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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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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 abolishing this punishment in all countries.
2. At the thirty-fifth session of the General Assembly, Austria, Costa Rica, the Federal Republic of Germany, Italy, Portugal and Sweden submitted a draft resolution (A/C.3/35/L.75) 1/ by which the Assembly, recalling its resolution 2857 (XXVI) and 32/61 and considering that, 14 years after the signature of the International Covenant on Civil and Political Rights, the time had 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, would take note of the draft of a second optional protocol to the Covenant, contained in document A/C.3/35/L.75; would request the Secretary-General to invite comments and observations by member Governments and to submit a report to the Assembly at its thirty-sixth session; and would decide to consider at its thirty-sixth session the draft optional protocol, together with the report, under the item entitled "International Covenants on Human Rights".
3. By decision 35/437 of 15 December 1980, the General Assembly, having taken note of draft resolution A/C.3/35/L.75, decided to consider at its thirty-sixth session, under the item entitled "International Covenants of Human Rights", the idea of elaborating a draft of a second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; and requested the Secretary-General to transmit draft resolution A/C.3/35/L.75 to Governments for their comments and observations and to submit a report to the Assembly at its thirty-sixth session. Subsequently, the General Assembly, in its resolution 36/59 of 25 November 1981, invited Member States to submit further comments and observations and requested the Secretary-General to submit to it at its thirty-seventh session a report containing the views expressed by Governments.
4. Accordingly the Secretary-General send a note verbale to Governments inviting them to submit comments and observations. As at 30 September 1982, replies had been received from the Governments of the following Member States: Algeria, Austria, Belgium, Cyprus, Germany, Federal Republic of, Italy, Pakistan, Qatar, Togo and Yugoslavia. This document contains summaries of observations and comments received in accordance with the above-mentioned resolution. 2/ Any additional information that becomes available after that date will be submitted in addenda to the present report.

II. SUMMARY OF REPLIES RECEIVED FROM GOVERNMENTS

ALGERIA

[Original: French]

[24 March 1982]

1. Since Algeria attained independence, whatever the nature of the offence they have committed, persons sentenced to capital punishment have always had the benefit of scrupulous observance of legal procedures and have been granted all the rights of defence. The death sentence has always been passed by a legally constituted court, and all possible channels of appeal have always been open to the individual sentenced to that punishment.

2. The legal rules governing the death penalty in Algeria are fairly similar to all those existing in that field in other countries around the world that have not abolished that form of punishment. The Algerian Penal Code provides for the death penalty mainly in the case of attempts on human life where there has been a premeditated act. Article 261, paragraph 1, of the Code summarizes the cases in which a person shall be sentenced to capital punishment as follows: "Any person guilty of murder, parricide or poisoning shall be sentenced to death". The sole exceptions to this rule are set forth, first of all, in article 293, which provides for the death penalty in cases where a murder has not been committed but a person has been abducted and subjected to physical torture or where the purpose of the abduction was to obtain payment of a ransom. Moreover, article 351 makes armed robbery punishable by death, and article 395 makes arsonists who set fire to inhabited or residential buildings subject to that same penalty.

3. In addition to offences committed against the individual, there are other areas where provision is made for capital punishment. These include: (a) both serious and less serious offences against the security of the State; (b) the crimes of treason and espionage; (c) attempts and conspiracies against the authority of the State and the integrity of the national territory; (d) offences committed with the aim of destabilizing the State by means of massacre and destruction; (e) offences committed through participation in an insurrectional movement.

4. Article 119 of the Penal Code also provides that any judge or civil officer guilty of misappropriation of public funds shall be sentenced to death. It is clear that, in this case, the augmentation of the penalty is based more on the office of the offender than on the nature of the offence. Moreover, articles 197 and 198 provide that counterfeiters, forgers of money and distributors of counterfeit money, shall be sentenced to death. Article 417 concerns an acute problem that is currently arising throughout the world, namely, air piracy.

5. This broad range of cases in which the death penalty is the applicable punishment might appear to suggest that executions take place in Algeria relatively frequently. This is, in fact, not the case at all: since, even in situations where the offender would normally be subject to capital punishment, the court does

not systematically sentence him to death. The atrocity or seriousness of the offence must actually be such as to make mitigation out of the question.

