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TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING
TREATMENT OR PUNISHMENT

Draft Code of Medical Ethics

Report of the Secretary-General

CONTENTS

	<u>Page</u>
I. INTRODUCTION	2
II. REPLIES RECEIVED FROM GOVERNMENTS	3
Austria	3
Costa Rica	4
Ethiopia	5
Germany, Federal Republic of	6
Holy See	8
Ireland	8
Kuwait	9
Madagascar	9
New Zealand	9
Republic of Korea	9

* A/37/50/Rev.1.

I. INTRODUCTION

1. In accordance with General Assembly resolution 3218 (XXIX) of 6 November 1974, 8453 (XXX) of 9 December 1975 and 31/85 of 13 December 1975, the World Health Organization (WHO) was invited to prepare a draft Code of Medical Ethics relevant to the protection of persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment.
2. At its thirty-fourth session, the General Assembly considered the report of WHO on the development of codes of medical ethics transmitted by the Secretary-General (A/34/273, annex). In resolution 34/168 of 17 December 1979, the General Assembly noted that the Executive Board of WHO had endorsed the principles set forth in the report of its Director-General on the development of codes of medical ethics and had requested the Director-General to transmit that report to the Secretary-General of the United Nations.
3. By that resolution, the General Assembly requested the Secretary-General to circulate the draft Code of Medical Ethics to Member States, the specialized agencies concerned and interested intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council for comments and suggestions. At its thirty-fifth and thirty-sixth sessions the General Assembly, by resolution 35/179 of 15 December 1980 and 36/61 of 25 November 1981, renewed its request for comments and decided to consider the question at its thirty-seventh session with a view to adopting the draft principles of medical ethics.
4. Accordingly the Secretary-General sent a note verbale to Governments requesting them to submit comments and observations. As at 30 June 1982, replies had been received from the Governments of the following States: Austria, Costa Rica, Ethiopia, Germany, Federal Republic of, Holy See, Ireland, Kuwait, Madagascar, New Zealand and Republic of Korea. Additional information that becomes available after that date will be submitted in addenda to the present report. The present document contains observations and comments received in accordance with the above-mentioned resolutions. 1/

1/ The full texts of these replies are on file with the Secretariat and are available upon request.

II. REPLIES RECEIVED FROM GOVERNMENTS

AUSTRIA

[Original: English]

[9 June 1982]

1. The Government of Austria states that the principles proposed in the draft Code of Medical Ethics constitute a valuable contribution to the world-wide campaign against torture. The draft as contained in the annex to General Assembly resolution 36/61 contains a number of improvements as compared to the unrevised draft. There are, however, a number of changes that could contribute to a further improvement of the present text.

2. Since it is the main aim of the draft to formulate obligations of the health personnel towards prisoners and detainees, paragraph 1 should be rephrased in a way that it addresses itself to the health personnel:

"1. Medical Ethics requires health personnel to give prisoners and detainees the same protection of their health and the same treatment of their diseases as to persons who are not in prison or detained."

Such a formulation would comply with the tenor of the present draft, whose addressee is the health personnel.

3. Furthermore, the Austrian Government believes that the term "relationship" in paragraph 3 requires further clarification in order to assure that all abuses resulting from the dependency of the prisoner or detainee are covered. In addition, paragraph 3 should not only state that it is the purpose of the medical relationship to protect and improve the physical or mental health of the prisoner, but it should also clearly request that the purpose of any medical relationship must be the protection or improvement of the prisoner's health. The latter part of paragraph 3 would therefore read as follows:

"... medical relationship in the sense that its purpose must be the protection or improvement of the physical or mental health of the prisoner or detainees".

4. In paragraph 4 (b), it has to be ensured that the infliction of pain or suffering which is only inherent in or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners does not constitute a violation of the envisaged Principles of Medical Ethics unless such punishment - due to the personal circumstances under which such punishment is inflicted - adversely affects the physical or mental health of the prisoner or detainee.

5. Finally, it is the opinion of the Austrian Government that international instruments drafted by the United Nations and aiming at tackling essential issues such as the present ones should contain a preamble. Such an addition would comply with standing practice and could serve as a guide-line for the application of the

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Principles of Medical Ethics. It is therefore suggested to add the following preamble whose wording follows the preamble of General Assembly resolution 36/61:

"Reaffirming the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as unanimously adopted in General Assembly resolution 3452 (XXX) of 9 December 1975,

"Recalling General Assembly resolution 31/85 of 13 December 1976, in which the World Health Organization was invited to prepare a draft code of medical ethics relevant to the protection of persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment,

"Taking note with appreciation of the Guidelines for Medical Doctors concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in relation to Detention and Imprisonment, adopted by the twenty-ninth World Medical Assembly, held at Tokyo in October 1975,

"Recognizing that throughout the world significant medical activities are increasingly being performed by health personnel other than physicians, such as physician-assistants, physical therapists and nurse practitioners,

"Alarmed that not infrequently members of the medical profession or other health personnel are engaged in activities which are difficult to reconcile with medical ethics,

"Convinced of the need to set standards in this field which ought to be implemented by members of the medical profession and other health personnel as well as by government officials,

"Firmly believing that it is the privilege of the health personnel and in particular of the medical doctor to practice medicine in the service of humanity, to preserve and restore bodily and mental health without distinction as to persons, to comfort and to ease the suffering of his or her patients irrespective of his or her status of imprisonment or detention,".

