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The Council of Europe and its Observer States: the current situation and a way forward

Committee Opinion[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Pieter OMTZIGT, Netherlands

A. Conclusions of the committee

1. The Committee on Legal Affairs and Human Rights welcomes the report presented by the Political Affairs Committee and supports the draft resolution and draft recommendation proposed by the rapporteur, Mr David Wilshire.

2. Nevertheless, it would like to present a few amendments encouraging observer states to fully respect well-established international human rights law standards and to implement the ideals and values of the Council of Europe. In this context, the committee reiterates, *inter alia*, that the application of the death penalty in the United States of America and Japan is a violation of fundamental human rights. In addition, the committee considers that it should be more closely involved – as should also be the Political Affairs Committee – in relations with observer states.

B. Proposed amendments to the draft resolution

Amendment A (to the draft resolution)

In the draft resolution, after paragraph 8, add the following paragraph:

> *"In this respect, referring to its Resolution 1560 (2007) and Recommendations 1760 (2006), 1627 (2003) and 1533 (2001), the Assembly reiterates that the application of the death penalty is a violation of fundamental human rights. Therefore, the Assembly deeply regrets that, to date, two observer states with the Council of Europe, namely Japan and the United States, continue to have recourse to and to apply the death penalty."*

Amendment B (to the draft resolution)

In the draft resolution, delete paragraph 9.

Amendment C (to the draft resolution)

In the draft resolution, in paragraph 11, delete the last sentence.

1. See Doc. 11471, presented by the Political Affairs Committee.

Amendment D (to the draft resolution)

In the draft resolution, in paragraph 12, after the words “a clearly defined set of standards”, add: “to be elaborated by the Council of Europe Statutory Organs”.

Amendment E (to the draft resolution)

In the draft resolution, in paragraph 13, replace the words “would be a perfectly acceptable response” by: “would need to be assessed by the Assembly”.

Amendment F (to the draft resolution)

In the draft resolution, after paragraph 19, add the following new paragraph:

> *“The Assembly also reiterates its readiness to establish a constructive dialogue with the parliamentary delegations of Japan and the United States of America on important human rights and legal issues, including the abolition of the death penalty”.*

Amendment G (to the draft resolution)

In the draft resolution, in paragraph 20, replace the word “signature” by “signature and ratification”.

Amendment H (to the draft resolution)

In the draft resolution, in paragraph 22, replace the word “signatories” by “parties”.

Amendment I (to the draft resolution)

In the draft resolution, in paragraph 25, after “the Assembly therefore invites all observer states”, add the following first sub-paragraph:

> *“to fully respect well-established international human rights law standards and to implement the ideals and values of the Council of Europe, including in the fight against terrorism”.*

Amendment J (to the draft resolution)

In the draft resolution, delete paragraph 26.

Amendment K (to the draft resolution)

In the draft resolution, after sub-paragraph 27.5, add the following new sub-paragraph:

> *“to present to the Assembly an annual report on their involvement as observers”.*

Amendment L (to the draft resolution)

In the draft resolution, after sub-paragraph 27.5, add the following new paragraph:

> *“In addition, referring in particular to its Recommendation 1760 (2006), the Assembly urges Japan and the United States of America, at last, to place an immediate moratorium on executions and to abolish the death penalty as soon as possible.”*

Amendment M (to the draft resolution)

In the draft resolution, in paragraph 28, replace the words: “The Assembly invites the Political Affairs Committee (through its external relations sub-committee) to:” by the following words: “The Assembly invites its committees, in particular its Political Affairs Committee and its Committee on Legal Affairs and Human Rights, to:”.

Amendment N (to the draft resolution)

In the draft resolution, after sub-paragraph 28.3, add the following new paragraph:

> *"The Assembly also resolves to seize its Political Affairs Committee and its Committee on Legal Affairs and Human Rights for opinion to examine any future request for observer status with the Council of Europe and/or with the Assembly."*

Amendment O (to the draft resolution)

In the draft resolution, delete sub-paragraph 30.1.

