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INTERNATIONAL COVENANTS ON HUMAN RIGHTS

Elaboration of a second optional protocol to the International
 Covenant on Civil and Political Rights, aiming at the abolition
 of the death penalty

Report of the Secretary-General

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ANNEX

Draft resolution A/C.3/35/L.75

I. INTRODUCTION

1. By its resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977, the General Assembly affirmed that, in order fully to guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued was that of progressively restricting the number of offences for which capital punishment might be imposed, with a view to the desirability of abolishing this punishment in all countries.
2. By its decision 35/437 of 15 December 1980, the General Assembly took note of the draft resolution entitled "Measures aiming at the ultimate abolition of capital punishment (draft Second Optional Protocol to the International Covenant on Civil and Political Rights)" (A/C.3/35/L.75) submitted by Austria, Costa Rica, the Dominican Republic, Germany, Federal Republic of, Italy, Portugal and Sweden (see annex); decided to consider at its thirty-sixth session, under the item entitled "International Covenants on Human Rights", the idea of elaborating a draft of a second optional protocol to the International Covenant on Civil and Political Rights (resolution 2200 A (XXI), annex), aiming at the abolition of the death penalty; and requested the Secretary-General to transmit the text of the draft resolution to Governments for their comments and observations and to submit a report to the Assembly at its thirty-sixth session.
3. A summary of the comments and observations received from Governments appears in section II of the present document.

II. REPLIES RECEIVED FROM GOVERNMENTS

AUSTRIA

/Original: English/
/16 August 1981/

1. It will be recalled that Austria has a long-standing tradition of supporting all endeavours aimed at the abolition of capital punishment. The Austrian Government therefore welcomes all initiatives aimed at this objective. It was in this spirit that Austria co-sponsored General Assembly decision 35/437, which is considered an important step towards the elimination of capital punishment.
2. Although the International Covenant on Civil and Political Rights guarantees the right to life to every human being requesting the protection of this right by law and attempting to discourage the use of capital punishment, there is nevertheless a need to clearly define practical measures to implement those principles.
3. In this respect the elaboration of a protocol to articles 6 and 7 of the International Covenant on Civil and Political Rights has been repeatedly suggested. Such a protocol would be in compliance with relevant resolutions adopted at the twenty-sixth and thirty-second sessions of the General Assembly which emphasized again the desirability of ultimately eliminating capital punishment. The protocol should be optional in character in order to meet the legal and other difficulties a number of Member States of the United Nations might encounter when approaching this question. The optional nature of the protocol would offer States in which capital punishment has not been abolished so far, a period of time sufficient to prepare their public opinion for the suppression of the death sentence and for adjusting their legislation to that end. Furthermore, it would give those countries that have already abolished capital punishment the opportunity to unite with such countries. Finally, a substantial number of ratifications might result in mobilizing public opinion all over the world in favour of the elimination of capital punishment. It should be stressed in this connexion that Austria would be in a position to adhere immediately to an instrument as proposed during the thirty-fifth session of the General Assembly.
4. Austria would also believe that the abolition of capital punishment should be debated at the regional level and - where practicable - within regional organizations. In that context initiatives taken within the Council of Europe have to be mentioned.
5. In addition, the Austrian Government considers that it would constitute a small initial step - perhaps decisive in the long run - towards the ultimate goal of eliminating capital punishment altogether if Member States were to refrain from the execution of death sentences in cases where national law provides for the possibility of acts of clemency and leniency. The existing national rules provided for clemency should be applied to the largest extent possible. In order to

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encourage progress towards the abolition of capital punishment and with a view to preventing detrimental developments, declarations to this effect could be made vis-à-vis the United Nations. In the realization of this proposal the United Nations could largely depend on the experience gathered with respect to the Unilateral Declarations against Torture.

6. Finally, Austria would believe that the debate on capital punishment should be continued at the forthcoming session of the General Assembly and - if necessary - also at the following one. After extensive discussion which will hopefully show the ways and means for tackling the problems involved, the issue could be transferred to United Nations bodies competent for human rights questions such as the Commission on Human Rights, which has extensive experience with difficult human rights issues. It also has subsidiary organs at its disposal which in the past have successfully carried out difficult drafting tasks assigned to them. In such a case it would be necessary to provide the Commission on Human Rights with clear instructions. Such guidance cannot be offered, however, unless clarifying and thorough debates have taken place in the General Assembly. On the other hand, it would also be conceivable that the General Assembly decides after an extensive study of the problems associated with capital punishment to establish a working group of its own or a group of experts. Such an approach to the unresolved problems might even be given precedence over others.

