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THE ADMINISTRATION OF JUSTICE AND THE
HUMAN RIGHTS OF DETAINEES

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

ANALYSIS CONCERNING THE PROPOSITION TO ELABORATE
A SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS AIMING AT
THE ABOLITION OF THE DEATH PENALTY

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INTRODUCTION

1. In its decision 35/437 of 15 December 1980, reaffirmed in its resolution 36/59 of 25 November 1981, the General Assembly of the United Nations 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 this idea.

2. In its resolution 1984/19 of 6 March 1984 the Commission on Human Rights invited the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to consider this idea. In its resolution 1984/7 of 28 August 1984 the Sub-Commission proposed to entrust the present 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 protocol.

3. Taking note of those resolutions, the General Assembly requested in its resolution 39/137 of 14 December 1984 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 the Economic and Social Council to authorize the Sub-Commission to entrust the present Special Rapporteur with the preparation of the said analysis. This recommendation was adopted by the Economic and Social Council in its resolution 1985/41 of 30 May 1985.

PART ONE

I. THE DEATH PENALTY AND INTERNATIONAL LAW

4. Several international law provisions are relevant for the question of the death penalty. Most important are article 6 of the International Covenant on Civil and Political Rights, article 2 of the European Convention on Human Rights, article 4 of the American Convention on Human Rights and articles 100 and 101 of the (Fourth) Geneva Convention relative to the treatment of prisoners of war. Also particularly relevant are the Sixth Additional Protocol to the European Convention on Human Rights of 1983 and the Additional Protocols of 1977 to the Geneva Conventions of 1949. In addition, it is worthwhile to pay attention to the activities of the Human Rights Committee and other United Nations organs as well as the Inter-American Court and Commission on Human Rights.

A. The Death Penalty and the Covenant

5. The "right to life" is guaranteed by article 6 of the International Covenant on Civil and Political Rights, adopted by the General Assembly in its resolution 2200 A (XXI) of 16 December 1966. As of 1 January 1987, 85 States are parties to the International Covenant on Civil and Political Rights, which entered into force on 23 March 1966. An examination of the "travaux préparatoires" of the Covenant helps to understand better the intentions of its drafters with respect to the death penalty. An examination of the reports of the Human Rights Committee with respect to the abolition of the death penalty appears also to be particularly interesting.

1. The relevant "travaux préparatoires" of the Covenant

6. Particularly important are the discussions in the Commission on Human Rights and in the Third Committee of the General Assembly. The discussions in the Commission on Human Rights mainly took place during its sixth session in 1950 and during its eighth session in 1952. Those discussions have been summarized in the Annotations of the text of the draft International Covenants on Human Rights (document A/2929) prepared by the Secretary-General in 1955. The discussions in the Third Committee of the General Assembly which took place in 1957 are summarized in the relevant Report of the Third Committee (document A/3764).

7. In view of their length those summaries are reproduced in Appendix I. As much as possible, precise references to the relevant passages of the summary records of the Commission on Human Rights and the Third Committee of the General Assembly relative to the interventions made by Government representatives are added to those summaries.

8. The views of the drafters of the Covenant on the death penalty can be summarized as follows:

(a) Article 6, paragraph 2, imposes strict conditions on the execution of the death penalty:

The requirement of gravity: "only for the most serious crimes";

The requirements of legality and non-retroactivity: "in accordance with the law in force at the time of the commission of the crime";

The requirement of conformity with the Covenant and the Genocide Convention: "not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide".

The requirement of "a final judgment rendered by a competent court".

(b) Article 6, paragraph 4, favours non-execution of the death penalty by stating that "amnesty, pardon or commutation of the sentence of death may be granted in all cases".

(c) Article 6, paragraph 5, excludes two categories of persons from the imposition of the death penalty: persons below 18 years of age and pregnant women.

(d) Article 6, paragraph 6, expresses clearly a strong presumption in favour of the abolition of the death penalty by stating that "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant".

9. As far as the abolition of the death penalty is concerned, this last paragraph is undoubtedly the most important. The text of article 6, paragraph 6, was adopted by 54 votes to 4, with 1 abstention (A/C.3/SR.820, paragraph 26). In the Third Committee (A/3764, paragraph 111) it was stated that because the abolition of capital punishment was a highly controversial question, it was better to leave the problem to each State concerned to resolve. However, in order to avoid the impression that the Covenant sanctioned capital punishment, it was agreed to add a clause to the effect that nothing in the article should be invoked to delay or prevent the abolition of capital punishment by any State party to the Covenant.

