



General Assembly

Distr.
GENERAL

A/44/592 + Add. 1
9 October 1989

ENGLISH

ORIGINAL: ARABIC/ENGLISH/
FRENCH/SPANISH

GENERAL ASSEMBLY
Forty-fourth session
Agenda item 98

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 containing views expressed
by Governments pursuant to Commission on Human Rights
resolution 1989/25 of 6 March 1989

CONTENTS

	<u>Page</u>
I. INTRODUCTION	3
II. REPLIES RECEIVED FROM GOVERNMENTS	4
Australia	4
Belgium	5
Botswana	7
China	7
Costa Rica	9
Dominican Republic	10
Egypt	10
Finland	17

CONTENTS (continued)

	<u>Page</u>
France	17
German Democratic Republic	19
Germany, Federal Republic of	20
India	22
Italy	22
Japan	25
Netherlands	26
Norway	27
Panama	28
Philippines	28
Portugal	29
Qatar	31
Spain	31
Switzerland	32
Uruguay	33
Venezuela	33

I. INTRODUCTION

1. In its decision 35/437 of 15 December 1980, reaffirmed in its resolution 36/59 of 25 November 1981, the General Assembly decided to consider 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. In its resolution 37/192 of 18 December 1982, the General Assembly requested the Commission on Human Rights to consider that idea.
2. In its resolution 1984/19 of 6 March 1984, the Commission on Human Rights invited the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider the idea. In its resolution 1984/7 of 28 August 1984, the Sub-Commission proposed to entrust Mr. Marc Bossuyt as Special Rapporteur with the preparation of an analysis concerning the proposition to elaborate a second optional protocol, taking into account the documents considered and the views expressed in the Assembly, the Commission and the Sub-Commission in favour or against the idea of elaborating such a protocol.
3. Taking note of those resolutions, the General Assembly, in its resolution 39/137 of 14 December 1984, requested the Commission and the Sub-Commission to consider further the idea of a second optional protocol. In its resolution 1985/46 of 14 March 1985, the Commission on Human Rights recommended to the Economic and Social Council that it authorize the Sub-Commission to entrust Mr. Marc Bossuyt as Special Rapporteur with the preparation of the above-mentioned analysis. The recommendation was adopted by the Economic and Social Council in its resolution 1985/41 of 30 May 1985.
4. The Special Rapporteur presented his report (E/CN.4/Sub.2/1987/20) to the Sub-Commission at its thirty-ninth session, in 1987. At its fortieth session, in 1988, the Sub-Commission, in its resolution 1988/22, decided to transmit the comparative analysis and the comments expressed at its thirty-ninth and fortieth sessions and the draft second optional protocol to the International Covenant on Civil and Political Rights, prepared by the Special Rapporteur (E/CN.4/Sub.2/1987/20), to the Commission on Human Rights for its consideration.
5. The Commission on Human Rights, at its forty-fifth session, in its resolution 1989/25, decided to transmit to the General Assembly, through the Economic and Social Council, the comparative analysis and the draft second optional protocol as well as the comments expressed at the thirty-ninth and fortieth sessions of the Sub-Commission and at the forty-fifth session of the Commission on Human Rights. The Commission also requested the Secretary-General to bring the comparative analysis to the attention of all Governments and to invite them to communicate to him, before 1 September 1989, their comments on the text of a draft second optional protocol contained in annex I to the analysis, and to submit to the Assembly for consideration at its forty-fourth session the aforementioned text and a report containing the views expressed thereon by Governments. It also recommended that the Assembly consider taking suitable action on a second optional protocol on the abolition of the death penalty.

6. At its first regular session of 1989, the Economic and Social Council, in its decision 1989/139, approved the decision of the Commission on Human Rights to transmit to the General Assembly for suitable action the comparative analysis concerning the proposal to elaborate a second optional protocol to the International Covenant on Civil and Political Rights and the draft second optional protocol prepared by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as well as the comments expressed at the thirty-ninth and fortieth sessions of the Sub-Commission and the forty-fifth session of the Commission.

7. The present document contains the replies received from Governments as at 22 September 1989. Any further information received from States will be reproduced in an addendum.

II. REPLIES RECEIVED FROM GOVERNMENTS

AUSTRALIA

[Original: English]

[8 August 1989]

1. The Government of Australia sees the adoption of the draft second optional protocol on the abolition of the death penalty as an important step in the promulgation of international human rights standards, building on article 6 of the International Covenant on Civil and Political Rights, which proclaims the inherent right to life and places serious limitations on the application of capital punishment in States that have not abolished the death penalty. Australia concurs with the conclusion of the Special Rapporteur that article 6, paragraph 6, of the covenant contains a strong presumption in favour of abolition of the death penalty. Australia also considers it relevant that it has been the clear opinion of the Human Rights Committee that the intention of the Covenant was to encourage countries to abolish capital punishment.

2. In his analysis on the proposition to elaborate a second optional protocol, the Special Rapporteur has pointed to other international instruments, law and practice that further demonstrate the growth of international opinion against capital punishment. Australia notes in particular that, by its resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977, the General Assembly reaffirmed the desirability of abolishing the death penalty in all countries.

3. The Government of Australia considers that the Special Rapporteur has also convincingly demonstrated that there is a strong international commitment to the right to life, and that the promulgation of an optional protocol on the abolition of the death penalty would enhance that commitment. Australia supports the view that such a protocol would constitute progress in protecting the right to life. Australia notes that the right to life is a fundamental principle contained in the Universal Declaration of Human Rights, which by its nature sets the standard for international efforts to protect and promote human rights.

4. Australia notes that there are Governments opposed to the abolition of capital punishment for various reasons. Opposition to abolition would not, however, seem to be grounds for opposing the promulgation of an optional protocol against the death penalty. It is noteworthy that many States which retain capital punishment have nevertheless supported or not opposed the measures taken to elaborate the present draft optional protocol.

5. In the view of the Government of Australia the death penalty is an inhumane and degrading form of punishment, which violates the most fundamental of human rights - the right to life. The death penalty has been abolished federally and in all Australian States, and it is over 20 years since it was last enforced within Australia. There is no evidence to suggest that abolition has in any way led to an increase in what were previously "capital crimes".

6. The draft optional protocol is the culmination of many years of careful consideration by the appropriate specialist bodies of the United Nations. It has received the endorsement of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the expert body to which the Special Rapporteur was responsible. The resolution of the forty-fifth session of the Commission on Human Rights transmitting the draft protocol to the General Assembly was adopted by consensus, and the Economic and Social Council has strongly endorsed that decision. These facts are indications that the text has already achieved a high level of international acceptability.

7. The proposed optional protocol will provide all abolitionist countries with an opportunity to firmly register internationally their position on capital punishment, and it will place no compulsion on retentionist States. Australia regards this instrument as an important step in the process of expanding and strengthening international human rights, and strongly supports and commends the Special Rapporteur's draft text. Australia looks forward to its early adoption by the General Assembly.

BELGIUM

[Original: French]

[31 August 1989]

1. Belgium has noted with great interest the excellent report of the Special Rapporteur, consisting of a comparative analysis and a draft second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

2. Belgium draws attention to the Special Rapporteur's conclusion that this analysis was not designed to press States to abolish capital punishment or to become parties to a second optional protocol. But at the same time, Belgium feels obliged to point out, along with the Special Rapporteur, that in today's world there is a growing movement towards the abolition of the death penalty, a movement which has already produced tangible results in many countries, either through the

adoption of national legislation or, in a broader sphere, through the conclusion of regional agreements.

3. The report also indicates that several countries have expressly demonstrated their will to make commitments in this area at the global level and, more particularly, within the framework of the International Covenant on Civil and Political Rights.

4. Such a commitment not only would fulfil the desire already expressed by the General Assembly in its resolution 2857 (XXVI) of 20 December 1971, and repeated several times since then, but also would be part of the follow-up to article 3 of the Universal Declaration of Human Rights, as well as article 6 of the International Covenant on Civil and Political Rights. Belgium would like to recall that the Human Rights Committee, established under the Covenant, noted in its General Comment 6 (16), on article 6 of the Covenant, that "the article also refers generally to abolition in terms which strongly suggest ... that abolition is desirable" (CCPR/C/21/Rev.1).