BOTSWANA

/Original: English/
/28 April 1981/

1. The Republic of Botswana has studied document A/C.3/35/L.75 and regrets to report that Botswana is unable to support the substance of that document. It agrees that:

- (a) Every human being has the inherent right to life;
- (b) This right shall be protected by law;
- (c) No one shall be arbitrarily deprived of his life.

But equally, it is our view that:

(a) A nation has the sovereign right to determine in advance, within the parameters of its constitutional provisions, the suitable punishment to be meted out to any of its number for the commission of any specified offence;

(b) The imposition of capital punishment is not per se an arbitrary deprivation of life. (In terms of section 4 of the Constitution of the Republic of Botswana, "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.");

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(c) In a democratic society, the abolition of a punishment of the magnitude of capital punishment must be consistent with the will of the people;

(d) The people of Botswana still consider capital punishment a necessary deterrent and therefore there is currently no mandate for its abolition.

2. It will be appreciated therefore if the Secretary-General could be informed that in view of the foregoing, Botswana is unable to lend its support to the draft Second Optional Protocol to the International Covenant on Civil and Political Rights relating to the abolition of capital punishment.

DENMARK

/Original: English/

/7 August 1981/

The Danish Government has no observations or comments to document A/C.3/35/L.75 submitted to it as an annex to the note of 9 April 1981 concerning decision 35/437 adopted by the General Assembly on 15 December 1980.

DOMINICAN REPUBLIC

/Original: Spanish/

/27 April 1981/

1. Article 8, paragraph 1 (Title II, Sect. I) of the Constitution of the Dominican Republic establishes that life is inviolable and that "consequently, the death penalty, torture, or any other penalty or procedure harmful to or entailing the loss or diminution of the physical integrity or health of the individual shall in no case be established, imposed or enforced".

2. Furthermore, considering that the American Convention on Human Rights signed at San José, Costa Rica, to which the Dominican Republic is a party, while banning capital punishment, by way of compromise does not extend this ban to States which retain capital punishment in their legal systems, the Dominican Republic made a declaration in the instrument which it deposited with the Organization of American States stating the following:

"OBSERVATIONS AND CONSIDERATIONS OF THE DOMINICAN REPUBLIC
ON THE AMERICAN CONVENTION ON HUMAN RIGHTS

"In signing the American Convention on Human Rights, the Dominican Republic trusts that the principle of abolishing capital punishment will come to be applied by all American States without dilution. It maintains the views expressed in the observations and comments which it made concerning the draft of the above-mentioned Convention and which it circulated among delegations of the Council of the Organization of American States on 20 June 1969."

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3. Later, at the request of the Secretary-General of that organization, it confirmed and expanded the spirit of that pronouncement, thereby clearly endorsing the conflict that exists between the principle of abolition and the permissibility of capital punishment in countries which retain the death penalty.

4. Accordingly, the Dominican Republic has no comment to make on General Assembly decision 35/437 entitled "Capital punishment".

FINLAND

/Original: English/

/11 August 1981/

1. Finland belongs to the group of countries which have in their own penal system abolished death penalty. The development of the general concept of justice in Finland has made it increasingly clear that capital punishment could not be considered compatible with the basic ideas of justice on which the Finnish legal system is founded.

2. Based on these considerations, Finland has also in international contexts supported efforts to work towards universal abolishment of the death penalty. The work to further this aim is seen as one of the sectors where the International Covenant on Civil and Political Rights has not yet been adequately developed so as to fully guarantee the respect for human life. Consequently, Finland is ready to consider the proposal contained in draft resolution A/C.3/35/L.75 presented to the thirty-fifth session of the General Assembly in order to evaluate its effectiveness for contributing towards the achievement of the final goal, universal abolishment of the death penalty. This evaluation will undoubtedly find a good basis in the report of the Secretary-General on the replies received from Governments concerning draft resolution A/C.3/35/L.75 and on the discussions to be held during the thirty-sixth session of the General Assembly.

3. The Government of Finland notes that questions of principle concerning the universality of the human rights criteria will also have to be considered in the context of the suggested second optional protocol to the International Covenant on Civil and Political Rights.

GERMANY, FEDERAL REPUBLIC OF

/Original: English/

/1 August 1981/

1. The Government of the Federal Republic of Germany is the author of the draft second optional protocol to the International Covenant on Civil and Political Rights mentioned in paragraph (a) of decision 35/437. The Government of the Federal Republic of Germany therefore welcomes the decision of the General Assembly and fully supports the idea of elaborating a draft second optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.