Amendment P (to the draft resolution)

In the draft resolution, change the wording of sub-paragraph 30.6 as follows:

> *"to consider introducing new designations for existing parliamentary observers in line with any proposal that might be made by the Council of Europe Statutory Organs".*[2]

C. Proposed amendments to the draft recommendation

Amendment Q (to the draft recommendation)

In the draft recommendation, in paragraph 2, after the words: "The Assembly invites the Committee of Ministers", insert a new first sub-paragraph as follows:

> *"to reiterate the position of principle that states enjoying observer status shall respect fundamental human rights and shall not apply the death penalty".*

Amendment R (to the draft recommendation)

In the draft recommendation, in paragraph 2, after the words "The Assembly invites the Committee of Ministers", insert a new sub-paragraph as follows:

> *"to intensify its political dialogue with Japan and the United States, to urge both countries, at last, to place an immediate moratorium on executions and to abolish the death penalty as soon as possible, and to present to the Assembly by the end of 2008 a detailed account of its contacts with these countries".*

Amendment S (to the draft recommendation)

In the draft recommendation, in sub-paragraph 2.2, after the words "specific standards, formal commitments and a monitoring process" add the following words: ", to be elaborated by the Council of Europe Statutory Organs,".

D. Explanatory memorandum, by Mr Pieter Omtzigt

1. The observer status (with the Council of Europe and/or with the Parliamentary Assembly)

1. The core objective of the Council of Europe, as reflected, *inter alia*, in its Statute and most recently in the Final Declaration of the Warsaw Summit of Heads of State and Government of May 2005, is to preserve and promote democracy, the rule of law and human rights.

2. According to paragraph 1 of Statutory Resolution (93) 26 of the Committee of Ministers of the Council of Europe "any state willing to accept the principles of democracy, the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and wishing to co-operate with the Council of Europe may be granted by the Committee of Ministers, after consulting the Parliamentary Assembly, observer status with the Organisation".

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2. See paragraph 12 of the draft resolution and sub-paragraph 2.4 of the draft recommendation.

3. In July 1999, the Committee of Ministers laid down further criteria (see CM/Inf(99)50), in particular the obligation for these states to:

– share Council of Europe values, as reaffirmed in particular in the Final Declaration of the Strasbourg summit in October 1997 (including the principle of abolishing the death penalty);

– have a European connection;

– be willing and able to make a positive contribution to the work of the Council of Europe;

– maintain sustained contacts with the Council of Europe headquarters, preferably through a permanent office in Strasbourg.

4. To date, five states have been granted observer status with the Council of Europe, namely (in chronological order) the Holy See, the United States, Canada, Japan and Mexico.

5. In addition, in accordance with Article 60.1 of the Parliamentary Assembly Rules of Procedure, "the Assembly may, on the proposal of the Bureau, grant observer status to national parliaments of non-member states of the Council of Europe which meet the conditions set out in paragraph 1 of Committee of Ministers Statutory Resolution (93) 26 on observer status. Any requests for observer status shall be referred to the Political Affairs Committee for report and to other relevant committees for opinion".

6. To date, the parliaments of Israel, Canada and Mexico have observer status with the Council of Europe Parliamentary Assembly (see table below).

Country	Observer status with the Council of Europe (date of status)	Parliaments enjoying observer status with the Parliamentary Assembly
Israel	–	No formal arrangement (status granted on an ad hoc basis on 2 December 1957, before the Assembly officially introduced it in 1961)
The Holy See	(7 March 1970) No formal arrangement	–
United States	(10 January 1996) – CM Statutory Resolution (93) 26 – Parliamentary Assembly Recommendation 1282 (1995) – CM Resolution (95) 37	–
Canada	(3 April 1996) – CM Statutory Resolution (93) 26 – Parliamentary Assembly Opinion No. 196 (1996) – CM Resolution (96) 9	(28 May 1997) – Parliamentary Assembly Rules of Procedure – CM Statutory Resolution (93) 26 – Parliamentary Assembly Resolution 1125 (1997)
Japan	(20 November 1996) – CM Statutory Resolution (93) 26 – Parliamentary Assembly Opinion No. 194 (1996), 20 March 1996 – CM Resolution (96) 37	–
Mexico	(1 December 1999) – CM Statutory Resolution (93) 26 – the "1999 criteria" [CM/Inf (99) 50] – Parliamentary Assembly Opinion No. 214 (1999) – CM Resolution (99) 32	(4 November 1999) – Parliamentary Assembly Rules of Procedure – CM Statutory Resolution (93) 26 – Parliamentary Assembly Resolution 1203 (1999)