5. Though the death penalty remains in the Belgian Penal Code (arts. 8-11) and is still imposed by the courts, in practice no one sentenced to death for an offence under the general law has been executed since 1918. Under ministerial instructions, in the event of a capital sentence (in peacetime), the judicial authorities are duty-bound to enter a plea for clemency of their own motion. It is the tradition to show clemency by commuting a death sentence to a sentence of life imprisonment. In other words, the Belgian authorities reject the very principle of enforcing capital punishment because of their deep commitment to the cause of human rights. Belgium should thus be ranked among the abolitionist States.

6. On 28 August 1983, Belgium signed Protocol No. 6 to the European Convention on human rights. This Protocol affirms the principle of abolition of the death penalty, and recognizes the subjective right of the individual (in peacetime) to be neither condemned to death nor executed. The internal procedure for ratification of this Protocol is under way. In the context of consideration of this question, the Minister of Justice is currently preparing a bill on the abolition of the death penalty.

7. Accordingly, Belgium favours the drafting of an instrument which would permit States that so desire to embody their determination to abolish the death penalty in an international legal obligation. It believes that the text proposed by the Special Rapporteur in annex I to his report adequately responds to that aspiration on the part of a large segment of the international community, without infringing on the sovereign right of States to subscribe or not to subscribe to such an instrument.

8. Belgium recalls that the General Assembly decided, at its forty-second session, to continue its consideration of this question at its forty-fourth session, "in the light of action taken by the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities" (decision 42/421 of 7 December 1987). It is useful to note that the draft in question, in annex I to the above-mentioned report, received the support of the

Sub-Commission (resolution 1988/22) and the Commission (resolution 1989/25). These bodies decided, each time without a vote, to transmit the comparative analysis and the draft to the higher authority. Belgium hopes that this spirit of consensus and constructive co-operation can also prevail when the General Assembly considers the draft with a view to its adoption.

BOTSWANA

[Original: English]

[26 July 1989]

The Department of External Affairs of the Republic of Botswana stated that the position of its Government is to retain the death penalty.

CHINA

[Original: English]

[20 September 1989]

1. The Chinese Government attaches importance to the question of the death penalty and has taken note of the work done over a long period of time by the United Nations system on the question, particularly the work on the draft second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, done by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and by the Special Rapporteur.
2. The Chinese Government holds that the adoption of the death penalty as a form of punishment depends entirely on actual political, economic, social and cultural developments, on the state of social order and the need for combating crimes in the country concerned, and on the will of the broad masses of people.
3. In the light of its national conditions, China has established the death penalty in its criminal law. However, it has taken various measures at the same time to limit strictly the application of the death penalty.
4. The application of the death penalty is confined to a small number of cases involving crimes that are grave in nature and cause great harm. These include crimes of counterrevolution that cause especially serious harm to the State and the people, crimes that endanger public security and have very serious consequences, crimes of infringing upon the personal rights of citizens with very serious circumstances, crimes of public and private property violation involving huge amounts with especially serious circumstances. Even in cases involving the above crimes, the death sentence can only be meted out when the circumstances are very serious and the consequences very grave. In practice, those who are sentenced to

death in the end are only the principal criminals who have committed most heinous crimes in these cases.

5. With regard to the subjects of crimes, the Chinese Criminal Law provides that the death penalty is not to be applied to persons who have not reached the age of 18 at the time the crime is committed or to women who are pregnant at the time of sentencing. Persons who have reached the age of 16 but not the age of 18 may be sentenced to death with a two-year suspension of execution if the crime committed is particularly serious.

6. With regard to judicial procedures, the Chinese Criminal Procedure Law provides that the intermediate people's courts should be courts of first instance for cases in which there may be a death sentence, and these cases must be submitted to the Supreme People's Court for approval. The approval of death sentences is not subject to the time restrictions of the trial to ensure that there is enough time to review the facts of the crime and the appropriateness of the law applied. The Chinese Criminal Procedure Law also provides that the defendants should be guaranteed the right to appeal within 10 days, i.e. to apply for exemption from criminal punishment or reduction of a sentence, or to request a review of the case.

7. The Chinese Criminal Law also provides that "a two-year suspension of execution may be announced at the same time the sentence of death is imposed, and reform through labour carried out and the results observed". A death sentence with suspension is not an independent form of sentence and can only be announced at the same time the sentence of death is imposed. This is a practice that China has created in the system of criminal punishment, that is, not to carry out immediately the execution of the criminal who is to be sentenced to death and provide an opportunity for him to render meritorious service to atone for his crimes. If the person sentenced to death truly repents during the two-year reform, he is to be given a reduction of sentence to life imprisonment or a fixed-term imprisonment from 15 years to 20 years. This is a manifestation of the policy of combining severe punishment with leniency. In so doing, we can urge the offenders to repent and at the same time bring the initiative of the family members into play, thus reducing the number of executions of death penalty. When it has been verified that a criminal sentenced to death with a suspension of execution resists reform or continues to commit crimes in an odious manner, the sentence of death should still be executed after the matter has been submitted to the Supreme People's Court for judgement or approval. Our sentencing practices over the years have shown that the overwhelming majority of the criminals sentenced to death with suspension can repent, confess to be guilty and accept the punishment, and consequently the State will exercise leniency and reduce their sentence. Those who resist reform and are executed in the end are very few.

8. In short, the basic principle concerning the death penalty is "not to abolish the death penalty, but apply strict control in an effort to minimize the number of executions". The provisions on the death penalty in Chinese law are formulated by the National People's Congress - the supreme organ of power in China - in exercise of the rights endowed by the Chinese Constitution. The purpose of these provisions is to safeguard the interests of the Chinese people, and they are a reflection of the will of the Chinese people.

COSTA RICA

[Original: Spanish]

[22 August 1989]

1. The Government of Costa Rica considers it necessary, given the concern it has always felt for the protection of human rights, to make comments on the draft second optional protocol to the International Covenant on Civil and Political Rights.
2. In 1869, Costa Rica adopted legislation abolishing the death penalty. In restoring the validity of the 1871 Political Constitution in 1882, the country's leader at the time, Tomás Guardia, totally changed article 45, which specified the cases in which the death sentence could be imposed, and replaced it with a categorical declaration: "Human life is inviolable in Costa Rica". Since then, this precept has been maintained in the Political Constitution. In 1917, during consideration of a new Constitution, there occurred in the Constituent Assembly a heated debate between those who favoured restoration of the death penalty and those who defended the status quo. In the final vote, those seeking restoration were defeated. When the current Political Constitution was adopted in 1949, the 1871 text was made even more concise; the 1917 text was adopted, and said simply: "Human life is inviolable". In 1982, on the centenary of the incorporation in the Political Constitution of the declaration on the inviolability of life, a world congress on human rights was held in Alajuela, Costa Rica, as a special commemorative event.
3. Given the nation's record, the Government of Costa Rica has considered it imperative to support the movement for the elaboration of the second optional protocol to the International Covenant on Civil and Political Rights. We have co-sponsored resolutions adopted by various bodies which have addressed the issue.
4. We thus wish to express our support for and agreement with the proposed text of the second protocol, the result of the Special Rapporteur's work.
5. In the first place, the text in question is an optional protocol. Consequently, the countries that believe it necessary to maintain that form of punishment may be parties to the International Covenant on Civil and Political Rights, without being required to ratify the protocol. But at the same time, we States that believe it necessary to express our views on the need to abolish the death penalty can make them known even more clearly and forcefully.
6. The Government of Costa Rica considers that specific cultural differences regarding specific human rights do exist and should exist. However, it believes that essential to the very concept of human rights is the conviction that human life is inviolable and that it is necessary to make it impossible for the State to deprive its citizens of their lives. Hence there must be progressive development in the legal system, national as well as international, for the protection of human rights, and the system must aim to be comprehensive. Although that evaluation must be gradual, it must also be positive in giving increasing recognition to all the implications.

7. With these principles in mind, we declare that we have no objection whatever to the draft second optional protocol, and that we propose to try every possible means to have it adopted by the General Assembly and initiate the process for signature and ratification.