2. The Government of the Federal Republic of Germany has taken a close interest in General Assembly resolutions 1918 (XVIII) of 5 December 1963, 2393 (XXIII) of 26 November 1968, 2857 (XXVI) of 20 December 1971, 3011 (XXVII) of 12 December 1972 and 32/61 of 8 December 1977, and in Economic and Social Council resolutions 934 (XXXV) of 9 April 1963, 1337 (XLIV) of 31 May 1968, 1574 (L) of 20 May 1971, 1656 (LII) of 1 June 1972, 1745 (LIV) of 16 May 1973, 1930 (LVIII) of 6 May 1975 and 1979/72 of 9 May 1979, as well as in the work on capital punishment carried out by the sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. It is convinced that mankind has reached a state of maturity in which it should be able to live without the death penalty stipulated by state legislation. This is not to say that the Government of the Federal Republic of Germany would pronounce any legal or moral judgement on those countries that have not yet abolished capital punishment. Nor can it expect States with other cultural traditions and other religious convictions to share its own misgivings about capital punishment. However, capital punishment deprives man of his most precious asset, namely his life. The Government of the Federal Republic of Germany is convinced that the forces of society, especially its educational, penal and correctional systems, ought to be so powerful that the State has no need to deprive men of their lives to ensure its protection. As a matter of fact, crime statistics in many countries demonstrate that the abolition of capital punishment has no detrimental effect on the crime rate. On the other hand, experience has taught us that miscarriages of justice and also misuse of the death penalty do create irrevocable facts. Doubts about the deterrent effect of capital punishment are supported by the finding that what the offender bears in mind is not the statutory penalty but the chances of his being detected. An offender acting in the heat of the moment does not consider anything at all. Furthermore, an offender acting out of conviction, including violent offenders, is in most cases immune to the deterrent effect of the threat of punishment.

3. The Government of the Federal Republic of Germany has always concurred with the approach adopted by the United Nations in the field of capital punishment. The United Nations has from the outset looked at capital punishment not only under the criminological aspect but also from the point of view of human rights. In the latter case the United Nations has from a very early stage been searching for ways and means of restricting the use of the death penalty and for milder methods of application. In this context reference is made in particular to General Assembly resolution 32/61 of 18 December 1977, which reaffirms in its operative paragraph 1 that the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment. Moreover, the Government of the Federal Republic of Germany has always been conscious of the importance of article 6, paragraph 1 and paragraph 6, of the International Covenant on Civil and Political Rights, which not only guarantees the right to life but also makes clear that nothing in that provision should be interpreted in such a way as to delay or prevent the abolition of capital punishment by any State party to the Covenant.

4. The Government of the Federal Republic of Germany is well aware that up to now capital punishment has not been outlawed on a global scale. It has therefore drafted the protocol, as noted by the General Assembly, in optional form. The

object is to give the debate on the restriction and abolition of capital punishment a new and precise direction by affording those States which are in a position to do so the opportunity to assume an obligation in this respect under international law. This obligation would go beyond merely domestic regulations on the abolition of the death penalty. The Government of the Federal Republic of Germany proposes and supports an optional protocol to the International Covenant on Civil and Political Rights which would oblige States acceding to it to abolish and not reintroduce capital punishment. Although such an additional optional protocol to the Covenant would supersede article 6 of the Covenant only for those States acceding to it, it is to be hoped that the elaboration of such an instrument will act as a signal for the future and give a fresh impulse and thrust to the discussion, with the ultimate objective of abolishing capital punishment world wide. States which do not feel ready to accede to such a protocol would be in no way restricted in their internal legislation; they would not be obliged to abolish the death penalty under their domestic law.

5. The Government of the Federal Republic of Germany realizes that it will be some time before the United Nations can bring about an optional protocol of the kind the General Assembly has taken note of. The General Assembly is venturing onto new ground with such a project. Therefore, it may be too early to decide during the thirty-sixth General Assembly on the wording of an international legal instrument on the abolition of capital punishment. The debate on this subject under item 87 (International covenants on human rights) of the thirty-sixth session of the General Assembly should rather be an assessment of the observations and comments of Governments and of the report of the Secretary-General on this subject. In the light of this debate it should then be decided when negotiations on the wording of an international agreement on the abolition of capital punishment should begin and which lines they should follow. In the view of the Government of the Federal Republic of Germany the draft second optional protocol to the International Covenant on Civil and Political Rights presented in document A/C.3/35/L.75 could be a suitable basis for such negotiations within the framework of the United Nations.

GREECE

/Original: English/

/11 September 1981/

1. Although capital punishment is still in force in Greece, it has to be noted that the last execution of a death sentence took place nine years ago, i.e. in 1972, as a result of particular abhorrent crimes: a man was sentenced to death four times for burning to death his two minor children, his wife and his mother-in-law.