Pending request for observer status with the Council of Europe	Pending request for observer status with the Parliamentary Assembly
None	Parliament of Kazakhstan

7. However, the observer states/parliaments have not all been granted observer status on the basis of formal arrangements, in particular on the basis of the 1993 Statutory Resolution. In addition, as indicated by the Rapporteur of the Political Affairs Committee, they argue that the statutory resolution on observer status of 1993 contains no formal standards and commitments, and the observers are not parties to Council of Europe key human rights conventions, in particular the European Convention on Human Rights. In this respect, however, the Council of Europe Committee of Ministers, in 2006, referred to the "obligation for observer states to meet the requirements of Statutory Resolution (93) 26, the additional criteria adopted by the Committee of Ministers on 7 July 1999, and relevant international legal standards".[3]One can nevertheless question whether the criteria for the granting of observer status of July 1999 – which only applied to Mexico – can be retroactively applied to other observer states. There is obviously a need to clarify this situation (see Chapter III below).

8. I agree with the Rapporteur of the Political Affairs Committee, according to which "this should not prevent the Assembly, the Committee of Ministers or other Council of Europe bodies from continuing to question observer states and comment on matters that cause concern where there appears to be a disregard of principles which we in the Council of Europe believe to be fundamental"[4](see below).

9. That being said, I do not share the view that observers should be included – subject to their agreement – in the framework of Assembly debates on the state of human rights and democracy, as proposed by the Rapporteur of the Political Affairs Committee. Indeed, these reports should focus on and be limited to European countries. Enlarging the geographical scope of the report would dilute its content, impact and visibility and could therefore even be detrimental to the credibility of the Organisation.

10. Nevertheless, the Assembly could and should continue to hold debates, when appropriate, on relevant specific issues of concern in observer states (for example the death penalty – see below).

2. Respect for rule of law and human rights standards by observer states: overview of certain issues of concern

11. In his report, Mr Wilshire has invited the Rapporteur for opinion of the Committee on Legal Affairs and Human Rights to provide a brief overview of the observers' respect of the rule of law and human rights. Given the very tight time schedule given to me to prepare this opinion,[5]I have decided to limit this chapter to an overview of a number of major issues of concern, raised by international organisations and/or judicial bodies and/or NGOs concerning observer states, in the light of the core values and principles of the Council of Europe.

2.1. Respect for international and human rights law standards: major issues

2.1.1. The United States (observer status with the Council of Europe)

12. The United States has traditionally been and remains Europe's long-standing ally in resisting tyranny, upholding the rule of law and defending human rights. The United States, with the help of allies like Canada, helped European states to defeat tyranny and dictatorship in 1945 and once again during the Cold War. Human rights are now well established throughout Europe thanks to American interventions at crucial times in European history. The United States and Europe share common values and pursue the same goal of promoting and strengthening respect of human rights and the reinforcement of the rule of law.

13. However, in 2007, on several occasions, the Council of Europe Parliamentary Assembly considered that the American administration, in its pursuit of its so-called "war on terror", has inappropriately and unilaterally disregarded certain key human rights and humanitarian legal norms. More specifically, the Assembly pointed out that the "United States continues unlawfully to detain persons in Guantánamo and elsewhere, in flagrant breach of its international obligations", has "maintained – at least until very recently – a 'spider's web' of secret detention centres and unlawful inter-state transfer routes, often in collaboration with countries notorious for their use of torture"[6]and has "attempted to undermine the effectiveness of the

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3. See the reply from the Committee of Ministers to Parliamentary Assembly Recommendation 1760 (2006) on the position of the Assembly as regards Council of Europe member and observer states which have not abolished the death penalty, Doc. 11174, paragraph 4.
4. See Doc. 11471, paragraph 26.
5. I was appointed rapporteur on 13 December 2007, to replace the former rapporteur, Mr Cebeci (Turkey, EPP/CD).
6. See also the positive role of the Canadian authorities in the case of Maher Arar, in Parliamentary Assembly Doc. 11302.