DOMINICAN REPUBLIC

[Original: Spanish]

[7 July 1989]

1. The Dominican Republic recognizes in article 8, paragraph 1, of its Constitution "the inviolability of life, thus precluding the introduction, imposition or application of the death penalty under any circumstances". It is therefore sympathetic to and supportive of any effort to abolish the death penalty in all countries.
2. Article 6 of the International Covenant on Civil and Political Rights guarantees the "right to life". The trends in modern penology are to reduce prison time, reintegrate former prisoners into society, and require each country to provide more and more training for prison, especially psychologists and sociologists investigating the causes of staff abnormal human behaviour and seeking adequate corrective measures.
3. The Dominican Republic urges limits on the application of the death penalty in countries where it still exists, and strongly recommends its abolition.
4. The Dominican Republic attaches great value to the protocol and supports the draft.

EGYPT

[Original: Arabic]

[29 August 1989]

1. The right to life heads the list of all rights enjoyed by man: indeed, it is acquired by man even before he sees the light of day because it is enjoyed by the foetus while still in the womb of its mother. All laws laid down by the revealed religions have therefore erected a strong wall of protection and respect around this right. They have prohibited any form of encroachment on it and treated such encroachments as departures from the principles established in the laws of the revealed religions: the perpetrator is thus subject to the ultimate punishment in both this world and the next.
2. Positive legislation has also affirmed the right to life as an automatic human right since olden times. Indeed, most legislation protects the right to life not only of man but also of flora and fauna which are of use to man.

3. It is neither just, legal nor logical to protect a human being's right to life without prescribing the death penalty for any person who deliberately deprives a human being of that right.
4. The need to punish a criminal, which is obviously essential, was recognized at the earliest stages of community life, while at the same time the consciences of individuals were imbued with a sense of the need for justice. Punishment is designed to ensure the full protection of social values and interests, as well as to protect fundamental human rights. These rights are of immense significance for societies living under democratic systems, and punishment law must ensure that they are adequately protected and observed. From the moral point of view, moreover, there must always be appropriate requital when a crime is committed or human rights are violated, meaning that there must be an appropriate relationship between the magnitude of the criminal act and the magnitude of the penalty imposed in respect of its perpetration. Considerations of justice so dictate, because common sense holds that there must be requital for evil: the objective of punishment is to instil a sense of justice in the minds of men.
5. Punishment is the principal instrument whereby a particular and general deterrent is established. By virtue of the threat implicit in it, punishment is instrumental in preventing crime and protecting both the community and individuals. It constitutes a general deterrent against the perpetration of crimes and, if a crime is in fact committed, chastises the criminal and dissuades others from imitating him and following his footsteps.
6. The Egyptian Constitution incorporates all the principles of criminal justice set forth in the Universal Declaration of Human Rights. All crimes and penalties are governed by the law, and all penalties are imposed by virtue of a judicial sentence. Every defendant is innocent until proven guilty before a court of law, in which he is guaranteed the right to defend himself. The Constitution also provides that individual freedom is a natural right and an inviolable privilege, that the private life of citizens is protected by the law and that any infringement of individual freedom or the inviolability of the private life of citizens is a crime in respect of which no criminal or civil suit shall be subject to limitations.
7. Egyptian law provides for the death penalty only in respect of certain serious crimes such as murder, certain offences against State security, whether external or internal, and some crimes related to drugs. The legislator was obliged to intervene decisively to combat the latter problem, with a view to protecting society, when the spread of drugs developed into an enormous threat, undermining the fabric of society and its individual members.
8. The Egyptian legislator has invested the death penalty with a number of legal and administrative guarantees, including the following:

The State undertakes to appoint a defence lawyer for any defendant who lacks an advocate, at the expense of the State;

A death sentence must be pronounced unanimously by all members of the court which pronounces the sentence;

The legislator has provided that the Mufti of the Republic must be informed of all death sentences and that the Mufti must, after consideration of the case, either express an objection to the sentence or give it his approval;

The legislator has forbidden that any person be sentenced to death if he was under the age of 18 at the time when he committed the crime;

It is a legal requirement that an appeal must be lodged against any death sentence before the Court of Cassation, in order that the case may be reviewed if the Court sees good reason to do so;

The Minister of Justice must submit a file on any case in which a death sentence is pronounced to the President of the Republic, who is entitled either to reduce the penalty or to grant a pardon;

Even after a court becomes convinced that the defendant has committed a crime which is legally punishable by death, the legislator allows the court to commute the penalty to a sentence of hard labour for life, or for a specific period, if the circumstances of the criminal or of the crime dictate in favour of clemency.

9. Statistical surveys carried out in a number of countries which have removed the death penalty from their legislation indicate a clear and continuing rise in the number of murders, which has led some of these countries to reintroduce the death penalty in respect of certain serious crimes.

10. Note should be taken at this juncture of the statement, in a report by Amnesty International, to the effect that retention of the death penalty in a body of legislation does not necessarily imply any excess in its application. There are 27 countries which, although retaining legislation for the death penalty, have not carried out a single execution for over 10 years.

11. With regard to the statement in the report that 12 death sentences were handed down in Egypt between 1985 and mid-1988 in respect of crimes of murder, abduction and rape, i.e., an average of about three sentences each year, these are not significant when set against the total number of crimes committed during this period and the size of the Egyptian population (over 50 million). The criteria which led Amnesty International to adopt the position that the death penalty was a violation of human rights were of an emotional and irrational nature, in which no account was taken either of the circumstances of different human societies or of objective considerations, resulting in conclusions which are at odds with the practical reality of many countries of the world.

THE DEATH PENALTY: RETENTION OR ABOLITION

1. The death penalty in Egyptian legislation

12. The Egyptian legislator has prescribed the death penalty for a number of major crimes against national security and the higher interests of the country, such as treason and espionage, those which do serious harm to society, such as the importation of or traffic in narcotic drugs, the abduction of women if accompanied by rape, crimes against the lives of individuals, such as murder with aggravated circumstances, including malice aforethought, premeditation or poison, or in connection with a crime, and cases involving the misdemeanour and crime of torturing a defendant to death or the crime of providing false testimony if a defendant is sentenced to death and executed on the basis of such testimony.

13. The legislator has, however, applied a number of rules to the penalty, the intention being that they should serve as guarantees before sentence is pronounced or carried out, while also ensuring that account is taken of what is appropriate, and of humanitarian feelings. These rules are as follows:

The death sentence may not be imposed on any person who was under 18 years of age at the time when he committed the crime (art. 15 of Law No. 31 of 1974, relating to minors);

The death sentence is not mandatory, as the Egyptian legislator empowers the court to substitute a lesser penalty, in accordance with certain penalty provisions governing the aforementioned crimes, or with the provisions of article 17 of the Law relating to penalties, which provide that "the death penalty may be commuted, if the circumstances of the crime in respect of which the public action is brought dictate that clemency be shown by the judges, to hard labour for life, or for a specific period ...";

The death penalty may be pronounced only if the judgement of all members of the criminal court panel is unanimous (art. 381, para. 2, of the Law relating to criminal proceedings), taking due account of the seriousness of the crime and the magnitude of the penalty. The penalty is thus invested with a procedural guarantee ensuring that it is imposed only in cases when all members of the panel are in agreement;

The criminal court must obtain the opinion of the Mufti of the Republic before pronouncing a death sentence, in order to confirm that the sentence is in keeping with the provisions of Islamic law (art. 381, para. 2, of the Law relating to criminal proceedings);

The Office of the Public Prosecutor must serve notice of a death sentence pronounced in the presence of the litigant parties to the Court of Cassation, together with a note indicating its opinion, in order to verify that the law has been properly applied, even if the convicted person does not resort to the cassation procedure to appeal against the sentence. Neither does the expiry of the period prescribed for serving notice of the sentence to the Court of Cassation absolve the Office of the Prosecutor of its duty; such notice is accepted even if

it is served subsequently. Furthermore, the Court of Cassation must judge whether the law has been properly applied even if the Office of the Public Prosecutor does not submit a note indicating its opinion (art. 46 of Law No. 57 of 1959, relating to cases and procedures for appeals to the Court of Cassation);

When a death sentence is confirmed, the papers relating to the case must be submitted to the President of the Republic in order that he may exercise his power to grant a pardon, or to commute the penalty in any case where implementation of the sentence is not mandatory and indisputably in the interests of the community (art. 149 of the Constitution of the Arab Republic of Egypt; art. 470 of the Law relating to criminal proceedings).