6. Furthermore, it should be noted that, even where an offender has been sentenced to death, other remedies are available to the condemned person to enable him to escape execution: firstly, an appeal against a high court decision, which is the normal course of action in the case of all offences judged in the last resort (articles 250 and 495 of the Code of Penal Procedure); secondly, an appeal for reprieve. All desirable legal safeguards are applied in the carrying out of the penalty.

7. Article 197 of Order No. 72-2 of 10 February 1972 establishing the code of prison organization and rehabilitation provides that "the death penalty may be enforced only after rejection of the appeal". The death penalty may not be carried out in the case of a pregnant woman or a woman breast-feeding a child aged under 24 months or in the case of a condemned person who is seriously ill or has become insane. The execution may not take place on national or religious feast days, on Fridays, or during Ramadan. Article 111, paragraph 13, of the Constitution gives the President of the Republic the right to grant a reprieve; that article stipulates that the President has the right to grant a reprieve, the right to grant a total or partial remission of any penalty and the right to annul any legal consequences of sentences passed by any court.

8. The dossiers of persons condemned to death are always transmitted automatically to the President of the Republic, even if no petition for a reprieve has been made. The dossiers are prepared by the Office for Penal Affairs and Reprieves of the Ministry of Justice.

9. The President announces his decision after taking account of the opinion of the Ministry of Justice and after consulting with the Superior Council of the Judiciary. Once he has announced his decision, that decision becomes irrevocable, because the right to grant a reprieve is an act of government falling within the sphere of the sovereign powers of the Head of State. So far, this power has been exercised in such a way as to be distinctly favourable to persons condemned to death. For example, during the period from 1974 to 1976, out of approximately 30 death sentences only one sentence was carried out.

10. It may therefore be noted that the Algerian State shows great leniency, which has a corresponding impact on the decisions of the criminal courts, and it is not inconceivable that, in time, a de facto abolition of capital punishment will be witnessed.

AUSTRIA

[Original: English]

[18 June 1982]

1. With regard to resolution 36/59 entitled "Capital Punishment" adopted by the General Assembly on 25 November 1981, the Austrian Government wishes to refer to

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its statement made in reply to the note of the Secretary-General G/SO 214/44 of 9 April 1981, in which Austria declared unequivocally its support for all endeavours aimed at the abolition of capital punishment.

2. Consequently Austria also continues to favour the adoption of a Second Optional Protocol to the International Covenant on Civil and Political Rights.

3. In this context it seems useful to underline again the optional nature of the proposed Protocol. It does not force States which are not yet able to abolish death sentences to adjust their legislation to that but offers them the possibility first of creating a favourable domestic climate and then of ratifying this Protocol, whereas other States - such as Austria - would be in a position to adhere immediately to it.

4. It may be encouraging to note in this respect that the Council of Europe is about to adopt a Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty and to open it for signature. Austria believes however that such a humanitarian endeavour should not be limited to the regional level.

BELGIUM

[Original: French]

[22 July 1982]

1. Belgium is considering the abolition of the death penalty in times of peace. It should be noted that, although the death penalty still forms part of the Belgian Penal Code, it has not been carried out for many years in times of peace.

2. The death penalty would be retained in times of war, but Belgium does not intend to equate mere periods of internal disturbances with "times of war", even though the former may be serious and involve the use of weapons, since such a course of action would be likely to lead to abuses.

3. The carrying out of the death penalty in times of war must remain an exception, and the guarantees of fair trial and respect of the right of defence must be ensured, whatever the circumstances of the war.

CYPRUS

[Original: English]

[27 July 1982]

1. Capital punishment is a mandatory sentence in Cyprus for premeditated murder under the Criminal Code and for certain offences under Military Penal Law, as follows:

(a) Under section 27(2) of the Criminal Code, Cap. 154, the sentence of death is not pronounced against an offender if at the time of the commission of the offence he was under 16 years of age; instead, the court sentences him to be detained under such conditions, in such a place and for such a period as are specified by the Council of Ministers;

(b) When a woman convicted of a capital offence is found to be pregnant, she is sentenced to life imprisonment (section 27(3) of the Criminal Code, Cap. 154);

(c) According to section 12 of the Criminal Code, Cap. 154, any person who at the time of committing the offence is, through any disease of the mind, incapable of realizing what he is doing, is not considered criminally responsible for his act or omission;

(d) For offences under ordinary penal law, the Assize Court has jurisdiction to pass a death sentence. (The Assize Court is constituted of a President and two District Judges nominated by the Supreme Court);

(e) For offences under military penal law, the military court has jurisdiction. (The military court is constituted of two members and the President, who should be an advocate having at least 7 years' practice).

