soon as possible by complete abolition of the death penalty ». In addition, on 9 November 2000, at their 107th Session, the Committee of Ministers further adopted a Declaration “For a European Death Penalty-Free Area”.

In support of these convictions, the Committee of Ministers has recognised the need to sensitise public opinion on the death penalty. In its Interim Reply to Assembly Recommendation 1302, adopted at the 588th meeting of the Deputies in April 1997, the Committee of Ministers declared its support for all activities designed to raise awareness among both the public and professionals, including law enforcement officials and policy-makers, on questions such as the absence of evidence in support of the so-called « deterrent effect » of capital punishment and of the growing recognition of a contradiction between recourse to capital punishment and respect for human rights. The Committee of Ministers indicated its intention to provide assistance and advice to interested States, notably through educational and awareness-raising activities.

¹ See Resolution 1044 and Recommendation 1246 (1994), Resolution 1097 and Recommendation 1302(1996).

² Resolution 1187(1999)¹, adopted by the Standing Committee, acting on behalf of the Assembly, on 26 May 1999.

The Council of Europe Committee of Ministers has also continued, until recently, to monitor capital punishment to ensure compliance with the commitments accepted by all member States of the Council of Europe within the context of its thematic monitoring procedure. The subject continues to be considered at meetings of the Ministers' Deputies at six-month intervals "until Europe has become a de jure death penalty-free zone". Most recently, in April 2005, January 2006 and April 2006, the Committee of Ministers adopted decisions in which it called on the Russian Federation to take without delay all the necessary steps to abolish the death penalty and to ratify Protocol No. 6 to the European Convention on Human Rights.

On 11 July 2002, the Committee of Ministers of the Council of Europe adopted Guidelines on Human Rights and the Fight against Terrorism. Guideline No. XIII, paragraph 2, provides that extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant extradition if it has obtained adequate guarantees that (i) the person whose extradition has been requested will not be sentenced to death; or (ii) in the event of such a sentence being imposed, it will not be carried out. A similar provision has been included in the Amending Protocol to the 1977 European Convention for the Suppression of Terrorism, which was opened for signature on 15 May 2003.

It can also be noted that it was at the European Ministerial Conference on Human Rights (Rome, 3-4 November 2000) that it was decided to examine the proposal for a new Protocol to the ECHR, which would exclude the possibility of maintaining the death penalty in respect of acts committed in time of war or imminent threat of war. This decision culminated in Protocol No 13 to the ECHR abolishing the death penalty in all circumstances.

The European Court of Human Rights

The European Court of Human Rights has also recognised the considerable evolution with regard to the legal position of the death penalty. In the Grand Chamber judgment of 12 May 2005 in *Öçalan v. Turkey*, the Court noted that capital punishment in peacetime had come to be regarded as an unacceptable form of punishment which was no longer permissible under Article 2 of the Convention. The Court held that the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3 of the Convention.

In the *Soering v. the United Kingdom* (1989) judgment, the Court found that exposure to the "death row phenomenon" in the United States of America would result in inhuman and degrading treatment. In line with the principles laid down in this and subsequent cases, States now require firm assurances from the United States and other retentionist countries that persons to be extradited will not be sentenced to death. This principle has been followed by courts in numerous countries, also outside Europe, including Canada and South Africa.

Co-operation and outreach activities

As part of its co-operation activities a number of projects have been conducted by the Council of Europe, to raise awareness against recourse to the death penalty particularly among the media and the general public. Further, a Joint European Commission – Council of Europe Programme (03/04/2000 – 31/12/2002) to abolish the death penalty: action to foster public awareness was agreed in early 2000. The Joint Programme initially focused on Albania, the Russian Federation, Turkey and Ukraine, but was later extended to cover

Armenia, Azerbaijan, Belarus, the Federal Republic of Yugoslavia (Montenegro and Serbia) and Georgia.