14. Defendants in respect of the aforementioned crimes are also notified of all the guarantees prescribed by the Egyptian legislator in order to ensure that criminal trials are justly conducted. These include the following:

Every defendant in respect of a crime must have an advocate. If he does not have a lawyer appointed by him, a lawyer must be assigned to him. Court proceedings and any sentence based thereon are considered invalid if this basic rule of public order is disregarded (art. 67, para. 2 of the Constitution of the Arab Republic of Egypt; art. 214, para. 2, of the Law relating to criminal proceedings);

It is also mandatory that the defendant's advocate should attend all the proceedings of the court and present his arguments for the defence in person or through a representative appointed by him. If he does not comply, the criminal court must sentence him to a fine not exceeding 50 Egyptian pounds, without prejudice to any disciplinary trial, if required (art. 375 of the Law relating to criminal proceedings);

Any public official or employee who is ordered to torture a defendant or carries out such torture himself with a view to inducing confession is subject to hard labour or imprisonment for a period of between 3 to 10 years, or to the penalty prescribed for murder in the event of the death of the victim (art. 126 of the Law relating to penalties). False testimony also incurs the death penalty if the defendant is sentenced to death and executed on the basis of such testimony (art. 295 of the Law relating to penalties);

No penalty is imposed in cases of legitimate self-defence (art. 245 and subsequent articles of the Law relating to penalties), cases of reduced responsibility such as constraint, duress, loss of consciousness or control at the time the act was committed by virtue of insanity, mental deficiency or intoxication as a result of involuntary drunkenness or the taking of narcotic drugs either inadvertently or under duress (arts. 61 and 62 of the Law relating to penalties).

2. Why the death penalty should be retained

15. The death penalty is one of the oldest penalties recognized in ancient legislation, the infliction of pain was a basic element of the process. Although this has changed in modern legislation, such that the death penalty is now

restricted to a small number of crimes, particularly crimes against life and certain crimes against State security and there has been a change in the way the sentence is carried out, eliminating any physical pain other than that which is necessary to end the life of the person concerned, an international controversy has arisen over whether the penalty should be retained. Some have called for its abolition on the grounds that the penalty is brutal and that it is based on the exaction of retribution from criminals by depriving them of life - a concept which should be shunned by civilized societies - and on despair of reforming such criminals, whereas the hope should be maintained that any criminal can be reformed. They argue that society does not benefit from the death penalty: serious crimes have not increased in the countries which have abolished it, neither have they fallen in those which maintain it. If the objective is to isolate a person from society, this can also be done by depriving him of liberty for life. Furthermore, life is not a gift from society which can then legitimately be taken away. The law, which prohibits killing, cannot order that a person be killed. The arguments conclude by stating that a mistake in imposing the death penalty cannot be rectified once the sentence has been carried out.

16. However, these arguments are almost devoid of any legal value, are incompatible with proper criminal policy and run counter to the community's interest in the battle against crime, for the following reasons:

The basis of the philosophy of punishment is the establishment of a particular deterrent, by inflicting the same harm on the criminal as he has inflicted on the victim or on the community, as well as a general deterrent, by making criminals fear the consequences of committing crimes and appreciate the enormity of such crimes through the level of the penalties imposed in respect of them. It is therefore appropriate to impose the death penalty for crimes which terrorize humanity. The death penalty is valid when it is necessary, and the objective is not so much to exact retribution from the criminal as to limit the occurrence of the most serious crimes against human societies;

The death penalty is imposed only upon those who commit serious crimes, particularly crimes against the lives of individuals. The punishment thus fits the crime, and there is no reason to request that the life of a criminal should be spared if he did not respect the right of the victim to his life, terrorized the community by abducting and raping a woman or corrupted it by spreading narcotic poisons and thus endangered coming generations and the future of mankind. If the crime is very serious, and the fault of its perpetrator and the threat which it poses to society are categorically proven, the crime clearly warrants the death penalty, and imposition of the penalty is no more than a decisive and effective step to combat crime and save society;

The death penalty is no harsher than penalties involving deprivation, which may last for the rest of the convicted person's life or for the greater part of it, bringing pain and suffering from which he will never find relief. The death penalty, with the brief pain which it brings, is no harsher than these penalties, with the long distress that they entail;

The statement that the death penalty is based on despair of reforming criminals, and that hope must be maintained for the reform of any criminal, is invalid. The argument is based on pure hypothesis and wanton disregard for the reality of human nature when possessed by evil and aggression, in cases where examination of the person concerned has established that he represents a great danger to society and is not susceptible to reform;

The statement that society does not benefit from the death penalty, and that serious crimes have neither increased in countries which have abolished it nor fallen in countries which maintain it, is invalid. Although there are some criminals who are not awed by the penalty, there are others who do fear it; if the penalty is abolished, they proceed to commit crimes which they did not commit before for fear of being punished. This is demonstrated by the fact that, in countries where the death penalty has been abolished, the crime rate has increased, obliging some of them to reinstate it;

The statement that the death penalty's objective of isolating a person from society can be achieved by means of the permanent deprivation of liberty is invalid. The latter penalty will achieve this purpose only if it is enforced particularly severely by means such as isolation of the convicted person for a protracted period, with the futile travail and harm which that entails;

The statement that life is not a gift from society which can then be taken away from an individual by that society would also apply to all penalties involving the restriction of liberty. Since it is not society which gives an individual his liberty, it is therefore not entitled to take away or restrict such liberty. Freedom existed prior to the establishment of society, and the role of society is limited to organizing that freedom. If we pursue this argument, the right of the group to impose any penalty will be denied. Furthermore, it is not a requirement, if a society's infringement of certain of its members' rights is to be legitimate, that it should be society which accords those rights. The only requirement for the establishment of such legitimacy is that it should be society which protects and organizes those rights and that it should see fit, for the purposes of maintaining itself in existence, to withdraw or curtail such protection. This is what happens when it imposes the death penalty upon individuals who either seriously deviate from or significantly endanger it;

The statement that a law which prohibits killing may not order that someone be killed is invalid, because the law also prohibits the detention and incarceration of people, but no one has objected to penalties involving deprivation of liberty. Moreover, the State is responsible for imposing penalties and is empowered to take related action which is not open to individuals;

The statement that a mistake in imposing the death penalty cannot be rectified once the sentence has been carried out is invalid. Judicial errors are rare and, in the case of imposing the death penalty, almost non-existent, given the prudence of the judges and the requirement that their judgement must be unanimous in order to preclude any doubt. In addition, the penalty and its implementation are invested with guarantees which make any mistake improbable. Also, a mistake is of no consequence in establishing the legitimacy of a penalty from the point of view

of principle, particularly if it is essential for the security and stability of society.

17. In summary, proper criminal policy, the interests of society, Egyptian experience and the experience of countries which have abolished the death penalty require that the penalty be retained in order that it may continue to serve as a warning both of the adverse consequences of committing actions which are punishable by that penalty and of the enormity of such actions. Meanwhile, the guarantees with which the imposition of the penalty has been invested by the Egyptian legislator make it impossible for the penalty to be imposed or carried out other than in cases where the circumstances of the crime and the interests of society require it.

FINLAND

[Original: English]

[25 August 1989]

1. The Government of Finland expresses its appreciation for the work of the Special Rapporteur and its support for the draft protocol. Every effort should be made to limit the imposition of the death penalty and to formulate international norms so that more and more countries refrain from using the death penalty.
2. Finnish legislation meets in all essentials the standards and obligations set by the draft protocol.
3. Finland abolished the death penalty for all offences in all circumstances in 1972. The death penalty in peace-time was abolished in 1949. There have been no executions in Finland in peace-time since 1826.
4. Finland is a party to the Protocol 6 to the European Convention on Human Rights concerning the Abolition of the Death Penalty.
5. With regard to the commentary of the Special Rapporteur concerning article 1 of the draft protocol, it is pointed out that the Finnish constitutional system requires the incorporation of the provisions of international instruments into national legislation before they are applicable.

FRANCE

[Original: French]

[30 August 1989]

1. France has duly approved the decision to draw up a draft optional protocol for the abolition of the death penalty and wishes to reaffirm its position through the present document.