2. A person sentenced to death has the right, as for any other criminal offence, to appeal to the Supreme Court against conviction or sentence on any ground of law or fact. Similarly, persons sentenced to death by the military court have the right to appeal to the Supreme Court. (The Supreme Court consists of 5 Judges, one of whom is the President of the Court).

3. According to the Criminal Procedure (Amendment) Rules, 1964, the Assize Court fixed the date of execution, which should not be less than eight weeks and not more than nine weeks from the date of the imposition of the death sentence. The Supreme Court may postpone the date of execution and fix another date in lieu thereof.

4. The right of a person condemned to death to petition for pardon or reprieve is safeguarded by article 53 of the Cyprus Constitution which reads as follows:

"1. The President or the Vice-President of the Republic shall have the right to exercise the prerogative of mercy with regard to persons belonging to their respective community who are condemned to death.

2. Where the person injured and the offender are members of different communities such prerogative of mercy shall be exercised by agreement between the President and the Vice-President of the Republic; in the event of disagreement between the two, the vote of clemency shall prevail.

3. In case the prerogative of mercy is exercised under paragraph 1 or 2 of this article, the death sentence shall be commuted to life imprisonment."

5. Capital punishment is carried out by hanging. Executions are not public.

6. Since Cyprus attained independence in 1960 the death sentence has been carried out in only two cases, the last in 1969. All other death sentences were commuted by the President of the Republic to sentences of life imprisonment.

7. There is a trend towards commuting a death sentence to life imprisonment. An amendment of the law which would enable the court to have a discretion to pass, in certain cases, an alternative sanction to capital punishment is contemplated but, for the time being, there are no trends toward the abolition of the death sentence.

GERMANY, FEDERAL REPUBLIC OF

[Original: English]

[15 June 1982]

1. The Government of the Federal Republic of Germany welcomes resolution 36/59 adopted by the General Assembly on 25 November 1981. As a co-sponsor of this resolution the Federal Government shares the views expressed in a number of previous resolutions of the United Nations. In this context, mention is made in particular of Assembly resolution 32/61 of 8 December 1977, in operative paragraph 1 of which the Assembly reaffirmed that the main objective to be pursued in the field of capital punishment was that of progressively restricting the number of offences for which the death penalty might be imposed with a view to the desirability of abolishing that punishment.
2. The Federal Government would like to stress, however, that in submitting a draft convention for the abolition of capital punishment it does not intend to pass a legal or moral judgement on States which have neither abolished the death penalty nor intend to do so. Proceeding from this consideration the Federal Government presented its draft in the form of an optional protocol to the International Covenant on Civil and Political Rights. The adoption of such a protocol would not force any State to assume the obligations deriving from this legal instrument.
3. The initiative by the Federal Republic of Germany is designed to revive the discussion on the restriction and abolition of capital punishment. The optional protocol will provide States able to do so with the option of entering into an internationally binding commitment in this field.
4. The Government of the Federal Republic of Germany is of the opinion that the submitted draft second optional protocol to the International Covenant on Civil and Political Rights could be discussed on a broad basis during the forthcoming thirty-seventh session of the General Assembly.

ITALY

[Original: French]

[26 April 1982]

1. The Italian Constitution does not authorize the death penalty save in cases specified by wartime military laws (article 27, last paragraph). Capital punishment is thus abolished not only in the case of crimes committed with aggravating circumstances, previously provided for in the Criminal Code, but also in the case of military offences committed in peacetime. Furthermore, in view of the supplementary character of the Wartime Military Code, capital punishment is now automatically replaced by penalty of imprisonment in the case of a number of offences which the Wartime Military Code, having no applicable independent provisions, refers to other codes.