COSTA RICA

[Original: Spanish]

[28 April 1982]

1. With regard to resolution 36/61, entitled "draft Code of Medical Ethics", the Government of Costa Rica has the pleasure to state that it supports the draft Code, which is in perfect harmony with the principles that inspire the policy of the United Nations and of Costa Rica in matters of human rights.

2. It also is in line with the draft Convention on torture, which has been supported by the Government of Costa Rica in the Commission on Human Rights.

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ETHIOPIA

[Original: English]

[30 March 1982]

The opinion of Socialist Ethiopia regarding this draft Code of Medical Ethics is as follows:

1. The draft Code provides generally that torture and other cruel, inhuman or degrading treatment or punishment is prohibited and that medical personnel should take no part in any capacity. However, no interpretation has been given as to what constitutes "torture and other cruel, inhuman or degrading treatment or punishment". Although it is not known what has prevented this, it is stated in the background report on the draft Code that it is unthinkable to provide a detailed code of medical ethics applicable in all contexts and at all times. In any case, it may be possible to prohibit certain practices in the same way as the term "torture" has been generally defined in the draft Code. Therefore, we believe that an attempt at providing a general interpretation to the above-mentioned phrase might help the implementation of the principles embodied in the Code.

2. The draft lays no control mechanisms regarding the implementation of the principles of medical ethics. A universally acceptable control mechanism may be difficult but not impossible to achieve. We believe, therefore, that an attempt at laying down certain procedures be made in this regard. Similarly, how these principles may be implemented or what the sanctions for violating them would be have not been stated in the Code. We are of the opinion that the Code should recommend steps to be taken under municipal laws on persons who violate these international principles.

3. Although the draft Code prohibits the participation with and the compelling of medical personnel by public authorities from torturing prisoners or detainees, it does not prevent prisoners from forming relations with medical personnel. For instance, a medical professional may collaborate with a prisoner and try to help the prisoner escape proper and legal punishment by providing a false testimony about the state of health of the latter. Such and other similar breaches of conduct by medical professionals should be treated.

4. Paragraph 3 of the Tokyo Declaration prohibits the doctor's presence during any procedure during which torture and other forms of cruel, inhuman or degrading treatment is used or threatened. According to this paragraph, the doctor's presence is prohibited during the punishment even if he takes no part in it. We feel that this paragraph should be amended in such a way that it leaves room for presence of doctors with the sole purpose of helping victims of illegal treatment or improper infliction of penalty.

GERMANY, FEDERAL REPUBLIC OF

[Original: English]

[1 February 1982]

Heading and preamble

1. Further to the Declaration of Tokyo by the World Medical Association and the United Nations Standard Minimum Rules for the Treatment of Prisoners (General Assembly resolution 3218 (XXIX)), the Code constitutes another major step forward in the endeavour to protect prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment. Observance and promotion of such protection is mandatory under the Basic Law for the Federal Republic of Germany (especially arts. 1, 2 and 104).
2. The Federal Medical Association in the Federal Republic of Germany fully endorses the wording of the Declaration of Tokyo. Under the national regulations governing the medical profession every physician in the Federal Republic of Germany is bound by his vow to place his life in the service of humanity.
3. As is reflected in the heading of the Code and was especially pointed out by the Secretary-General, prisoners and detainees can only be effectively protected if not only physicians but all other health personnel concerned with the provision of medical care are explicitly covered by the Code. It is suggested, therefore, that an express clause to this effect be included in the preamble and in a separate section at the end. The section might be worded as follows:

"The principles shall also apply to all other health personnel concerned with the provision of medical care for prisoners and detainees."

Principle I

4. The tendency underlying the demand that prisoners and detainees should have the same rights with regard to health protection and medical treatment in case of illness as are enjoyed by free citizens is to be welcomed and is in keeping with applicable regulations. It should be noted, however, that certain restrictions are inevitable as a result of prison organization. A prisoner does not have the right to consult a physician of his choice, for instance, nor is there any reason to believe that this right will ever be introduced. On the other hand, entitlement to measures such as the early diagnosis of an illness, nursing, aids, and grants for dental substitutes and crowns, has been granted on the basis of the general provisions of German Social Insurance Law (arts. 57 to 62, Penal Execution Act).

Principle II

5. The definition of the term "torture" which has in fact been taken verbatim from the United Nations 1975 Declaration on Torture, is ultimately not satisfactory in so far as the substantive and logical connexion between the second paragraph and the first paragraph with its basic definition remains unclear. The same problem of

definition has arisen at the negotiations on the draft Convention against Torture being held in the forum of the United Nations Human Rights Commission where the question as to whether the corresponding paragraph 2 of the definition of torture should be maintained or dropped is still at issue. As far as the Convention against Torture is concerned, the Federal Government's approach to this question is and remains open to both possibilities.