International Criminal Court (ICC)".[7]The United States was instrumental in setting up the ICC, which ensures that the most heinous of crimes cannot be committed with impunity. It is rather unfortunate that the United States has not ratified the treaty, but has also taken steps via bilateral agreements to exempt its citizens from ever being prosecuted. Furthermore, the United States passed the American Service-Members' Protection Act, whose most contentious provision is what has been commonly referred to as the "Hague Invasion Act", reserving the right to the United States to invade The Hague to remove United States citizens detained by or on behalf of the ICC.

14. In addition, the United States has not abolished the death penalty (the issue of the death penalty is addressed in a separate chapter below).

15. In December 2007, the Council of Europe Commissioner for Human Rights[8]stressed that "the United States administration has approved interrogation methods against terrorist suspects which clearly violate the agreed standards". "That the United States administration continues to authorise interrogation methods which are prohibited makes even more alarming its refusal to put an end to the use of secret prisons where abducted persons are kept by the CIA in total isolation for special treatment" he added. "Enhanced interrogation techniques" are among the terms used by the current United States administration to describe methods of extracting information from detainees in the so-called "war on terror". They cover "waterboarding", the use of dogs and sexual humiliation. Although this term is not clearly defined, human rights organisations and human rights NGOs consider that these methods amount to torture. Last December, Mr Dick Marty, Chairperson of the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly, welcomed "the moves in the two houses of the United States Congress towards banning the CIA from using these coercive interrogation methods".[9]To date, the bill is still with the United States Congress.

2.1.2. Mexico (observer status with the Council of Europe and the Parliamentary Assembly)

16. According to NGOs, federal and state authorities should ensure that state law and practice are consistent with international human rights standards and that longstanding impunity for human rights abuses ends. Mexico should in particular focus on five key areas: international human rights standards; public security and the criminal justice system (including conditions of detention in prisons and the issue of torture and ill-treatment); accountability; human rights defenders and the rights of victims.[10]

17. In 2005, in its Resolution 1454 (2005) on the disappearance and murder of a great number of women and girls in Mexico, the Assembly established that hundreds of women and girls had been brutally murdered in the northern Mexican border state of Chihuahua since 1993.[11]Reportedly, women are still being abducted, tortured and killed despite government efforts to investigate these brutal murders. To tackle the situation, a federal law strengthening the right of women to live free from violence was passed recently. In addition, in February 2007, a Special Federal Prosecutor's Office for Crimes of Violence Against Women was established.

2.1.3. Israel (the Knesset's observer status with the Parliamentary Assembly)

18. The Parliament of Israel acquired observer status with the Parliamentary Assembly on an ad hoc basis in 1957, before the Assembly officially introduced it in 1961. It was not required to give any undertakings. In addition, the State of Israel has never requested to be granted observer status with the Council of Europe.

19. In 1954, Israel abolished the death penalty for ordinary crimes but not for exceptional crimes (such as treason during a time of war and genocide). However, since then, it was only applied once, in 1962.[12]Israel should be encouraged to abolish the death penalty for all crimes.

20. In this chapter on respect for international law, one should also mention a number of issues arising from the situation in the Middle East, in particular the Advisory Opinion of the International Court of Justice (ICJ) in the case of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.[13]The ICJ concluded, *inter alia*, that "The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are

7. See Parliamentary Assembly Resolution 1539 (2007).
8. The *International Herald Tribune*, "Speak out, Europe!" by Thomas Hammarberg, 10 December 2007, http://www.iht.com/articles/2007/12/10/opinion/edhammar.php.
9. Council of Europe press release 893(2007), 7 December 2007.
10. See, *inter alia*, http://web.amnesty.org/library/Index/ENGAMR410022007.
11. See Parliamentary Assembly Resolution 1454 (2005).
12. To the Nazi leader A. Eichmann.
13. www.icjcij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6&case=131&k=5a&lang=en.

contrary to international law". In addition, international human rights bodies as well as NGOs continue to denounce alleged violations of human rights and international humanitarian law by Israel.[14]More particularly, allegations of torture continue despite efforts to deal with this issue.[15]The country's difficult security situation and its right to self-defence are often invoked in this context.