2. It should also be taken into account that, in accordance with our Reformatory Code, death sentences - which are in any case rarely pronounced - are not executed but are ipso facto commuted to life imprisonment after a lapse of three years.

3. The death sentence is maintained in Greece in the framework of prevention of criminality and can be pronounced only in cases of murder, robbery with resulting

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death, terrorist activities and crimes against the democratic form of government, the independence and peace of the country.

4. Our position in the future with regard to capital punishment will depend on the evaluation of existing circumstances.

GUATEMALA

/Original: Spanish/

/23 June 1981/

1. Under the Penal Code of Guatemala, in accordance with the Constitution of the Republic, the death penalty is considered an exceptional punishment. It is characterized as an extraordinary penalty which can be applied only in cases specifically designated by law. Such cases concern a few crimes in which the defendant presents a special and particular degree of danger to society. Under Guatemalan legislation, the death penalty can never be applied where there is only a presumption of guilt and is not applied to women, minors or persons over 70, for political crimes or to persons in respect of whom a request for extradition has been granted on condition that they not be sentenced to death. When appealing a death sentence, every relevant legal remedy is admissible, including annulment and pardon. These two remedies are not admissible, however, in the event of an invasion of the territory, a town or city being besieged or mobilization for war. The death penalty shall be carried out only after every legal remedy has been exhausted.

2. For reasons of a constitutional nature, Guatemala would be unable to sign, ratify or accede to the Second Optional Protocol to the International Covenant on Civil and Political Rights as currently worded in the draft.

JAPAN

/Original: English/

/28 July 1981/

1. The Government of Japan is unable to accept the draft Second Optional Protocol to the International Covenant on Civil and Political Rights.

2. In its view it is not appropriate to attempt to reach in an international forum a resolution with regard to the question of the retention or abolition of the death penalty intended to be applicable to all States, and believes that in each country the majority public opinion in that country should be fully taken into account.

3. In the case of Japan, the death penalty exists for only 17 offences: 10 of particularly heinous homicide (e.g. wilful murder, train-wrecking causing death), 3 of collective action jeopardizing the nation's security (e.g. leading an insurrection) and 4 of acts gravely endangering the public (e.g. arson in inhabited structures). Moreover, life imprisonment or imprisonment with or without labour for a term of years are available alternative penalties for all but one of the 17 offences, inducement of foreign aggression. There is no possibility whatsoever of the Japanese courts' imposing the death sentence arbitrarily, since very strict standards and practices with regard to the application of the death penalty have been established over many years, together constituting a most rigorous and liberal judicial process. The majority of Japanese citizens support retention of the death penalty as a just punishment for criminals who have committed particularly heinous crimes and regard it as an effective deterrent to such crimes. As demonstrated by the result of the public opinion survey carried out in June 1980, in which as small a percentage as (approximately) 14 per cent of those answering the questionnaire favoured its abolition, the Japanese public overwhelmingly support the retention of the death penalty.

4. The Government of Japan, therefore, considers that it is not desirable to abolish the death penalty in Japan at the present time.

5. It may be added here that the Legislative Council, an advisory organ to the Minister of Justice, after many years of study aimed at an over-all revision of the Penal Code, submitted to the Minister of Justice a draft revised Penal Code which, while reducing the number of capital offences and making a lesser penalty available in the case even of the crime of inducement of foreign aggression, retains the death penalty in the light of the people's will as described above.

MADAGASCAR

/Original: French/
/27 July 1981/

The Democratic Republic of Madagascar reports that, although the death penalty has been imposed in certain cases, no sentence has actually been carried out for some 20 years in Madagascar, a reprieve always being granted. Moreover, once a death sentence has been pronounced, an appeal for mercy is automatically lodged, even if the person sentenced omits to do this. It must be added that the retention of the death penalty serves as a deterrent.

NETHERLANDS

/Original: English/
/1 September 1981/

1. The Netherlands Government wishes to stress - as a preliminary remark - that the proposed optional protocol has to be basically directed toward the abolition of capital punishment and not against arbitrary and summary execution, since guarantees to preclude abuse of capital punishment have already been included in article 6 of the Covenant.

2. As to the wording of the provisions of an optional protocol, the Netherlands attach great importance to a well-balanced and consistent formulation, because most of the rights laid down in the Covenant, including those contained in article 6, are directly applicable in the Netherlands. The Netherlands Government, therefore, would propose to bring the wording of the new optional protocol, as far as it contains substantive obligations, in line with the wording of corresponding provisions of the Covenant. Furthermore, some provisions might be worded in such a way as to enable those States Parties where constitutional law so permits, to regard them as "self-executing" and thus to put them into effect from the very moment of ratification. Special reference should be made to the obligation of States Parties no longer to consider, nor to impose or to execute capital punishment against any individual under its jurisdiction.