2. The adoption of this draft protocol on the basis of the truly comprehensive and well-documented report of the Special Rapporteur of 29 June 1987 constitutes for France a new and most significant step in the fuller reflection of human rights in international instruments.
3. As the report of the Special Rapporteur states so well, the implementation of an international instrument devoted specifically to the abolition of the death penalty follows logically from the "right to life" as contained in article 6 of the International Covenant on Civil and Political Rights, this right being one of the basic principles of the Universal Declaration of Human Rights.
4. France is one of the last countries in Western Europe to have abolished capital punishment.
5. The death penalty was in fact abolished by the French Parliament in 1981. Since that date France has acceded to Protocol No. 6 of the 1983 European Convention on Human Rights, concerning the abolition of the death penalty. Recent experience has confirmed the arguments which led to the adoption of such a position in 1981.
6. The question of the death penalty is not one of deterrence of criminal behaviour or of methods of punishment but rather a matter of political and moral choice.
7. As far as the deterrent effect is concerned, the basic fact is that there is no correlation between the rate of violent crime and the presence or absence of the death penalty.
8. All the studies on this subject by international bodies, such as the Council of Europe in 1962 or the United Nations in the same year, or by national bodies, have arrived at the same conclusion, namely, that there is no such correlation.
9. Thus, in terms of curbing crime, the death penalty provides no additional security to a democratic society.
10. The problem is thus much more a political and moral one: the real foundation of the death penalty is the idea that the power of the State over citizens extends to the right to take their lives.
11. In a democratic society, whatever its merits or moral conscience, no man, no authority and no State should have such a right over anyone in peace-time.
12. If it is fully understandable for the relatives of victims to demand that justice be done by taking the lives of those guilty of atrocious crimes, it is difficult to maintain that this should be the role of the State, whose duty is rather to go beyond private vengeance and to apply general norms to society as a whole.
13. In a democracy, man and respect for the human person are both the source and the final goal of social organization.

14. Moreover, in order to satisfy the most basic moral requirements, the death penalty presupposes two mandatory conditions:

(a) The existence of totally guilty people, who are fully responsible for their acts;

(b) The existence of an absolutely infallible judicial system capable of deciding who should live and who should die.

15. One is forced to conclude that it is impossible to fulfil both these conditions with absolute certainty. Society as a whole thus runs the risk of making mistakes, and making them irreparably.

16. Whatever the level and quality of the administration of justice in a country, and of the jury in an assize court, the risk of judicial error and arbitrariness is inherent in the system.

17. With regard to arbitrariness, it was recognized before the abolition of the death penalty in 1981, that certain regions in France, and thus certain juries, tended to favour the death penalty, while others opposed it. This led to unequal treatment, which could be absolute, one criminal being condemned to death and another not, for comparable crimes.

18. With respect to judicial error, not to speak of absolute judicial error (proof of the accused's innocence after his execution), the mere existence of contradictory judgements in one and the same case by two different courts clearly shows the considerable risks involved in implementing capital punishment.

19. A country which aspires to freedom cannot keep capital punishment on its statute books. A prerequisite for freedom is the non-granting to anyone of a power so absolute that the consequences of a decision are irremediable. Another prerequisite is rejecting the final elimination of an individual, however criminal he may be.

20. A system of justice which evades this double requirement becomes less effective and loses some of its civilizing influence. The death penalty implies social bankruptcy; its abolition reflects an ethical principle.

GERMAN DEMOCRATIC REPUBLIC

[Original: English]

[29 August 1989]

1. Upon decision of the Council of State of the German Democratic Republic of 17 July 1987 and by virtue of the 4th Law amending the Penal Code of 18 December 1987, the death penalty was abolished in the German Democratic Republic. This decision was taken in the awareness that in the Penal Law of the German Democratic Republic the requisite legal conditions are provided in order

reliably to guarantee the comprehensive protection of socialist society and its citizens against criminal acts.

2. Thus, prerequisites do exist in the German Democratic Republic to support the objective as provided for in article 1 of the draft second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Therefore, the German Democratic Republic has expressly come out in favour of resolution 1989/25 adopted by the Commission on Human Rights, advocating a speedy deliberation and adoption of the draft optional protocol. This does not contradict the general position of the German Democratic Republic that a decision on abolishing or retaining the death penalty should be the sovereign right of each State.

GERMANY, FEDERAL REPUBLIC OF

[Original: English]

[18 August 1989]

1. The Federal Republic of Germany has abolished the death penalty in its Basic Law, thus acknowledging the inviolability of human life as a constitutional principle. The painful experience of the abuse of power by the ruthless and bloody dictatorship of the Nazi régime in particular led to this unequivocal decision.
2. Capital punishment denies man one of his fundamental human rights - the right to life. In the view of the Government of the Federal Republic of Germany civilization has now reached a level of maturity at which it should be possible to dispense with criminal laws that provide for the death penalty.
3. The need to protect the public and the individual against serious crimes does not require the use of capital punishment. Societies should develop an educational and social system, as well as effective criminal justice and criminal sentencing aimed at correction and public security, which will effectively help preventing and suppressing such crimes. A penal system based on prison sentences also ensures protection of the public at large.
4. Crime statistics do not confirm that the death penalty has any significant influence on the crime rate. Doubts about the deterrent effect of capital punishment are supported by the finding that what the criminal bears in mind is not the penalty but the chances of his being detected, whereas an offender acting in the heat or on the spur of the moment does not consider anything at all. Persons acting out of conviction are generally not deterred by any threat of punishment.
5. Apart from the inviolability of human life, which prohibits the State from declaring a human being unfit to live, however guilty he may be, the danger of miscarriage of justice is a decisive reason for prohibiting the death penalty. Once it has been carried out, the death penalty cannot be reversed. Life cannot be given back. Yet miscarriages of justice cannot be avoided, as history has shown time and again.

6. These are the reasons why the Government of the Federal Republic of Germany has since autumn 1980 been actively pursuing an initiative within the United Nations intended to create an international instrument for the global abolition of the death penalty. This initiative contains the proposal for a second optional protocol to the International Covenant on Civil and Political Rights. The key article of this protocol would oblige acceding States to abolish capital punishment and not to execute any person within their jurisdiction. This approach corresponds to former procedures followed by the United Nations in the development of international human rights instruments. Many of these instruments have only been signed and ratified by a certain number of Member States. The Optional Protocol already in existence concerning the procedure for complaints by individuals in cases of human rights violations is a clear example of this. Whereas the Covenant itself may be considered the generally accepted minimum of guarantees in the field of civil and political rights, the First Optional Protocol clearly goes a step further. Even though a considerable number of States disagree with this procedure, which they consider to be incompatible with their conception of national sovereignty, the international community did not refuse to elaborate this instrument and to give those States which wanted to assume an additional obligation the possibility to do so.

7. After thorough and lengthy discussions within the system of the United Nations on the question of a second optional protocol, the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities has written a comparative analysis of the international legal situation concerning the death penalty. The Government of the Federal Republic of Germany has noted with satisfaction that the report states that there is a growing trend in the world today towards abolition of the death penalty. In fact the number of States that have abolished this punishment is increasing each year. Many States that provide for the death penalty in their laws have not applied it for a very long time. On the other hand, it is a sad reality that even now the death penalty is still being imposed and often misused as a means for non-democratic régimes to fight political opponents and enemies. Such régimes have applied and still do apply this irrevocable punishment even to the extent of mass executions.

8. The Government of the Federal Republic of Germany does not pronounce any moral judgement on those legal systems which maintain the institution of capital punishment. On the contrary, it respects each State's sovereign decision on this fundamental question, based on different historical influences, legal traditions and religious beliefs. Those States which are not in a position to consent to the abolition of capital punishment will not be affected in any way by the second optional protocol and no political or legal pressure to accede to that protocol will be applied against them.

9. The Government of the Federal Republic of Germany fully agrees with the Special Rapporteur when he states in his report that he "fails to see any valid reason why States not yet in a position to do so should try to put obstacles to the initiative of those States desirous to undertake that international commitment". Indeed, there is no plausible argument why States that are not willing to abolish capital punishment should prevent other States from undertaking this commitment under international law when they are willing to make their convictions known in an internationally binding manner.

10. This is why the Government of the Federal Republic of Germany feels that the time has come to take action on this question and proposes that the General Assembly adopt at its forthcoming session a resolution that should contain - similar to the procedures taken in regard to the Covenants - in its annex the text of a second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. It is encouraging that the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights and the Economic and Social Council decided at their last sessions to put forward the idea of a second optional protocol on the abolition of the death penalty to the General Assembly for further action.

