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from: Political and Security Committee
to: Permanent Representatives Committee/ Council

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Subject: EU Guidelines on Death Penalty
COMMON GUIDELINES
Consultation deadline: 16.4.2013

1. The Working Group on Human Rights (COHOM) established, on 2 April 2013, the revised draft "EU Guidelines on Death Penalty", as set out in the Annex.
2. On 12 April 2013, the Political and Security Committee endorsed the above-mentioned draft text.
3. COREPER is therefore invited to approve the draft EU Guidelines on Death Penalty and submit them to the Council for adoption.

EU GUIDELINES ON DEATH PENALTY**I. INTRODUCTION**

- i. The European Union has a strong and unequivocal opposition to the death penalty in all times and in all circumstances.¹ Therefore, and encouraged by the growing momentum towards abolition of the death penalty worldwide, the EU will continue its long-standing campaign against the death penalty.²
- ii. The United Nations, *inter alia* in the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC) and in the ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, has established strict conditions under which the death penalty may be used by those Member States which have not yet abolished it³. The Second Optional Protocol to the ICCPR commits each State Party to take all necessary measures to permanently abolish the death penalty within its own jurisdiction.
- iii. During the 62nd, 63rd, 65th and 67th sessions of the United Nations General Assembly, the Plenary of the General Assembly adopted, with increasing majorities, Third Committee resolutions on a Moratorium on the use of the death penalty (62/149, 63/168, 65/206 and 67/176). The European Union actively participated in the cross-regional alliance which successfully led and guided these initiatives through the General Assembly and all EU Member States co-sponsored these initiatives. In these resolutions, the General Assembly calls upon all States that still maintain the death penalty to:

1 EU/Council of Europe Joint Declaration on World Day Against the Death Penalty 10 October 2012.

2 EU Strategic Framework and Action Plan on Human Rights and Democracy, Luxembourg, 25 June 2012, 11855/12.

3 Clear distinction made by the Human Rights Committee in *Judge v Canada* Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

- Respect international standards that provide safeguards guaranteeing the protection of the rights of those facing the death penalty, in particular the minimum standards⁴;
- Make available relevant information with regard to their use of the death penalty which can contribute to possible informed and transparent national and international debates;
- Progressively restrict the use of death penalty and not to impose capital punishment for offences committed by persons below eighteen years of age and on pregnant women;
- Reduce the number of offences for which the death penalty may be imposed;
- Establish a moratorium on executions with a view to abolishing the death penalty.⁵

These General Assembly resolutions also call upon States which have abolished the death penalty not to reintroduce it and encourage them to share their information in this regard.⁶

The UNGA 67 Resolution also calls upon States that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.

These General Assembly resolutions are in line with the resolutions on the death penalty as adopted by the Commission on Human Rights in all consecutive sessions, the last being resolution 2005/59.

The EU supports the call that all United Nations agencies, intergovernmental regional bodies and NGOs should continue to support States in abolishing the death penalty through their advocacy, monitoring and technical cooperation activities⁷.

⁴ United Nations Economic and Social Council Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, ECOSOC Res. 1996/15, UN Doc E/CN.15/1996/15 (1996).

⁵ UNGA RES 67/176.

⁶ UNGA RES 67/176.

⁷ UN Secretary General Report, A/HRC/18/20, para 61, 4 July 2011.

In this context, the EU will continue working closely with civil society and support its essential role of reporting, raising awareness and calling for action

The EU also notes important actions being undertaken by other stakeholders including the International Commission Against the Death Penalty as well as initiatives by Parliaments.

- iv. At the October 1997 Council of Europe Summit, Heads of Government, including all EU Member States, called for universal abolition of the death penalty. Moreover, new states to the Council of Europe have committed themselves to moratoria and to ratify the 6th Protocol of the European Convention on Human Rights (ECHR) committing them to permanent abolition. The 6th Protocol has been ratified by all EU Member States. The 13th Protocol of the ECHR, which has been signed by all EU Member States and entered into force on 1 July 2003, commits the member states concerned to permanent abolition of the death penalty in all circumstances.

The Committee of Ministers of the Council of Europe decided in September 2007 to declare a “European Day against the Death Penalty” which is to be marked each year on 10 October to coincide with the World Day Against the Death Penalty. In December 2007, this European Day was also declared by the European Union.

