



## **Explanatory Report to the Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty**

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I. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, drawn up within the Council of Europe by the Steering Committee for Human Rights and adopted by the Committee of Ministers, was opened for signature by the member States of the Council of Europe on 28 April 1983.

II. The text of the explanatory report prepared by the Steering Committee for Human Rights and submitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Protocol, although it might be of such a nature as to facilitate the understanding of the provisions contained therein.

### **Introduction**

On 25 September 1981, at the 337th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe gave the Steering Committee for Human Rights the following terms of reference:

"To prepare a draft additional protocol to the European Convention on Human Rights abolishing the death penalty in peacetime."

That decision marks the culmination of a long movement towards the abolition of the death penalty in the member States of the Council of Europe.

The European Committee on Crime Problems, for instance, included "the problem of capital punishment in the States of Europe" in the work programme it drew up at the time of its creation in 1957.

The Parliamentary Assembly has, for its part, dealt with this question on several occasions, the most recent being in 1979 when its Legal Affairs Committee appointed Mr Lidbom (Social Democrat, Sweden) Rapporteur. On the basis of Mr Lidbom's report (Doc. 4509), the Assembly adopted two texts on 22 April 1980 during its 32nd Session. In Resolution 727 it "appeals to the parliaments of those member States of the Council of Europe, which have retained capital punishment for crimes committed in times of peace, to abolish it from their penal systems", while in Recommendation 891 it recommended that the Committee of Ministers "amend Article 2 of the European Convention on Human Rights to bring it into line with Resolution 727".

At the same time, the European Ministers for Justice dealt with this problem at the instigation of Mr Broda, the Austrian Minister for Justice. At their 11th Conference (Copenhagen, 21-22 June 1978), they recommended that the Committee of Ministers of the Council of Europe "refer questions concerning the death penalty to the appropriate Council of Europe bodies for study as part of the Council's work programme". At their 12th Conference (Luxembourg, 20-21 May 1980), they considered that "Article 2 of the European Convention on Human Rights does not adequately reflect the situation actually attained in regard to the death penalty in Europe" and went on to recommend the Committee of Ministers to study the possibilities for the elaboration of new and appropriate European standards concerning the abolition of the death penalty

Finally, at an informal meeting at Montreux on 10 September 1981, the conference "expressed a great interest in every national legislative action aimed at abolishing capital punishment and in the efforts undertaken in the same sense at international level, notably within the Council of Europe".

Once it had been finalised by the Steering Committee for Human Rights, the draft protocol was transmitted to the Committee of Ministers which adopted the text at the 354th meeting of the Ministers' Deputies (6-10 December 1982) and opened it for signature by the member States of the Council of Europe on 28 April 1983.

## **Commentary on the provisions of the Protocol**

### **Article 1**

This article, which should be read in conjunction with Article 2, affirms the principle of the abolition of the death penalty. Subject to the situations envisaged in Article 2, a State must, where appropriate, delete this penalty from its law in order to become a Party to the Protocol. The second sentence of this article aims to underline the fact that the right guaranteed is a subjective right of the individual.

### **Article 2**

This article clarifies the scope of the Protocol by limiting the obligation to abolish the death penalty to peacetime. A State can in fact become a Party to the Protocol even if its law (present or future) makes provision for the death penalty in respect of acts committed in time of war or of imminent threat of war. It is however specified that, where this is so, the death penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. Furthermore, a state whose law makes provision for the death penalty in such cases must communicate the relevant provisions to the Secretary General of the Council of Europe. It is clear that any declaration made under this article may be withdrawn or modified by notification to the Secretary General.

### **Article 3**

Article 15 of the European Convention on Human Rights authorises the Contracting Parties, "in time of war or other public emergency threatening the life of the nation", to take measures derogating from its obligations under the Convention. The solution adopted for this Protocol is more restrictive: Article 3 of the Protocol specifies that no derogation may be made under Article 15 of the Convention.

### **Article 4**

This article specifies, as an exception to Article 64 of the Convention, that States may not make a reservation in respect of the Protocol.

### **Article 5**

This is the territorial application clause contained in the Model Final Clauses adopted by the Committee of Ministers in February 1980.

### **Article 6**

This article corresponds to Article 5 of the first Protocol to the European Convention on Human Rights and to Article 6, paragraph 1, of Protocol No. 4. Its purpose is to define the relationship between the present Protocol and the Convention and states that all the latter's provisions will apply to Articles 1 and 5 of the Protocol. This of course includes the protection machinery established by the Convention. The Protocol's silence on this point means in fact that, as with the first protocol, any declarations which states have already made or may make in the future under Article 25 (individual petition) or Article 46 (compulsory jurisdiction of the Court) of the Convention will be effective with regard to the provisions of this Protocol.

Article 6 emphasises that the Protocol is "additional" and does not, as far as the Parties to the Protocol are concerned, supersede Article 2 of the Convention, since the first sentence of paragraph 1 and the whole of paragraph 2 of that article still remain valid, even for those states. The second sentence of paragraph 1 remains applicable for those states which retain the death penalty for acts committed in time of war or of imminent threat of war, in particular as regards the requirement that the sentence must be pronounced by a court.

### **Articles 7 to 9**

These provisions correspond to the wording of the Model Final Clauses adopted by the Committee of Ministers of the Council of Europe.