11. The text prepared by the Special Rapporteur for a second optional protocol in annex I to his report could serve as a basis for the final drafting of an instrument under international law abolishing the death penalty to which only those States may become parties who are willing to do so. The possibility of a reservation that allows the death penalty in time of war - following the example of the 6th Additional Protocol of the European Convention on Human Rights - is of no relevance to the Federal Republic of Germany, which has abolished the death penalty without any exception.

12. In the view of the Government of the Federal Republic of Germany, the General Assembly should at its forthcoming session take action on this crucial matter and - by adopting the text of a second optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty - should create the possibility for States to assume an obligation under international law prohibiting capital punishment.

INDIA

[Original: English]

[1 September 1989]

India, being a retentionist country, has no comments to offer on the text of the draft second optional protocol to the International Covenant on Civil and Political Rights.

ITALY

[Original: French]

[14 September 1989]

1. With reference to resolution 1989/25 adopted by the Commission on Human Rights at its forty-fifth session concerning the elaboration of a second optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty, and in particular to the invitation to Governments to communicate to the Secretary-General their comments on the draft protocol in

question, the Italian Government wishes to express its deep appreciation and favourable view of the text of the legal instrument which has been submitted for the consideration of the international community, and its hope that it will be promptly adopted by the General Assembly at its forty-fourth session.

2. Following a period of in-depth reflection within United Nations bodies over the past few decades, beginning with the drafting of article 6 of the Covenant on Civil and Political Rights (which proclaims the right to life, establishes strict limits on the imposition of the death penalty and, in paragraph 6, advocates the abolition of capital punishment), we have witnessed a groundswell of opinion against the death penalty among the public and in the legislation of a great many countries, to the point that the General Assembly, after some ad hoc studies, chose first to envisage the abolition of capital punishment everywhere (resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977) and then to entrust the Commission on Human Rights with the elaboration of a protocol on the question.

3. The remarkable work done since 1984 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and especially by the designated Special Rapporteur, produced an exhaustive comparative analysis together with a draft optional protocol, which the Commission on Human Rights decided in the above-mentioned resolution to transmit through the Economic and Social Council to the General Assembly with the recommendation that the Assembly should "consider taking suitable action" on the protocol.

4. Throughout this period, the Italian Government played its part in helping to form an international outlook that would be against the death penalty, and gave full support to the elaboration of an international convention on the subject (by submitting, inter alia, with six other countries a draft to the United Nations), while at the same time signing and ratifying Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, which was concluded by the member States of the Council of Europe in 1983 and makes provision for the abolition of the death penalty in respect of crimes committed in time of peace. (Art. 1 stipulates: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed.") The Italian Government therefore intends to confirm that the full and effective enjoyment of the right to life as a basic and inalienable right of the individual is incompatible with the imposition of capital punishment and that every individual must be recognized as having a genuine subjective right to its abolition.

5. It follows that Italy, whose very Constitution in article 27 prohibits the death penalty (save as specified by military laws in time of war), intends to endorse that obligation on the international level as well. It will do so on the basis of the draft protocol under consideration, which provides in article 1:

"1. No one within the jurisdiction of a State party to the present Optional Protocol shall be executed.

"2. Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction."

6. It must furthermore be recalled that Italy's cultural heritage includes the works of the celebrated jurist and philosopher, Cesare Beccaria, who was the first, in 1764 (in Dei delitti e delle pene), to put exhaustively and convincingly before the conscience of modern man the ethical and legal arguments in favour of the abolition of the death penalty. Showing an admirable aptitude for synthesis, he concluded that "the death penalty is not therefore a nation's right but, on the contrary, a war waged by it against the citizen". As can be deduced from a reading of the various international reports on the death penalty, such as the third report of the Secretary-General in 1985, it is noteworthy that, now, just as in the past, the death penalty does not reduce perceptibly the rate of criminality or of certain crimes. Moreover, it is becoming increasingly apparent that no system of penal procedure can forestall with any certainty the commission of irreparable judicial errors, and that in any case capital punishment, as Cesare Beccaria observed, makes impossible the "recuperation" and social rehabilitation of the guilty - to say nothing of the atrocity of the penalty itself (regardless of the mechanism employed) and the inconsistency of a law which, in order to punish one homicide, imposes another one. Lastly, as various reports have pointed out, including those of Amnesty International, the death penalty often is arbitrarily applied as a means of disposing of political opponents, and in any event it falls mainly on individuals from certain ethnic or religious minorities or from the most underprivileged strata of the population.

7. The overwhelming consensus that has developed in Italy on this subject was confirmed, inter alia, by the exhaustive debate which took place last July in the Chamber of Deputies and concluded with a virtually unanimous motion to the Government recommending a prompt approval, in the context of the United Nations, of the draft optional protocol in question. The Chamber of Deputies submitted a further proposal that those States where the death penalty is in force should suspend for at least three years the execution of any death sentences which have already been pronounced or which are pronounced during that period. The Italian Government believes that there is a special moral and political significance to such a proposal and, since the question of the death penalty will be the subject of a formal debate in the General Assembly, it intends to submit the proposal on that occasion in the manner deemed most appropriate by the members of the international community.

8. Since human rights are inherent in the very nature and dignity of man, and since States are bound by an obligation to respect and protect them, an obligation which is now universally recognized on the international level even before being recognized on the national level, Italy considers it timely and consistent to conclude an international legal instrument which, in order better to establish the inalienability of the right to life, will be binding on States that at present, in the exercise of their sovereignty, make provision in their legislation for the prohibition of capital punishment. Furthermore, while it continues to respect the different cultural, religious and social traditions in the countries of the international community, Italy believes that the adoption by the General Assembly, and the subsequent opening for signature by States, of a second optional protocol to the Covenant on Civil and Political Rights aiming at the abolition of the death

penalty would be an appropriate way of enhancing awareness, in keeping with the spirit underlying the Universal Declaration of Human Rights of 1948, and of article 5 in particular, which stipulates: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

JAPAN

[Original: English]

[13 September 1989]

1. Lack of international consensus

1. The question of the abolition of the death penalty should be carefully studied in each State, taking into consideration such factors as the sentiments of the people on the death penalty, the situation of crime and the criminal policy of each State.
 2. For this reason, it is inappropriate to make any decision on this serious question at a forum of an international organization without taking account of the above-mentioned domestic circumstances of each State.
 3. International treaties drawn up at United Nations forums, even if drafted in the form of an "optional protocol", must be ones universally acceptable to the majority of the States in the world. And in this case, as you all know, States that have already abolished the death penalty are still in a minority and even in those States where the death penalty has been discontinued, there are many people who advocate a return to capital punishment.
 4. Judging from this, it is premature and unrealistic to conclude that an international consensus, which is one of the most important pre-conditions for codifying an international instrument, has been reached on the abolition of the death penalty.
 5. It is inappropriate to submit this second draft optional protocol to the General Assembly before the debates at the Commission on Human Rights have been adequately carried out. The Government of Japan is of the opinion that this subject should at least be discussed and examined thoroughly at the Commission on Human Rights beforehand.
2. The relation between the International Covenant on Civil and Political Rights and this second draft optional protocol
6. This protocol was drafted as an "optional protocol" to the International Covenant on Civil and Political Rights. However, there are some doubtful points.
 7. Firstly, it seems improper and contradictory to prescribe in this draft protocol (art. 1) the abolition of the death penalty, notwithstanding article 6 of the International Covenant on Civil and Political Rights, which clearly admits the existence of the death penalty.

8. The situation is entirely different from the case of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty adopted by the Council of Europe. That Protocol No. 6, which proclaims the abolition of the death penalty, was enacted as an additional protocol to the above-mentioned European Convention, which has no provision about the enforcement of the death penalty.

9. Secondly, article 6 of the International Covenant on Civil and Political Rights was adopted as a result of the proposal by Colombia and Uruguay demanding the entire abolition of the death penalty being rejected by the overwhelming opposition of a great number of countries on the grounds that this matter should be left to the decision of each State. In view of this, it is doubtful whether this Protocol, which imposes the obligation of abolishing the death penalty on States, as an "optional" protocol to the International Covenant on Civil and Political Rights, should be drawn up, particularly as it is just a repetition of an old debate.

10. It is an amendment de facto of the relevant provision of the International Covenant on Civil and Political Rights to draft an optional protocol and make substantial provision therein that may contradict an article of the Covenant. In this sense, it may become a loop-hole in the provision on amendment (art. 51) of the Covenant.