- v. Article 2 of the EU Charter of Fundamental Rights, which became legally binding by virtue of the Treaty of Lisbon on 1 December 2009, provides that no one shall be condemned to the death penalty, or executed. Its Article 3 states that everyone has the right to respect for his or her physical and mental integrity. Its Article 4 prohibits torture, inhuman or degrading treatment or punishment and Article 19(2) states that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.⁸

⁸ Article 19(2) is implemented in practice by the inclusion of clauses allowing for the refusal of cooperation in agreements between the EU and third countries on cooperation in criminal matters. Examples include the agreement between the EU and the USA on extradition, 25 June 2003 (article 13 refuses extradition in case of risk of death penalty); Agreement between the EU and the USA on mutual legal assistance in criminal matters, 14 July 2004.; and Agreement between the EU and Japan on mutual legal assistance on Criminal matters, 30 November 2009 (art. 11)

All European Union Member States are fully committed to these provisions and implement them in practice. Abolition is also a precondition for candidate countries seeking accession to the EU.

- vi. In the Organisation for Security and Cooperation in Europe (OSCE), participating States are committed under the Copenhagen document to exchange information on the abolition of the death penalty and to make this available to the public. The EU fulfils this by regular statements within the OSCE's Human Dimension framework. In 2009 and 2010, the OSCE adopted resolutions on the death penalty⁹.
- vii. The Rome Statute of the International Criminal Court as well as the statutes of the other ad hoc international and hybrid criminal tribunals,¹⁰ all of which the EU supported, contain no provision imposing the death penalty, notwithstanding the fact that they were set up to deal with mass violations of humanitarian law including genocide.
- viii. The EU monitors closely and encourages measures and initiatives taken by other regional organisations inter alia the African Union and the Organisation of American States, who work towards the abolition of the death penalty.
- ix. The EU will keep these Guidelines under regular review and would envisage conducting such a review every three years, if necessary.

⁹ Resolution on a moratorium on the death penalty and towards its abolition, adopted by the General Committee on Democracy, Human Rights and Humanitarian Questions of the OSCE Parliamentary Assembly in Vilnius at the Eighteenth Annual Session on 1 July 2009 and Resolution on the Death Penalty adopted by the General Committee on Democracy, Human Rights and Humanitarian Questions of the OSCE Parliamentary Assembly in Oslo at the Nineteenth Annual Session on 6 July 2010.

¹⁰ ICTY, ICTR, SCSL, STL, ECCC.

II. OPERATIONAL PAPER

The EU considers that the death penalty constitutes serious violation of human rights and human dignity. Encouraged by the growing momentum towards abolition of the death penalty worldwide, the EU will continue its long-standing campaign against the death penalty.¹¹

The abolition of capital punishment contributes to the progressive development of human rights. Capital punishment is inhumane and unnecessary. No compelling evidence exists to show that the death penalty serves as a deterrent to crime. Furthermore, any miscarriage of justice could lead to the intentional killing of an innocent person by state authorities.

The objectives of the European Union are:

- To work towards universal abolition of the death penalty as a strongly held policy agreed by all EU Member States
- Where the death penalty still exists, the EU will,
 - o Advocate the immediate establishment of a moratorium on the use of the death penalty with a view to abolition.
 - o call for its use to be progressively restricted, including by reductions in the number of offences for which the death penalty will be implemented,
 - o advocate that it be applied respecting the minimum standards as set out in these Guidelines
 - o seek accurate information about the use of the death penalty including the offence it is used for, the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the minimum standards are incorporated in national law;
 - o where appropriate, seek disaggregated data on the nationality, sex, age, racial or ethnic origin, religion or belief, sexual orientation and other status, including disability, of persons executed or facing the death penalty.

¹¹ Language of the EU Strategic Framework Framework and Action Plan on Human Rights and Democracy Luxembourg, 25 June 2012, 11855/12.

These objectives form an integral part of the EU's human rights policy and many are explicitly defined actions under the EU's Action Plan for Human Rights and Democracy.¹²

In 2005 the EU, exercising its trade policy powers, adopted a Regulation prohibiting trade in goods which have no practical use other than for the purpose of capital punishment or for torture and ill-treatment as well as the supply of technical assistance related to such goods. The Regulation also makes provision for export controls on certain goods which could be used for such purposes. Responding to developments as regards capital punishment, the list of controlled goods was amended in December 2011. As a result, export controls are now applied to short and intermediate acting barbiturate anaesthetic agents, which could be used for the execution of human beings by means of lethal injection. Furthermore, the Regulation is being reviewed to assess whether additional measures might be necessary to ensure that EU economic operators refrain from trade which either promotes or otherwise facilitates capital punishment in foreign countries.