3. In order to avoid possible confusion as to the differences in wording and purpose of the obligations emanating from the proposed protocol, the Netherlands Government would suggest to divide article 1, paragraph 1, into two separate articles.

4. The proposed text of these articles reads as follows:

Article 1: Each State Party (to the Covenant which becomes a party) to the present Protocol shall take all necessary measures to abolish the death penalty in its territory.

Article 2: No one under the jurisdiction of a State Party to the present Protocol shall be sentenced to the death penalty or executed to death.

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5. The purpose of article 1 is progressively to abolish capital punishment in the legal system of the States parties. For it would be unrealistic to presume that all States will, in effect, have abolished the death penalty before ratification. Article 1 therefore has been worded in such a way that following ratification States parties will be able gradually to take all necessary legislative and other measures for the formal abolition of capital punishment.

6. Article 2, on the other hand, creates an immediate obligation for all States parties not to apply capital punishment de facto from the moment of ratification. The Netherlands Government would also like to suggest a change in the wording of article 2, paragraph 2, and article 3, in order to integrate the protocol more fully into the implementation machinery of the Covenant and the Optional Protocol of 1966. In the present formulation, both articles require an explicit declaration by States parties before the implementation provisions of the International Covenant and Optional Protocol of 1966 can be made to apply to the proposed protocol. The Netherlands propose to invert that procedure by formulating those articles as follows:

Article 3: (previously article 2)

2. The competence of the Human Rights Committee established under article 28 of the Covenant to receive and consider communications, resulting from a declaration in accordance with article 41 of the Covenant, shall be effective in relation to the present Protocol, unless the State Party concerned has made a statement not to recognize such competence in respect of the provisions of the present Protocol.

Article 4: (previously article 3)

The present Protocol shall also supplement the Optional Protocol of 19 December 1966 to the International Covenant on Civil and Political Rights, unless the State Party concerned has made a statement not to recognize the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction in respect of the provisions of the present Protocol.

NORWAY

/Original: English/

/18 August 1981/

Norway in principle has no objections to the elaboration of a second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

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PHILIPPINES

/Original: English/

/15 June 1981/

1. The Philippines has not ratified the International Covenant on Civil and Political Rights. The matter is under consideration by the Government.
2. Consequently, because of article 4, paragraph 4, of the draft Second Optional Protocol, which provides that the "present protocol shall be open to accession by any State which has ratified the covenant or acceded to it", the Philippines could not yet be a party to the present protocol.
3. Parliamentary Bill No. 543 seeking the abolition of the death penalty in the Philippines is pending before the Batasang Pambansa (Philippine National Assembly).

SAINT VINCENT AND THE GRENADINES

/Original: English/

/14 July 1981/

Saint Vincent and the Grenadines has the honour to inform that its present position is that capital punishment is still a penalty for persons who are found guilty of murder.

SENEGAL

/Original: French/

/7 July 1981/

1. The Government of the Republic of Senegal is deeply committed to the objectives of the United Nations Charter and the Universal Declaration of Human Rights, and is philosophically opposed to capital punishment.
2. However, Senegal is not considering abolishing the death penalty for the time being and it cannot therefore accede at present to the draft Second Optional Protocol to the International Covenant on Civil and Political Rights.

SPAIN

/Original: Spanish/

/14 July 1981/

1. The draft Second Optional Protocol to the International Covenant on Civil and Political Rights submitted by Austria, Costa Rica, the Federal Republic of Germany

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Italy, Portugal and Sweden reflects the strong abolitionist trend existing in the world today and is designed to strengthen article 6 of the above-mentioned Covenant, which establishes the right to life, and General Assembly resolutions 2857 (XXVI), of 20 December 1971, and 32/61, of 8 December 1977, which stated the desirability of ultimately abolishing capital punishment.

2. However, notwithstanding this current of opinion, capital punishment continues to exist in the vast majority of States. According to a report of the Secretary-General of the United Nations dated 7 February 1980 (E/1980/9), of the 162 States Members of the United Nations, 129 retain the death penalty, 12 - including Spain - have abolished it for ordinary crimes or in peace-time and only 21 (including 9 in Latin America and 9 in Western Europe) have abolished it completely. The position of the States that retain the death penalty is so firm on this matter that during the discussion that took place on the subject at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Caracas in August 1981, it became clear that they were definitely not prepared to yield on the issue of their penal policy. The delegations of Austria and Sweden, which had introduced a draft resolution aimed at eventual abolition, did not put their proposal to the vote because of the adverse reactions they sensed from delegations attending the Congress.