2. A recent decision of the Constitutional Court (No. 54 of 15 June 1979) confirms the intention of the constitutional legislative authority not only to prohibit capital punishment in Italy but also to refrain from authorizing extradition for offences carrying the death penalty under the legislation of the requesting State.

3. At the international level, Italy has given very favourable consideration to all proposals for the total abolition of capital punishment and has, in addition, taken some initiatives towards, on the one hand, the gradual abolition of the death penalty until it has completely eliminated and, on the other, the institution of a five-yearly review of the situation in this regard by the United Nations. Among other things, Italy co-sponsored draft resolution A/C.3/35/L.75, of which the General Assembly took note in decision 35/347 and resolution 36/59 of 25 November 1981.

PAKISTAN

[Original: English]

[30 August 1982]

1. The Islamic Republic of Pakistan has a constitutional obligation for the enforcement of Islamic Sharia. Laws according to the injunctions of Islam as set out in the Holy Quran and the Sunnah, providing for capital punishment for certain offences, have been and will hence be enforced in Pakistan. Capital punishment of death has already been provided for rape in certain circumstances (amounting to Zina liable to hadd), through the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Similarly, capital punishment has been provided for an aggravated form of haraabah (a kind of dacoity) through the Offences against Property (Enforcement of Hudood) Ordinance, 1979 (VI of 1979).

2. The Government of the Islamic Republic of Pakistan, therefore, expresses its inability to adopt any measure aiming at the ultimate abolition of capital punishment.

QATAR

[Original: Arabic]

[27 May 1982]

1. The State of Qatar has restricted the application of the death penalty to a large extent and has restricted it to the most serious crimes, which are set out exhaustively in the Qatar Penal Code as follows:

(a) Article 20 of the Qatar Penal Code provides that the death penalty shall be applied in the case of premeditated murder and crimes against the State.

(b) Article 35 of the Code provides that: "The death penalty may not be imposed on any person who, in the court's determination, is under 18 years of age".

(c) Article 36 of the Code provides that "where it is established that a woman who has been sentenced to death is pregnant, a sentence of life imprisonment shall be substituted for the death penalty".

(d) Article 37 of the Code provides that "the death penalty shall be carried out only after its ratification by the ruler".

(e) Article 63 of the Code provides that "any person who is deliberately instrumental in causing the death of the ruler, his deputy or the heir apparent or who is instrumental in causing serious injury to either of them shall be punished by death".

(f) Article 65 of the Code provides that "any person who bears arms against the State of Qatar, enters on such a course of action or incites thereto shall be punished by death".

(g) Article 66 of the Code provides that "any person, who in any way, joins the armed forces of a State which is at war with Qatar, approaches or communicates with a foreign State or with any person working on its behalf for the purpose of carrying out hostile acts against Qatar or who approaches or communicates with a hostile foreign State or with any person working on its behalf regarding its war operations or in order to damage the war operations of the State of Qatar shall be liable to the death penalty".

2. The criminal courts impose the death sentence only after due legal process, during which the accused enjoys all defence guarantees. In addition, a condemned person has the right to utilize the channels of appeal to higher judicial bodies provided for by law and also to apply for pardon to the superior political authority, represented by His Highness the Amir of the State of Qatar, the constitutional guarantor of the independence of the judiciary. Until the Amir takes a decision on the question of pardon for the condemned man, the death penalty is not carried out.

3. The State believes that provision for the death penalty in the legislation remains necessary. It is a just, deterrent and decisive penalty in a limited number of cases and in specific circumstances stipulated in the legislation in force. There are certain crimes regarding which there is international unanimity that the perpetrators should be punished by the death penalty, in particular, crimes against humanity and against mankind and war crimes.

4. Qatar legislation relies on the Islamic Shari'a as a principal source of legislation in the State of Qatar. The Islamic Shari'a has prescribed the death penalty in the case of crimes the perpetrators of which deserve to be executed, such as premeditated murder and sedition.

5. The Government of the State of Qatar intends to retain the death penalty and is, therefore, unable to become a party to the proposed Optional Protocol.

TOGO

[Original: French]

[23 July 1982]

1. Although it is true that capital punishment has been retained in Togo's Criminal Code, it should be noted that the cases for which it is prescribed are extremely limited and defined unequivocally, so as to take into account the generally accepted international norms on the matter.