The European Union will continue to intensify its initiatives, including declarations or demarches on the death penalty, in international fora and towards other countries, in the light of the attached Minimum Standards Paper.

The European Union will consider, case by case, and on the basis of relevant criteria, whether to make demarches *i.e.* to privately make formal diplomatic representations of the EU's official position, or to make public statements addressed to other countries on the use of the death penalty.

The main elements of the EU approach will be as follows:

¹² EU Strategic Framework and Action Plan on Human Rights and Democracy, Luxembourg, 25 June 2012, 11855/12.

GENERAL DEMARCHES

Where relevant, the European Union will raise the issue of the death penalty in its dialogues and consultations with third countries. Elements in these contacts will include:

- The EU's call for universal abolition of the death penalty, or at least for a moratorium with a view to abolition.
- Where its use is maintained, the EU will emphasise that states should only use the death penalty in line with the minimum standards as set out in the attached paper, based on the provisions contained in international human rights law and other international standards, and they should maintain maximum transparency, including through publishing accurate information about the death penalty and its use.

The precise nature of such approaches will take into consideration, *inter alia*:

- Whether the country has an independent and efficient judicial system guaranteeing a fair trial to any accused person;
- Whether the country has made international undertakings not to use the death penalty ;
- Whether the legal system of the country, and its use of the death penalty, is closed to public and international scrutiny;
- And whether there are indications that the death penalty is widely used in contravention of the minimum standards.

Particular consideration will be given to making EU demarches on the use of the death penalty at times at which a country's policy on the death penalty is in flux, e.g., where an official or *de facto* moratorium on the death penalty is to be ended, or where the death penalty is to be reintroduced or expanded through legislation.

Particular consideration will be given to reports and findings by relevant international human rights mechanisms.

A demarche or public statement should be made where countries take steps towards abolition of the death penalty.

INDIVIDUAL CASES

In addition, where the European Union becomes aware of individual death penalty cases, in particular those which violate the minimum standards, the EU will consider making specific demarches. Actions will be considered on a case by case basis and interventions in legal proceedings (as *amicus curiae*, or otherwise) may be considered where appropriate and legally permissible.

Speed will often be essential in these cases. Member States proposing such demarches should therefore provide as much background as possible drawing on all available sources. This should include brief details of the alleged crime, criminal proceedings, the precise nature of the violation of the minimum standards, the status of any appeal and, if known, the expected date of execution.

Where there is sufficient time consideration should be given to seeking, from Heads of Mission, detailed information and advice on the case prior to demarches being made.

The present guidelines may productively be read in conjunction with the other EU Human Rights Guidelines, in particular the Guidelines to EU Policy towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the EU Guidelines on Human Rights Defenders.

HUMAN RIGHTS REPORTING

EU Heads of Mission should include an analysis of the application and use of the death penalty and the effect of EU action in this respect in their human rights reporting, including in the human rights strategies.

POSSIBLE RESULTS OF EU INTERVENTIONS: OTHER INITIATIVES

The EU will encourage countries to accede to, or ratify, the Second Optional Protocol to the ICCPR and comparable regional instruments. It will also support the development of such regional instruments where they do not exist.

In pursuit of its aim of abolition, the EU will also:

- Encourage states to ratify, without reservations, and comply with International instruments on the use of the death penalty, including the ICCPR;
- Encourage and offer bilateral and multilateral cooperation, inter alia in collaboration with civil society, including in the legal field with the aim to enhance the right to a fair and impartial trial for criminal cases and to create greater transparency around the use of the death penalty.
- Through the European Instrument for Democracy and Human Rights (EIDHR) the EU will continue to support civil society in its actions promoting the abolition, the establishment of moratoria and restrictions on the use of the death penalty. The EU remains the main donor in this area.
- Ensure that the actions, such as legal, financial or other technical assistance to third countries do not contribute to the use of the death penalty.

ACTION IN MULTILATERAL FORA

The EU will raise the issue of the death penalty in relevant multilateral fora and seize all appropriate opportunities to put before them initiatives aimed at introducing a moratorium on the use of the death penalty and, in due course, abolition. Whenever appropriate, the EU will seek to include references to the establishment of a moratorium on executions and the abolition of the death penalty in documents produced under the proceedings of these multilateral fora. This includes appropriate recommendations by Member States as part of the Universal Periodic Review Process (UPR) of the UN Human Rights Council. The EU will also cooperate with requests from UN bodies for information on consultation reports, and will encourage its Member States to do likewise.