In addition to countering ignorance and stimulating public debate one of the prime objectives of the Joint Programme was to ensure that governments fulfil their commitment to ratify Protocol No 6 of the European Convention on Human Rights and abolish the death penalty by law. Forty-five of the 46 member States have now done so. With regard to Russia, the only member State which has not yet done so, the Council of Europe has supported each year since 1999 at least one awareness raising activity devoted to abolition in the Russian Federation. These have included round table discussions among parliamentarians and widely known and respected public figures, representatives of the different religious communities, Constitutional Court judges, academics and journalists. All-Russia regional conferences on abolition and clemency have also been organised on an annual basis, in co-operation with the Administration of the President of the Russian Federation and which have served as fora to discuss the need to abolish the capital punishment definitively in law. Support has been provided for Russian-French and Russian-German colloquies, which have addressed the question of abolition from a comparative perspective discussing experiences in other Council of Europe member States during the process of achieving abolition, and how states have dealt with the difficulties on their way there. While such colloquies continued to meet with Council of Europe support, other co-operation activities targeting abolition slowed down during the last year following the clear position of the Russian political leadership that the moratorium on executions will be firmly maintained in the future. For as long as the jury courts system is not introduced throughout the federation (that process is expected to be completed by 2007) imposing the death penalty would remain unconstitutional in accordance with the Russian Constitutional Court's decision of February 1999. Further efforts, possibly jointly with the OSCE and the EU, would be needed to continue dialogue with Parliamentarians with a view to abolishing capital punishment in law as soon as possible. High level Council of Europe officials have taken every opportunity to systematically address the issue during meetings with Russian government authorities, high courts judges and public opinion formulators in their efforts to stimulate debate which would lead to abolition in Russia.

In Belarus, awareness activities on the abolition of the death penalty have also been conducted by the Council of Europe, since 2001. At a conference organised in April 2003, during which a book published by the Legal Initiative Organisation on Abolition of the death penalty in Belarus with the support of the Council of Europe, was presented to the public, the president of the Constitutional Court of Belarus invited Parliamentarians present to make an appeal before the Constitutional Court on the question on the constitutionality of the death penalty. Eventually, a number of Parliamentarians made this appeal and on 11 March 2004, the Constitutional Court reached the conclusion that a moratorium on executions should be established pending total abolition. The Council of Europe is planning to continue awareness-raising until death penalty is abolished in Belarus.

Efforts to Promote Universal Abolition

Parliamentary Assembly

As part of the Council of Europe's efforts towards universal abolition of the death penalty, the question of the status of the death penalty in States having Observer Status at the Council of Europe has also arisen in the Parliamentary Assembly. In practice this concerns

the USA and Japan, as the death penalty is not applied in the three other observer States – Canada, Mexico and the Holy See.

In the follow-up to fact-finding missions undertaken by Council of Europe delegations to Japan and the United States, the Council of Europe's Parliamentary Assembly adopted, in 2001, Resolution 1253(2001)³ calling on Japan and the United States, inter alia, to institute a moratorium on executions and to take the necessary steps to abolish the death penalty as well as to improve conditions on "death row" immediately. The Parliamentary Assembly decided to call into question the continuing observer status of the two States should no significant progress in the implementation of that resolution be made by 1 January 2003. In Recommendation 1522(2001), it asked the Committee of Ministers to initiate a dialogue with Japan and the United States on the Assembly's requirements.

The Committee on Legal Affairs and Human Rights organised three seminars in Tokyo in 2002, and in Springfield (Illinois) and Washington DC in 2003 on the issue.