(a) Where homicide has been committed either with premeditation or against a parent, whether for ritualistic or cannibalistic purposes or in order to prepare for, facilitate or commit an offence against property or public decency;

(b) Where an offence has been committed against the internal or external security of the State: espionage, secret dealings with the enemy or incitement to civil war, for example.

2. The death penalty, while retained in the positive law of Togo, is, however, rarely demanded and pronounced, if only because of the very low rate of crimes involving bloodshed in the Togolese Republic.

3. Although in 1979 a number of death sentences were handed down by the State Security Court for conspiracy, enlisting or complicity in enlisting soldiers and possession of arms, munitions and war matériel, the fact remains that the President of the Republic exercised the right of pardon which is his under the Constitution.

4. The same thing occurred in 1981 when two persons convicted of deliberate premeditated homicide had their sentences commuted by presidential decree.

5. No other death sentence was handed down by Togolese courts.

6. Accordingly, it has been the policy of Togo at the United Nations and especially in the Commission on Human Rights, of which it is a member, to follow very closely the efforts to have the Second Optional Protocol adopted as a way of encouraging those countries which are already advanced in criminology to pursue their policy of liberalization, until such time as it may gradually be extended to all the Member States.

YUGOSLAVIA

[Original: English]

[27 August 1982]

1. The Government of Yugoslavia considers as unacceptable the proposal contained in draft resolution A/C.3/35/L.75 entitled "Measures aiming at the ultimate abolition of capital punishment (draft Second Optional Protocol to the International Covenant on Civil and Political Rights)", embodied in United Nations document A/35/742 of 11 December 1981, paragraph 20.
2. The adoption of this draft resolution would result in amendments to the present International Covenant on Civil and Political Rights, which the Government of Yugoslavia has ratified (see "The Official Gazette of the Socialist Federal Republic of Yugoslavia", No. 7/71) and brought its national legislation into line with it.
3. Article 1 of the draft Optional Protocol to the International Covenant on Civil and Political Rights, whose adoption is proposed in the said draft resolution, stipulates that "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". Such a solution would be premature and not viable, having in mind the contradictions burdening present-day international relations among States and social systems. In addition to these circumstances, the contemporary concepts with respect to the purpose of punishment should be borne in mind, according to which one of the elements of the aim of punishment is general prevention, whose achievement is helped by the existence of the death penalty in criminal legislations, irrespective of the extent to which the death penalty is imposed in judicial practice.
4. The criminal legislation of Yugoslavia provides that the death sentence may be pronounced only for the most serious instances of grave crimes prescribed by law (article 37, para. 2, of the Criminal Law of the Socialist Federal Republic of Yugoslavia; see "The Official Gazette of the Socialist Federal Republic of Yugoslavia", No. 44/76). Further, in its article 37, paragraph 1, the Criminal Law of the Socialist Federal Republic of Yugoslavia stipulates that capital punishment shall not be imposed as the only principal punishment for a crime, but shall always be commutable to a sentence of imprisonment, while paragraphs 3 and 4 of the same article stipulate that the death sentence shall not be pronounced against persons who at the time of the commission of the crime were under 18 years of age or against pregnant women (para. 3). Under the conditions referred to in article 37,

paragraph 2, capital punishment may be imposed on persons of full age who at the time of the commission of the crime were under 21 years of age only for crimes against the foundations of the socialist self-managed social system and security of Yugoslavia, for crimes against humanity and international law, and for crimes against the armed forces of Yugoslavia (para. 4).

5. A special section of the Criminal Law of the Socialist Federal Republic of Yugoslavia and the criminal laws of the socialist republics and autonomous provinces provides for a small number of crimes for which the death penalty commutable to a sentence of imprisonment may be imposed. In addition, capital punishment is rarely imposed, and even more rarely carried out in judicial practice. According to judicial statistics, in the 10-year period 1971-1980, two or three death sentences were carried out annually on the average.

6. On the basis of the aforementioned, a conclusion can be drawn that capital punishment in Yugoslavia has been reduced to a reasonable measure, both in terms of criminal legislation and in terms of judicial practice.

7. The existing solutions in the criminal legislation of Yugoslavia are in conformity with the International Covenant in Civil and Political Rights.

Notes

1/ See A/35/742, para. 20.

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