3. Given this background, the proposal to elaborate a second optional protocol to the International Covenant on Civil and Political Rights aimed at bringing about the ultimate abolition of capital punishment and prohibiting its future re-establishment (art. 1) and having the force of an additional article to the above-mentioned Covenant (art. 2) is certainly to be commended inasmuch as it would continue the policy pursued by the General Assembly concerning the issue of capital punishment and would enable the General Assembly to adopt a decisive and final position on the matter, while leaving it up to Member States whether or not to accept the said Protocol. Should the Protocol be approved by the General Assembly, the 10 instruments of ratification or accession needed for it to enter into force, as stated in article 5 of the draft, would probably be obtained.

4. So far as consistency between the draft Protocol and Spanish law is concerned, it must be recognized that article 1 of the former does not coincide with Spanish law as regards the abolition of the death penalty.

5. Article 15 of the Constitution, after referring to the principle laid down in article 3 of the Universal Declaration of Human Rights and article 6, paragraph 1, of the International Covenant on Civil and Political Rights, establishes the right to life and goes on to declare that "the death penalty shall be abolished, except as provided for by military law in wartime". Abolition is therefore not total but applies only in peace-time. The Constitution contains a provision (the third repeal provision) repealing "any provisions contrary to those contained in the Constitution". Thus, the provisions of the Penal Code relating to the death penalty have been automatically annulled, without any revision of the Code being necessary, since a death sentence was not handed down alone but in conjunction with a sentence of long-term rigorous imprisonment with forced labour (reclusión mayor). Under the Code of Military Justice, on the other hand, the death sentence

was not handed down alone but in conjunction with a sentence of long-term rigorous imprisonment with forced labour (reclusión mayor). Under the Code of Military Justice, on the other hand, the death sentence was the sole sentence for certain very serious crimes, and this same Code and other special penal laws relating to military legislation established sentences consisting of the death penalty and one or more other penalties involving deprivation of freedom for certain crimes. For this reason, Royal Decree-Law 45/1978, of 21 December 1978, revised the Code of Military Justice, the Penal and Procedural Law of the Air Force and the Penal and Disciplinary Law of the Merchant Navy in order to replace the death penalty by a sentence of 30 years imprisonment, save in wartime.

6. The draft Penal Code referred by the Government to the Cortes (published in the Boletín Oficial de las Cortes Generales - Congreso de los Diputados, series A, on 17 January 1980) does not list the death penalty as one of the penalties which may be imposed (article 36).

7. Nevertheless, Organic Law 9/1980, of 6 November 1980, which revises the Code of Military Justice, still retains the death penalty as a military penalty in article 209, the last paragraph of which expressly states that it may be imposed only in wartime. Article 218 sets forth the effects of the death penalty. Article 258 sets forth the grounds on which the death penalty may be applied and article 314 states that the penalty for attempted murder is a sentence of 30 years imprisonment or death if the victim dies or suffers very serious injury.

8. Accordingly should the draft Optional Protocol to the International Covenant on Civil and Political Rights concerning the death penalty be approved by the General Assembly, Spain's accession to it would require: first, the prior authorization of the Cortes Generales, in compliance with article 94, paragraph (c) of the Spanish Constitution; secondly, the amendment of the Code of Military Justice as revised by Law 9/1980, mentioned above; and, lastly, the consideration of an important issue, namely, whether article 15 of the Spanish Constitution would have to be amended. Given the wording of that article, it could be thought that the draft Second Protocol we are commenting on contains a stipulation which is contrary to article 15 of the Spanish Constitution and would therefore require the prior revision of the Constitution (article 95 of the Spanish Constitution). However, another possible interpretation is that article 15 would not have to be amended, since the abolition provided for in the draft Second Protocol would be respected so long as the military penal laws applicable in wartime did not establish such penalties, and thus the draft Second Protocol would be consistent with article 15 of the Spanish Constitution provided the necessary amendment were made to the Code of Military Justice as explained above.

9. Articles 3 and 6 of the draft Protocol would not at present affect Spanish law, as Spain has not yet acceded to the first Optional Protocol to the International Covenant on Civil and Political Rights.

SWEDEN

[Original: English]
[28 April 1981]

1. Sweden was one of the States which at the thirty-fifth session of the General Assembly presented the draft resolution entitled "Measures aiming at the ultimate abolition of capital punishment (draft Second Optional Protocol to the International Covenant on Civil and Political Rights)".
2. Consequently, the Swedish Government is in full agreement with the proposal contained in the draft resolution and considers that the adoption of a second optional protocol along the lines of the draft attached to the draft resolution would be an important element in the work of the United Nations towards further restriction and eventual abolition of the death penalty throughout the world.