Two years after the adoption of its first resolution and recommendation on the abolition of the death penalty in Council of Europe observer States, the Parliamentary Assembly reaffirmed its complete opposition to capital punishment by adopting, on 1 October 2003, Resolution 1349⁴, in which it found Japan and the United States once more in violation of their fundamental obligation to respect human rights due to their continued application of the death penalty. The Assembly thus required Japan and the United States to make more of an effort to take the necessary steps to institute a moratorium on executions with a view to abolishing the death penalty. Accordingly, the Assembly decided to step up its dialogue with members of the Japanese parliament in order to achieve rapid progress on this matter, and to pursue its efforts to establish a dialogue with the United States, regretting the absence of a transatlantic parliamentary dialogue. It resolved to debate the abolition of the death penalty in Council of Europe member and observer States again in 2005 or in 2006. In Recommendation 1627(2003), the Assembly encouraged the Committee of Ministers to intensify its dialogue on the abolition of the death penalty with the governments of the countries concerned given the difficult situation in which the Organisation finds itself because of the presence of retentionist observer states. Furthermore, in Recommendation 1760 (2006), the Assembly recommends that the Committee of Ministers urges Japan and the United States "to abolish the death penalty as soon as possible".

Most recently, the Assembly, while considering the situation in the Middle East, decided in Resolution 1452 (2005) "to enter into a dialogue with the Palestinian Legislative Council, in order to support legislators in their endeavours to reinstitute a moratorium on executions and abolish the death penalty, and to engage the opponents of abolition in an informed debate" and "to offer its support and expertise to the Palestinian Legislative Council with a view to introducing a moratorium on executions and abolishing the death penalty, and to engaging the opponents of abolition in an informed debate".

Committee of Ministers

In this respect it should be noted that in July 1999, the Committee of Ministers approved the criteria for granting Observer Status with the Council of Europe in future. These include a

³ Doc. 9115, Abolition of the death penalty in Council of Europe observer states

⁴ Doc. 9908, Abolition of the death penalty in Council of Europe observer states

possible additional requirement that such States should “share Council of Europe values, as reaffirmed in the Final Declaration of the Strasbourg Summit” of October 1997. It may be noted in this respect that in the Summit Declaration, the Heads of State and Government of the Council of Europe called for the universal abolition of the death penalty.

More recently, in its reply to Parliamentary Recommendation 1627(2003) concerning the abolition of the death penalty in Council of Europe Observer States, the Committee of Ministers requested its Chairman to transmit the above-mentioned Resolution 1349 (2003) of the Parliamentary Assembly to the authorities of the observer States which still retain the death penalty and in so doing, to reiterate the Committee’s readiness to intensify dialogue with these States on this vital issue.

In May 2004, and in October 2004 respectively, the Committee of Ministers also decided to submit, on behalf of the Council of Europe, Statements of Interest in support of two “amicus curiae briefs” prepared by the European Union. The first, in May 2004, was for the case of Christopher Simmons (*Roper v. Simmons*), concerning the application of the death penalty in the United States against persons who were below 18 years of age at the time of the offence. This led to the significant decision of the Supreme Court of the United States, on 1 March 2004 when it held that death was a disproportionate punishment for under-age criminals and declared unconstitutional the sentencing to death of persons who had been under the age of 18 at the time of commission of the offences for which they were on trial, in pursuance of the 8th Amendment prohibiting cruel and inhuman treatment.

The second amicus curiae brief, of October 2004, was for the case of Jose Medellin and concerns the right of detained foreign nationals to be informed of the right to consular access (Art 36 of the Vienna Convention on Consular Relations). Proceedings are still underway before the US Courts.

Secretary General

In view of the Council of Europe’s principled position on the death penalty and its commitment to universal abolition, the Secretary General decided, in September 2000, on a policy to intervene in selected individual death penalty cases, in particular in those observer States to the Organisation which still have recourse to executions, since they are “deemed to share the same fundamental values and principles” as the Council of Europe. These interventions refer to the need to respect international human rights law, including relevant UN Human Rights Commission Resolutions, the most recent being Resolution 2005/59. So far this practice has led to interventions which concerned persons who were below the age of eighteen at the time of committing the crime, mentally retarded persons or “persons suffering from any form of mental disorder”. To date, the Secretary General has intervened in over 40 individual cases.