2.2. Abolition of the death penalty in Japan and the United States

21. To date, two observer states with the Council of Europe, namely Japan and the United States, continue to have recourse to and to apply the death penalty.

22. On several occasions, the Parliamentary Assembly and its Committee on Legal Affairs and Human Rights[16]have reiterated that the application of the death penalty is a violation of fundamental human rights and that capital punishment must be totally removed once and for all from the legislation of all countries which strive to uphold democracy, the rule of law and human rights.

23. In this context, it is worth underlining that one of the major achievements of the Council of Europe, and of its Parliamentary Assembly in particular, is the de facto[17]abolition of the death penalty in peacetime in Council of Europe member states. The Assembly has tirelessly led the campaign for a death-penalty-free zone, notably by making abolition a condition of accession for new member states. As a result, no execution has taken place on the territory of the Organisation's member states since 1997. In 2007, the Council of Europe officially declared a "European Day against the Death Penalty", to be held annually on 10 October. The European Union has also agreed to associate itself with this initiative.

24. The recent adoption by the General Assembly of the United Nations of a resolution[18]calling for a worldwide moratorium on the use of the death penalty is a milestone on the path towards the abolition of the death penalty worldwide.

25. It should be noted that Mexico, where the death penalty had not been carried out since 1937, officially abolished capital punishment in 2005. I welcome this very positive step.

26. In Japan, however, executions are still taking place.[19]In addition, as already stressed by the Parliamentary Assembly,[20]the conditions in which the death penalty is carried out continue to be rigorously denounced.

27. To date in the United States, 36 of the 50 states, as well as the federal government, are still retentionist.[21]On a positive note, it should also be stressed that there seems to be an increasing trend in favour of placing moratoria on state-wide implementation of the death penalty.[22]In December 2007, the State of New Jersey abolished the death penalty. In addition, the United States Supreme Court is presently examining whether lethal injection – the means of execution in most states – violates the United States Constitution's ban on cruel and unusual punishment.

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14. See in particular resolutions and reports of UN bodies, as well as reports of Human Rights Watch and Amnesty International.
15. In particular with the landmark judgment of the Supreme Court of Israel in 1999 prohibiting a number of interrogation methods by the General Security Service.
16. See Parliamentary Assembly Resolution 1560 (2007) and Recommendations 1760 (2006), 1627 (2003) and 1533 (2001).
17. In the Russian Federation, the death penalty moratorium has been extended until 2010. However, the Russian Federation, one of the Council of Europe's member states, has still not ratified Protocol No. 6 to the European Convention on Human Rights abolishing the death penalty, despite its formal commitment to do so undertaken upon accession to the Organisation in 1996.
18. Resolution on a moratorium on the use of death penalty, A/Res/62/149, adopted on 18 December 2007.
19. See Council of Europe press release 894 (2007), 7 December 2007 and press release 911 (2007), 12 December 2007.
20. See Parliamentary Assembly Doc. 10911, "Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty", see also http://thereport.amnesty.org/document/15.
21. See http://www.amnesty.org/en/report/info/AMR51/197/2007.
22. See Parliamentary Assembly Doc. 11303, "Promotion by Council of Europe member states of an international moratorium on the death penalty."

28. The Assembly has, on several occasions, urged Japan and the United States to place an immediate moratorium on executions and to take the necessary steps to abolish the death penalty.[23]Further to its position taken in June 2006,[24]the Assembly should invite the Committee of Ministers to:

– reiterate the position of principle that states enjoying observer status shall respect fundamental human rights and not apply the death penalty;

– intensify its political dialogue with Japan and the United States to encourage both countries to at last place an immediate moratorium on executions and to urge them to abolish the death penalty as soon as possible; and

– present to the Assembly by the end of 2008 a detailed account of its contacts with these countries.

2.3. Other issues

2.3.1. Mexico (observer status with the Council of Europe and the Parliamentary Assembly)

29. The 1999 Parliamentary Assembly report on the request of observer status of Mexico with the Council of Europe addressed the issue of the conflict in Chiapas.[25]Reportedly, sporadic outbursts of politically motivated violence continue to occur in indigenous communities in the states of Chiapas, Guerrero and Oaxaca.