11. It is explained that the preamble (paras. 3 and 4) of the draft optional protocol was quoted from the general comments of the Human Rights Committee established by article 28 of the International Covenant on Civil and Political Rights (E/CN.4/Sub.2/1987/20, para. 156). However, the view hoping for the abolition of the death penalty expressed in paragraph 156 is neither a majority opinion nor a widely accepted concept recognized by, for example, United Nations resolutions. For this reason, it is inappropriate to quote it in the preamble of this draft protocol.

NETHERLANDS

[Original: English]

[4 August 1989]

1. The Netherlands wishes to underline that the second optional protocol on the abolition of the death penalty will allow those States which have abolished the death penalty to bind themselves through international law. Adoption of the optional protocol will not bind or put prejudice on other States not wishing to abolish the death penalty. Therefore the Netherlands urges all those States not in a position to abolish the death penalty not to put obstacles to the initiative of those States willing to accept binding international standards.

2. As regards the draft itself, the Government of the Netherlands wishes to express its gratitude to the Special Rapporteur for the excellent text, of which it approves. The comments made by the Government of the Netherlands as laid down in

document A/36/441 of 5 October 1981 have been taken into account in the present draft. The scope of article 1 has been widened in comparison with the original wording and is more categoric now. With regard to article 2, the Netherlands Government would like to make the following comment. In Netherlands law the death penalty was abolished categorically in 1982 as was laid down in the Constitution. Therefore no exceptions of whatever nature, not even those mentioned in article 2 of the draft, are made. However, as this article will make it possible for more countries to accede to the optional protocol, there are no objections to the present text. It goes without saying that the Netherlands Government will not make the reservation mentioned in article 2.

NORWAY

[Original: English]

[1 September 1989]

1. Norway abolished the death penalty in peace time by the Civil Criminal Code of 1902. Capital punishment in wartime was abolished in 1979. No death penalty has, however, been imposed in Norway since the trials following the Second World War.
2. On 25 October 1988, Norway ratified Protocol No. 6 to the European Convention on Human Rights concerning the Abolition of the Death Penalty.
3. The right to life is the most fundamental of all human rights. Although this right is not absolute in the International Covenant on Civil and Political Rights, the Human Rights Committee has, in its general comments on article 6, adopted in 1982 during the sixteenth session of the Committee, stated that the wording of article 6 of the Covenant on the right to life strongly suggests that abolition of the death penalty is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life.
4. Norway has consistently supported the elaboration of a second optional protocol aiming at the abolition of the death penalty, and would recommend that the draft text, which was adopted by the Commission of Human Rights at its forty-fifth session and endorsed by the Economic and Social Council, should be adopted by the General Assembly at its forty-fourth session.
5. A number of countries have declared that they are unable to abolish the death penalty within their own jurisdictions. Such national positions should not, however, prevent the efforts of others to promote an optional instrument that enables them to put their commitment to abolish the death penalty on international record by formal adherence to an international legal instrument.

PANAMA

[Original: Spanish]

[5 July 1989]

1. Article 139 of the first Constitution of the Republic of Panama, promulgated in 1904, established the death penalty, also called capital punishment, it being applied only in the case of those individuals who had committed a crime of brutal homicide. That provision stated:

"Article 139. The law may impose the death penalty for the crime of homicide only when it is of a brutal nature. This shall apply as long as there are no sound penal institutions or genuine penitentiaries in the Republic."

2. The abolition of the death penalty or capital punishment is a postulate of humanitarian penal law which the Republic of Panama endorses. The death penalty was legally abolished in the Republic when the Constitution of 1904 was amended by article 1 of the Acts of Amendment of 1917 and 1918, which established: "There shall be no death penalty in Panama." Since that time it has not been permissible to impose the death penalty as a punishment for the commission of any crime, and the principle has remain unchanged in the constitutional law of the Republic.

3. At the present time, article 30 of the Political Constitution of 1972, amended by the Acts of Amendment of 1978 and by the Constitutional Act of 1983, reiterates this principle when it states:

"Article 30. There is no sentence of death or expatriation or confiscation of property."

4. Accordingly, under its legislation, there is no possibility that such a practice can be established in the Republic of Panama. Rather, it is considered appropriate to make every effort to ensure that this extremely important initiative is received favourably by the States parties to the International Covenant on Civil and Political Rights.

PHILIPPINES

[Original: English]

[31 August 1989]

1. Article III, section 19 (1), of the 1987 Constitution of the Philippines provides:

"Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted neither shall death penalty be imposed, unless for compelling reasons involving heinous crimes the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua."

/...

2. The foregoing constitutional provision has been clarified by judicial pronouncement in the case of People of the Philippines vs. Feliciano Muñoz, alias "Tony", et al., G.R. No. 4-38968-78, 9 February 1989, in this wise:

"The majority of the Honourable High Court voted that 'A reading of section 19 (1) of article III will readily show that there is really nothing therein which expressly declares the abolition of the death penalty. The provision merely says that the death penalty shall not be imposed unless for compelling reasons involving heinous crimes the Congress hereafter provides for it and, if already imposed, shall be reduced to reclusion perpetua. The language, while rather awkward, is still plain enough ...' (People of the Philippines vs. Feliciano Muñoz, alias "Tony", et al., G.R. No. L-38968-70, (9 February 1989).)

"Justice Melencio-Herrera said that, 'Simply put, the question is: did section 19 (1), article III, of the 1987 Constitution, abolish the death penalty or not? ... The majority pronouncement is that said provision did not abolish the death penalty but only provided for its non-imposition. Our reading, however, is that when the Constitution states that the penalty shall not be imposed, it can only mean that capital punishment is now deemed non-existent in our penal statutes.'"

3. However, the Philippines Commission on Human Rights, as an independent constitutional body, respects and upholds this mandate of the organic law and will vigorously oppose any legislative agenda for the restoration of the death penalty in the penal code.

PORTUGAL

[Original: French]

[31 August 1989]

1. Since Portugal, together with the Federal Republic of Germany, Austria, Costa Rica, the Dominican Republic, Italy and Sweden, submitted a draft additional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, it naturally supports this initiative.

2. We wish to thank the Special Rapporteur for his report and for the comparative analysis contained therein, which reflects what the situation is in international law, what positions are held by States on the death penalty, and how the issue has been considered within the United Nations.

3. We also wish to thank him for the text of the draft, which is based exactly on the elements embodied in his report, is responsive to legal trends and actual developments reflected in national legislation, and establishes a legal framework characterized by the optional nature of this future instrument of international law.

4. As we have stated on many occasions, Portugal abolished the death penalty for all civil offences over a century ago, in 1867. However, very early on, judicial practice had ceased to reflect the severity of the law, and the death penalty was rarely applied. The last execution of a woman, for instance, took place in 1772.

5. The Constitutional Charter of 1852 abolished the death penalty for political offences. In 1911, a law was passed abolishing the death penalty for military offences as well. It was reinstated during the First World War only for crimes of high treason committed in the theatre of operations.

6. The Constitution of 1976 contained an absolute prohibition of the death penalty, following a 60-year period during which it was applied only once - for the crime of spying for the enemy - since, as stated above, it was permissible solely in the case of military offences.

7. Thus for us, the abolition of the death penalty is not a simple legislative measure reflecting the degree of openness or arbitrariness in Parliament. We see it rather as arising from a deep-seated feeling among the population and as a response to the weight of public opinion that had long ensured its abolition in practice.

8. This naturally leads us to support the adoption of an optional international legal instrument allowing those States whose cultural, religious, social or political conditions permit or require it, to express, at the international level, their public commitment to the unconditional recognition of the right to life.

9. In recent years, many countries have shown a growing tendency towards the abolition of the death penalty. Whether by taking legislative action or by effectively failing to impose this form of punishment, these countries are attaching greater importance to preventive and social rehabilitation measures.

10. At the regional level, the Council of Europe has adopted a Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, which has been ratified by several States, including Portugal.

11. In our opinion, this national and international situation, together with the encouragement implicit in article 6, paragraph 6, of the International Covenant on Civil and Political Rights, can only encourage us to forge ahead.