Principle III

6. The wording of this section is unclear or at least hard to understand and its implications cannot be safely assessed. Does it mean, for instance, that a prison physician shall not act as an expert in criminal proceedings against prisoners, or not be permitted either to assist in the procedure prior to the execution of a prison sentence as is prescribed under German law (art. 107, Penal Execution Act)? The wording of paragraph IV would appear to indicate this. If it is the intention to restrict the activities of physicians to the physician-patient relationship, then this view should be qualified. A prison physician is usually entrusted with such additional responsibilities as are related to social hygiene and the official establishment of a person's state of health at the beginning and the end of his sentence as well as on special occasions.

Principle IV

7. The German Penal Execution Act proceeds on the basis that the execution of a sentence must not adversely affect a prisoner's health; in so far as there is no discrepancy with the second alternative of section IV. Article 107, paragraph 2, of the Penal Execution Act explicitly provides, for instance, that during his prison term a prisoner or detainee shall be under medical supervision and that his sentence shall not be executed or shall be interrupted if the prisoner's health is in danger. Nevertheless, there are doubts as to whether the mere fact that a physician certifies a prisoner or detainee as "fit for any form of punishment that may adversely affect physical or mental health" must in all cases be deemed to be a contravention of medical ethics. This formulation appears to allow too broad a scope in so far as it includes every possible aspect of an adverse effect on health. It should be considered whether a stricter wording could be found. Under the law applicable in the Federal Republic of Germany the execution of a prison sentence can only be postponed if the sentenced person is unfit to serve it. This is deemed to apply when the person falls insane or if in the event of another disease it must be feared that serving the sentence will cause immediate danger to his life (art. 455 (1) and (2), Code of Criminal Procedure). The execution of the sentence may also be delayed if in view of a sentenced person's poor physical condition immediate execution is incompatible with prison facilities (art. 455 (3), Code of Criminal Procedure). No conflict should be allowed to arise between these provisions and the provisions of the Code in the further revision of this section.

Principle V

8. The present wording of this section appears to be compromising on the question of force-feeding prisoners or detainees on hunger strike as well as open to a

variety of interpretations. It does not unequivocally require such forcible medical measures to be abolished. The Federal Government wishes to abide by its present practice of dealing with prisoners or detainees on hunger strike (on the basis of art. 101, Penal Execution Act). In revising this section further, it should therefore be made sure that the force-feeding of prisoners or detainees on hunger strike remains consistent with the provisions of the Code.

9. The Federal Medical Association (Working Group of West German Medical Associations) has moreover expressed doubts to the effect that the wording of section V, latter half of the sentence ("unless it is determined ... or his guardians") seems to be too vague in view of the greatly divergent national assessments of practices as pointed out in paragraph 5 of the Explanation of proposed principles. The Association considers that the United Nations Standard Minimum Rules for the Treatment of Prisoners should be amended in favour of prisoners and detainees and calls attention to the World Medical Association's willingness - which it fully supports - to take part in deliberations to that end. The Federal Medical Association cannot, for its part, accept the exception to the ban on the participation of physicians as referred to. This also applies to section VI, second sentence, since it leaves too wide a scope for interpretation.

In section (a) of its comments on document A/34/273, contained in this Mission's note of 1 February 1982, the Government of the Federal Republic of Germany suggested to add the sentence "The principles shall also apply to all other health personnel concerned with the provision of medical care for prisoners and detainees." The revised draft principles of medical ethics as set forth in the annex to resolution 36/61 have followed this suggestion. Sections (b) to (f) of the comments provided by the Government of the Federal Republic of Germany on document A/34/237 apply to the revised draft as well.

HOLY SEE

[Original: French]

[4 May 1982]

Without considering the Code itself, the Holy See believes that from the deontological and legal viewpoint it can accept the draft "Principles of Medical Ethics relevant to the role of health personnel in the protection of persons against torture and other cruel, inhuman or degrading treatment or punishment".

IRELAND

[Original: English]

[28 May 1982]

Ireland has no objection to the revised draft principles of medical ethics set forth in the annex to the resolution.

KUWAIT

[Original: English]

[12 May 1982]

The competent authorities in Kuwait have no observations concerning resolution 36/61 on the draft Code of Medical Ethics.

MADAGASCAR

[Original: French]

[7 June 1982]

The declarations of principle in the draft Code of Medical Ethics call for no particular comment on the part of the Government of the Democratic Republic of Madagascar, which believes, however, that the draft should be discussed in the regional Councils and in the World Health Assembly before becoming applicable.

NEW ZEALAND

[Original: English]

[11 June 1982]

The revised draft principles of medical ethics in the annex to the resolution take into account some of the previous comments of the New Zealand authorities, so that New Zealand is now in a position to support the revised draft principles.

REPUBLIC OF KOREA

[Original: English]

[28 April 1982]

The Government of the Republic of Korea has the honour to inform the Secretariat that the Republic of Korea registers its endorsement of the revised draft principles of medical ethics.