SWITZERLAND

[Original: French]
[11 August 1981]

1. The Swiss authorities approve the ultimate goal set by the United Nations on the question of capital punishment, namely, the complete abolition of this irreversible punishment, and believe that the means provided by the General Assembly for its gradual achievement are appropriate and realistic. The Swiss delegation to the first regular session of the Economic and Social Council in 1980 made a statement to that effect.
2. The representatives of Switzerland unreservedly supported the draft resolution submitted by Austria, Ecuador, the Federal Republic of Germany and Sweden at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Caracas. On that occasion, the Swiss delegates reiterated that it was important to continue to support all efforts undertaken within the framework of the United Nations and the Council of Europe to abolish capital punishment once and for all and to prevent its reinstatement.
3. The Swiss authorities think that the Draft Second Optional Protocol to the International Covenant on Civil and Political Rights (A/C.3/35/L.75) should be an appropriate international instrument because each of the States Parties would commit itself to abolishing capital punishment in its territory, and to ceasing to consider its use against any person under its jurisdiction, or to impose or execute the death penalty, and would renounce the reinstatement of that penalty in the event that it had already been abolished.
4. The Swiss Government wishes, lastly, to recall that the Swiss penal code, which unifies ordinary criminal law, has eliminated capital punishment throughout the territory of the Confederation even though the military penal code still authorizes capital punishment, albeit exclusively in time of war or when the threat of war is imminent. The abrogation of capital punishment, in the area of both

ordinary criminal law and military criminal law, will be reconsidered in the years to come, specifically as part of the public discussion of the plan for a complete revision of the Swiss Federal Constitution. The commission of experts responsible for drawing up that complete revision has, in effect, proposed, by a majority decision, to abolish capital punishment entirely in the area of military criminal law, even in times of war. Concomitantly, the Swiss penal code, which is currently being revised, will provide a whole series of new measures that should make it possible to combat more effectively new acts of violence such as terrorism and anarchist intrigues. Thus, for instance, it provides for more severe penalties in cases of kidnapping and false imprisonment.

SYRIAN ARAB REPUBLIC

[Original: Arabic]

[12 August 1981]

1. It is still necessary to maintain legislation providing for capital punishment as it is decisive, deterrent and just in specific cases and in those circumstances stipulated in the legislation in force.
2. There are certain crimes, particularly crimes against humanity, genocide and war crimes, regarding which there is international unanimity that their perpetrators should be punished by the death penalty.
3. Syrian legislation relies on Islamic law as a principal source, and this law recognizes capital punishment for such crimes as premeditated murder and open depravity, the perpetrators of which deserve to be eliminated from society.

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

[Original: English]

[11 August 1981]

1. The United Kingdom acknowledges the strength of feeling in those countries which have sponsored this Draft Second Optional Protocol, which has the objective of securing international obligations for the abolition, and against the reintroduction, of the death penalty. However, for the reasons stated on various occasions by United Kingdom representatives, there is no prospect that the United Kingdom might itself become party to any such instrument.
2. The issues surrounding capital punishment are diverse and complex and diametrically opposed views are held by people whose moral integrity and respect for those rights cannot be called into question. Thus, it is extremely difficult to achieve genuine unanimity or opinion. It is indeed a question of such moral significance that in the United Kingdom successive Governments have taken the view that the decision, whether or not to retain or reintroduce the death penalty, should be left to individual Members of Parliament voting according to their

consciences. In this way the death penalty was abolished for murder in 1963; and ever since, although there are deeply held views on both sides of the question, there has always been a substantial majority against the death penalty whenever it has been debated in Parliament. The most recent occasion was on 19 July 1979 when a motion that the death penalty should be made available to the courts again was defeated in the House of Commons by 362 votes to 243.

3. Accordingly, while the United Kingdom would not wish to stand in the way of further discussion about the adoption of treaty instruments on the abolition of the death penalty, it is unable to lend its support to these proposals.

UNITED REPUBLIC OF CAMEROON

[Original: French]

[21 August 1981]

1. The United Republic of Cameroon has, since 1967, considerably restricted application of the death penalty, limiting it to the most serious offences such as: aggression against the fatherland (articles 102 and 103 of the Penal Code); secession in time of war or state of emergency (article 111, paragraph 2 of the Penal Code); civil war (article 112); aggravated theft; murder committed with premeditation or by poisoning (article 276 of the Penal Code).
2. The death sentence is pronounced by the courts only after legal proceedings in the course of which the accused has enjoyed full guarantees for the conduct of his defence.
3. A convicted person has, moreover, the right of access to the means of recourse provided for by law to higher judicial bodies, as well as recourse to pardon from the supreme political authority represented by the President of the Republic, the constitutionally designated guarantor of the independence of the judiciary.
4. As long as no ruling has been made by the Chief of State on pardon for a convicted person, no death sentence may be carried out.
5. It follows from the above that those death sentences which are pronounced are actually carried out only in specific cases likely to constitute a grave breach of the peace and of public safety.
6. This gives to the death penalty a character which is deterrent in nature, promotes public safety and is, on the whole, equitable, while the fact remains that it would be difficult, in all fairness, to become involved in protecting the right to life of those who have so little regard for the life of others.
7. Consequently, given the present state of legislation in the Republic, the abolition of this penalty cannot be envisaged.