12. We realize that, despite technical progress in all fields, including the investigations aimed at establishing the truth in criminal proceedings, the irreversible character of the death penalty rules out any possibility of correcting judicial error. Moreover, maintaining the death penalty might imply a lack of confidence in the potential value of, and the facilities for, detention and rehabilitation. Worse still, it might imply that there was no hope of rehabilitating someone who had committed a most serious crime and had been sentenced to death under the conditions laid down in article 6 of the International Covenant on Civil and Political Rights.

13. The Portuguese experience, which is closely matched by that of other countries, shows that abolishing the death penalty does not bring about an increase in crime. As the United Nations Committee on Crime Prevention and Control has stated, there is no scientific proof that executions have a greater deterrent effect than imprisonment.

14. Lastly, we must not forget that when we allow the death penalty, or any form of torture, we very often open the door to the temptation to misuse it as a means of putting pressure on political opponents by creating fear. This is a sad fact of life confirmed both by past history and by current events.

15. Portugal believes that the optional nature of this future protocol will allow each State to weigh the advisability of acceding to it and, consequently, will not call into question any religious, political, cultural or social principles that might prevent some countries from taking such a decision.

16. In addition, adopting this protocol will allow States which have abolished the death penalty, or are considering doing so, to make their commitment internationally known.

QATAR

[Original: Arabic]

[8 June 1989]

The Permanent Mission of Qatar referred to a report dated 27 May 1982 which it had submitted on this issue and which was published in document A/37/407 and stated that there has been no further developments since then.

SPAIN

[Original: Spanish]

[30 August 1989]

1. The Government of Spain has studied with immense interest and warmly welcomes the draft second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, which has been prepared by the Special Rapporteur and is contained in document E/CN.4/Sub.2/1987/20.

2. The Government of Spain believes that the content of the draft reflects, for the most part, its own concerns in this area. The abolition of the death penalty constitutes a necessary step in the progressive development of human rights. The draft explicitly calls for abolition and allows no reservations in respect of crimes committed in time of peace. We fully agree with the Special Rapporteur's statement that any reservation of this nature would probably be incompatible with

the object and purpose of the second protocol. Spanish law provides for the application of the death penalty for specific crimes in time of war. We therefore believe that article 2, as drafted by the Special Rapporteur, should be included. This article will also make it possible for many more States to ratify the second protocol.

SWITZERLAND

[Original: English]

[31 August 1989]

1. Switzerland, which hopes to accede to the two United Nations Covenants on Human Rights in the near future, urges speedy adoption by the General Assembly of a second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

2. The draft optional protocol was transmitted to the General Assembly pursuant to Commission on Human Rights resolution 1989/25, of which Switzerland was a sponsor, which was adopted by consensus on 6 March 1989 and endorsed by the Economic and Social Council at its latest session. The fact that the many States which still have the death penalty did not oppose submission of the draft optional protocol to the General Assembly shows that they do not intend to deny abolitionist States the possibility of assuming a new international commitment in this sphere at the global level. It can therefore be deduced that the idea of a draft protocol is acceptable to the international community as a whole.

3. Abolition of the death penalty in peacetime is a manifestation of a general trend at the national and international levels in favour of removing this penalty from the legislation of States. In Switzerland, application of the death penalty in peacetime was abolished in 1942, when the Penal Code came into force. At the regional level, Switzerland became a party, in 1987, to additional Protocol No. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, adopted on 28 April 1983, which has so far been ratified by 14 States of the Council of Europe. This additional Protocol allows derogations from its prohibition of the death penalty only in time of war or of imminent threat of war. The same applies to the draft second optional protocol to the above-mentioned Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (cf. art. 2, para. 2, and E/CN.4/Sub.2/1987/20 of 29 June 1987, para. 168).

4. At the global level, the adoption of this second optional protocol by the United Nations General Assembly would constitute an important step towards full recognition of each human being's inherent right to life, which is established in article 6 of the Covenant and can be limited only under certain conditions prescribed for States that have not yet abolished the death penalty.

URUGUAY

[Original: Spanish]

[2 September 1989]

The Eastern Republic of Uruguay wishes to state that, in accordance with its historical and juridical tradition that it has invariably championed in international forums, it fully supports the draft submitted by the Special Rapporteur.

VENEZUELA

[Original: Spanish]

[26 September 1989]

1. The drafting of an instrument aimed at abolishing, preventing or prohibiting the application of the death penalty deserves top priority. For that reason, the Government of Venezuela takes the view that every effort should be made to produce a text that enjoys the broadest possible acceptance.
2. Venezuela's constitutional evolution demonstrates its rejection of use of the death penalty as a means of penalizing the commission of certain punishable acts.
3. Thus, as the Special Rapporteur points out, Venezuela is one of the countries that are internationally renowned for having totally abolished the death penalty, by law, in respect of any kind of offence committed in time of peace or war. Some writers even maintain that Venezuela was the first State in the world to abolish the death penalty.
4. In fact, the prohibition of the death penalty for political offences was embodied in the National Constitution of 1857. Subsequently, this prohibition was extended to common crimes in the Constitution of 1863.
5. All subsequent Constitutions confirm this principle, right up to the latest constitutional text, the Fundamental Charter of 1961 currently in force, which establishes in article 58 that:

"The right to life is inviolable. The death penalty shall not be established by any law whatsoever and no authority shall carry it out."
6. The durability of this principle in Venezuelan positive law is no more than a reflection of the evolution in Venezuela of the concept of the right to life as an absolute and fundamental right which, as such, brooks no exceptions and which, in view of its importance, finds a place in the sphere of constitutional rights. That is why, even under military penal law, the laws of war and other special laws, the death penalty is not provided for.

7. In Venezuela, the abolition of the death penalty essentially reflected the political will of the country's rulers, in their conviction that the right to life is inviolable.

8. Naturally enough, in view of the polemical nature of the subject, there has been discussion on various occasions of the advisability or otherwise of using this penalty, especially following the commission of some abominable crime by which society has been deeply affected. However, such discussion has never gone further than a simple exchange of views lacking any real repercussions, as is shown by the fact that there has been no strong movement of public opinion in Venezuela in favour of restoring the death penalty, nor any efforts at legislative reform in that direction.

9. Venezuelan studies agree with those carried out by many other countries or international bodies in indicating that use of the death penalty by the State as a means of deterring the commission of those offences for which the penalty was established has been in vain. Application of the death penalty has had quite the opposite effect of encouraging a high crime rate by the atmosphere of violence that it creates.

10. Likewise, Venezuela fully agrees that the death penalty blatantly thwarts one of the fundamental aims of punishment: behaviour modification and social rehabilitation. The death penalty is also an abuse of man's power over man, in so far as society can dispose of the life of a human being under cover of a judgement of guilt. So the only absolute factor for Venezuelan law is the right to life, not the right of the State to punish certain kinds of criminal behaviour, because the latter right is limited by certain inalienable human rights.

11. It is worth recalling that the preamble to the National Constitution requires Venezuela to co-operate with other nations to achieve the aims of the international community on the basis, among other principles, of a universal guarantee for individual human rights, among which the right to life is particularly relevant and is obviously impaired by the establishment of the death penalty for any reason or purpose whatsoever.

12. We therefore welcome the initiative taken by a group of seven countries, which has now been finalized by the United Nations Special Rapporteur, to establish a body of norms aimed at abolishing this penalty.

13. The Government of Venezuela considers that the text of the draft optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, as prepared by the Special Rapporteur, can meet the concern felt by States about the need for general international agreement on the abolition of the death penalty and on the appropriateness of abolishing it. As we see it, the draft under consideration still leaves room for improvement. The following observations are motivated by our wish to contribute to the elaboration of the text of the draft:

(a) With regard to the first preambular paragraph, we do not consider that abolition of the death penalty contributes to enhancing "human dignity", which has meaning and value in its own right. What abolition can do is contribute to enhancing respect for that dignity, for which reason we suggest adding the words "respect for" after the words "enhancement of";

(b) Consideration should be given to the possibility of introducing, in article 1 of the draft or in a separate article, the duty of all States to prohibit the death penalty;

(c) In our view and in accordance with how the matter is treated in Venezuelan constitutional law, as we have explained, it would be desirable not to allow any reservations to the protocol whatsoever, including the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime, as article 2, paragraph 1, of the draft puts it;

(d) As a matter of form, perhaps the full title of the International Covenant on Civil and Political Rights should be included in those articles which refer to it.