2.3.2. The Holy See (observer status with the Council of Europe)

30. The Holy See – the government of the "Vatican City State" – was granted observer status in 1970 prior to any formal arrangement. It was not required to give any undertakings. In addition, the Vatican's atypical institutional structure makes it a special case. Women are excluded from leading positions. Even if a number of NGOs[26]consider that the Vatican's doctrines/policies on sexual orientation and gender identity disregard fundamental rights of sexual minorities and use language that could be interpreted as intolerant in their respect, one should stress that the Holy See has expressed on several occasions its strong commitment to human rights and fundamental freedoms. It has, in particular, taken a strong position in favour of a worldwide abolition of the death penalty. It also plays an important role in the international community as a voice for peace and inter-religious tolerance.

31. Concerning the Holy See's observer status with the Council of Europe, like the Rapporteur of the Assembly's Political Affairs Committee, I fully support his opinion that the status quo should be accepted and continued.

32. Indeed, I very much welcome the fact that the Roman Catholic Church actively participates in a dialogue on human rights as an observer state.

33. To briefly conclude this chapter, the Assembly should strongly encourage observer states to fully respect well-established international human rights law standards and to implement the ideals and values of the Council of Europe, including in the fight against terrorism.

3. The necessity for additional criteria and clarification of the designation of the observer states

34. As indicated in Chapter I above, there is obviously a need to clarify which precise standards should be respected by observers. I share the view according to which observer states should have a European connection (see the 1999 criteria above). I also share the view of the Political Affairs Committee, according to which the current situation where the granting of observer status entails no formal commitments needs revision before any new application for observer status may be considered.

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23. Press release 900 (2007), 10 December 2007, http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=1981. See also Parliamentary Assembly Resolution 1560 (2007) on promotion by Council of Europe member states of an international moratorium on the death penalty", paragraph 2, and Doc. 11303.
24. See Parliamentary Assembly Recommendation 1760 (2006).
25. For details, see Parliamentary Assembly Doc. 8561.
26. In particular the International Lesbian and Gay Association (ILGA).

35. If, as proposed by the Political Affairs Committee, a clearly defined set of standards were to be attached to the general criteria set out in the statutory resolution, to which a state seeking observer status would have to commit itself, these standards should be elaborated by the Council of Europe Statutory Organs, which include the Parliamentary Assembly.[27]

36. If the approach proposed by the Political Affairs Committee were to be adopted, the unwillingness of states already enjoying observer status to accept to undertake, on a voluntary basis, to comply with a mutually agreed set of standards would, however, need to be assessed by the Assembly.

37. Finally, as proposed by the Political Affairs Committee, it might also be useful to consider clarifying the differing status of observer states by introducing new designations for existing observer states without altering their status in any way.

4. The importance of dialogue and the role of the Committee on Legal Affairs and Human Rights

38. The Assembly should invite its Political Affairs Committee, as well as its Committee on Legal Affairs and Human Rights, to take responsibility for developing the involvement of parliamentary observer delegations in all aspects of the Assembly's work. The Assembly should also reiterate its readiness to establish a constructive dialogue with parliamentary delegations of Japan and the United States on important human rights and legal issues, including the death penalty.

39. In addition, given that the ideals and values of the Council of Europe focus on democracy, the rule of law and human rights, the Assembly's Committee on Legal Affairs and Human Rights should be seized for opinion to examine any future request for observer status with the Council of Europe and/or with the Assembly.

40. The contribution of the parliamentary observers to the political debate in the Assembly is greatly appreciated and should be further encouraged.

Reporting committee: Political Affairs Committee. Committee for opinion: Committee on Legal Affairs and

Human Rights.

Reference to committee: Doc. 10626 and Reference No. 3125 of 1 September 2005.

Opinion approved by the committee on 21 January 2008.

See 6th Sitting, 23 January 2008 (adoption of the draft resolution and the draft recommendation, as amended); and Resolution 1600 and Recommendation 1827.

27. These criteria could be based, *inter alia*, on the 1999 criteria for the granting of observer status, the non-derogable rights of the European Convention on Human Rights (ECHR), and provisions provided in Protocol No. 6 of the ECHR.