The EU will encourage relevant international and regional organisations to support states to take appropriate steps to comply with minimum standards relating to the death penalty, and further encourage them to ratify, without reservations, and comply with international treaties relating to the death penalty.

III. MINIMUM STANDARDS PAPER

While continuing to state its strong opposition to the death penalty and advocate for its full abolition, the EU shall insist that those countries that still maintain executions respect the following minimum standards:

- i) The death penalty must not be imposed for non-violent acts such as financial or economic crimes, or because of political offences or rivalries. It shall also not be imposed for drug-related crimes, religious practices or expression of conscience, or for sexual relations between consenting adults, it also being understood that scope should never go beyond the most serious intentional crimes.
- ii) Capital punishment must never be provided for in law as a mandatory sentence.

- iii) Capital punishment shall not be imposed for a crime for which the death penalty was not prescribed at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
- iv) Capital punishment shall not be imposed on:
Persons below 18 years of age at the time of the commission of their crime;
Pregnant women, new mothers and nursing women;
Persons suffering from any mental illness or having an intellectual disability
The elderly.
- v) Capital punishment shall not be imposed if the guilt of the person charged is not based upon clear and convincing evidence, leaving room for alternative explanation of the facts. In this respect, the use of torture to extract guilty pleas shall be strictly prohibited.
- vi) A final judgement rendered by an independent and impartial competent court after legal proceedings, including those before special tribunals or jurisdictions, which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings shall be necessary.¹³
- vii) When considering whether legal proceedings provide all possible safeguards to ensure a fair trial, due attention shall be given to whether anyone suspected of or charged with a crime for which capital punishment may be imposed has been informed of the right to contact a consular representative.¹⁴

¹³ Of particular relevance are Article 14's provisions to the effect that a person has a right to legal assistance without payment by him/her in any such case if s/he does not have sufficient means to pay for it and where necessary, the right to have the free assistance of an interpreter.

¹⁴ Vienna Convention on Consular Relations 63, article 36.1.

- viii) Military tribunals may not impose death sentences on civilians under any circumstances.¹⁵
- ix) Anyone sentenced to death shall have an effective right to appeal to a court of higher jurisdiction.
- x) Where applicable, anyone sentenced to death shall have the right to submit an Individual complaint under international or regional procedures; the death sentence will not be carried out while the complaint remains under consideration under those procedures; the death penalty will not be carried out as long as any related legal or formal procedure, at the international, regional or national level, is pending.
- xi) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases of capital punishment; the death sentence will not be carried out while such applications remain under consideration under relevant procedures in a state.
- xii) Capital punishment may not be carried out in contravention of a state's international commitments.
- xiii) Consideration shall be given to the length of time spent on death row and the conditions of imprisonment after having been sentenced to death, bearing in mind that the conditions of imprisonment of persons on death row should not be inferior to that of other inmates. These elements may constitute forms of torture or inhumane or degrading treatment or punishment¹⁶

¹⁵ UN Sub-Commission on the promotion and protection of human rights Resolution 2004/25 on the Imposition of the Death Penalty on Civilians by Military Tribunals; Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, para.80; Report of the Special Rapporteur on Extra Judicial Executions August 2012, paras.33 and 121.

¹⁶ The EU as well as the UN and the European Court of Human Rights have given legitimacy to the death row phenomenon (see the EU Guidelines on Torture and Other Cruel Treatment, the Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/279, 9 August 2012 and *Soering v UK* (1989) 11 EHRR 439).

- xiv) Where capital punishment occurs notwithstanding the EU's best efforts to prevent it, it shall only be carried out so as to inflict the minimum possible suffering. It may not be carried out in public or in any other manner intended to further degrade the person facing execution. Equally, it must not be practised in secrecy.¹⁷ The family and lawyers of prisoners on death row must be notified of details of their execution.¹⁸
- xv) The death penalty must not be applied or used in a discriminatory manner on any ground including political affiliation, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
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¹⁷ 2010 SG report to the UNGA (A/65/280): para: 72

¹⁸ The Human Rights Committee has found that the failure to notify the family and lawyers of the prisoners on death row of their execution is incompatible with articles 7 and 10, paragraph 1, of the ICCPR: Concluding observations of the Human Rights Committee: Japan, UN document CCPR/C/79/Add.102, 19 November 1998, para. 21