UNITED STATES OF AMERICA

Original: English]
[15 June 1981]

1. The United States would be unable to subscribe to some of the preambular language in the draft resolution. The paragraph recalling resolution 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977 should use the exact wording of those resolutions rather than attempt to paraphrase them. The United States would also not agree, as formulated in the last preambular paragraph, that the goal is necessarily to ban capital punishment completely.

2. While the United States does not, therefore, support the draft resolution as presently worded or the draft Second Optional Protocol, it would have no reason to object if other countries wished to adopt and accede to this Draft Protocol.

ZIMBABWE

[Original: English]
[7 May 1981]

The Government of Zimbabwe intends to retain the death sentence. Accordingly, it cannot be party to the proposed optional protocol.

ANNEX

Draft resolution A/C.3/35/L.75 a/

Measures aiming at the ultimate abolition of capital punishment

The General Assembly,

Recalling article 6 of the International Covenant on Civil and Political Rights, under which

- every human being has the inherent right to life,
- this right shall be protected by law,
- no one shall be arbitrarily deprived of his life and nothing in that article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the Covenant,

Recalling its resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977 which stated the desirability of ultimately abolishing capital punishment,

Mindful of the fact that the execution of the death sentence is irrevocable and miscarriages of justice cannot be entirely precluded,

Considering that 14 years after the signature of the International Covenant on Civil and Political Rights time has become ripe to endeavour further development and strengthening of the inherent right of every human being to life as set out in article 6, paragraph 1, of that Covenant,

Endeavouring, on the international level, to restrain and, finally, to ban capital punishment,

1. Takes note of the attached draft of a Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;

2. Requests the Secretary-General to invite comments and observations by member Governments and to submit a report to the General Assembly at its thirty-sixth session;

3. Decides to consider the draft optional protocol together with the report at its thirty-sixth session under the item "International Covenants on Human Rights."

a/ Submitted by Austria, Costa Rica, the Dominican Republic, Germany, Federal Republic of, Italy, Portugal and Sweden.

/...

ANNEX

Draft Second Optional Protocol to the International Covenant
on Civil and Political Rights

The States Parties to the present Protocol

...

...

...

have agreed as follows:

Article 1

1. Each State Party shall abolish the death penalty in its territory and shall no longer foresee the use of it against any individual subject to its jurisdiction nor impose nor execute it.
2. The death penalty shall not be re-established in States that have abolished it.

Article 2

1. As between the States Parties article 1 of the present Protocol shall be regarded as an additional article to the International Covenant on Civil and Political Rights of 19 December 1966. The provisions of the Covenant shall apply accordingly.
2. Nevertheless, the competence of the Human Rights Committee established under article 28 of the Covenant to receive and consider communications, resulting from a declaration in accordance with article 41 of the Covenant, shall not be effective in relation to the present Protocol unless the State Party concerned has made a statement recognizing such competence in respect of article 1 of the present Protocol.
3. Furthermore, no derogation from article 1 of the present Protocol may be made by virtue of article 4 of the International Covenant on Civil and Political Rights.

Article 3

The present Protocol shall also supplement the Optional Protocol of 19 December 1966 to the International Covenant on Civil and Political Rights of 19 December 1966, provided that the competence of the Committee pursuant to the Optional Protocol shall not be effective in relation to the present Protocol unless the State Party concerned has made a statement recognizing the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction also in respect of article 1 of the present Protocol.

/...

Article 4

1. The present Protocol is open for signature by any State which has signed the Covenant.

2. The present Protocol is subject to ratification by any State which has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified the Covenant or acceded to it.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 5

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 6

Article 3 of the present Protocol shall become effective only for such States Parties as are or become States Parties to the Optional Protocol of 19 December 1966.

Article 7

The provisions of the present Protocol shall extend to all parts of Federal States without any limitations or exceptions.

Article 8

Irrespective of the notifications made under article 4, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under article 4.
- (b) The date of the entry into force of the present Protocol under article 5.
- (c) Statements made under article 3 of the present Protocol.

Article 9

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.