10. In view of the particular relevance of this paragraph 6 for the abolition of the death penalty, some of the statements made in the Third Committee with respect to this paragraph are reproduced below:

(a) According to the representative of France (A/C.3/SR.811, paragraph 27), a possible compromise solution would be to express the Committee's wish to abolish the death penalty by inserting a provision to the effect that the States parties to the Covenant would undertake to develop their penal legislation in such a way as progressively to abolish capital punishment;

(b) According to the representative of Ireland (A/C.3/SR.813, paragraph 41), it must be made clear that the Covenant could not be regarded as an instrument perpetuating the institution of capital punishment;

(c) According to the representative of Italy (A/C.3/SR.814, paragraph 11), immediate and unconditional abolition of the death penalty might be harmful in some countries and prudence should be used, but once they had acknowledged the right to life, countries of high national organization and development should not evade their obligation to guide legislation towards the abolition of capital punishment, in accordance with a trend that had been manifest since the eighteenth century;

(d) According to the representative of Ecuador (A/C.3/SR.815, paragraph 28), the paragraph should contain a guarantee of the right to life, a restriction on passing the death penalty in countries where it still existed, and a recommendation for the abolition of the death penalty.

2. The Reports of the Human Rights Committee

11. The reports of the Human Rights Committee refer to questions put by its members on the abolition of the death penalty. The reports also contain information provided by States parties to the Covenant on the situation in their country with respect to the death penalty as well as comments of the Committee and its members with respect to the abolition of the death penalty.

(a) Information on the death penalty and questions on its abolition

12. In replying to questions by members of the Human Rights Committee many Governments provided information on the situation with respect to the death penalty in their country. In view of its great length this information is reproduced in appendix 2.

13. During the examination of the reports of the following States parties to the Covenant, Members of the Committee also asked specifically whether consideration was given to the abolition of the death penalty:

Afghanistan (A/40/40, paragraph 597); Australia (A/38/40, paragraph 143); Barbados (A/36/40, paragraph 156); Byelorussian Soviet Socialist Republic (A/40/40, paragraph 33); Chile (A/39/40, paragraph 457); Egypt (A/39/40, paragraph 296); Gambia (A/39/40, paragraph 327); Guinea (A/39/40, paragraph 145); Guyana (A/37/40, paragraph 256); India (A/39/40, paragraph 252); Jamaica (A/36/40, paragraph 261); Japan (A/37/40, paragraph 61); Jordan (A/37/40, paragraph 174); Mali (A/36/40, paragraph 235); Mauritius (A/33/40, paragraph 468); Mongolia (A/35/40, paragraph 93); Morocco (A/37/40, paragraph 140); Poland (A/35/40, paragraph 49); Rwanda (A/37/40, paragraph 237); Senegal (A/35/40, paragraph 204); Suriname (A/33/40, paragraph 285); United Republic of Tanzania (A/36/40, paragraph 211); Trinidad & Tobago (A/40/40, paragraph 133); Ukrainian Soviet Socialist Republic (A/34/40, paragraph 256); Union Soviet Socialist Republics (A/40/40, paragraph 270); Yugoslavia (A/33/40, paragraph 373 and A/39/40, paragraph 215).

14. Several Governments replied explicitly to that specific question:

(a) The representative of Chile stated that abolition of the death penalty was not so far envisaged in his country; however, several Chilean jurists were in favour of its abolition (A/39/40, paragraph 458).

(b) The representative of Egypt stated that his country did not think it necessary to abolish capital punishment because it was to safeguard society (A/39/40, paragraph 307).

(c) The representative of India informed the Committee that the abolition of the death penalty in his country was subject to lively discussion (A/39/40, paragraph 278).

(d) The representative of Jamaica informed the Committee that on the matter of capital punishment, debate was current in Jamaica and was being actively considered by a bipartisan parliamentary committee. That committee had asked for more time to make appropriate recommendations to Parliament (A/36/40, paragraph 282).

(e) The representative of Japan informed the Committee that the Legislative Council, one of the advisory bodies to the Minister of Justice, had recently studied the question of capital punishment and had concluded that its abolition would be unwarranted in view of the continued commission of brutal crimes and the fact that a large majority of Japanese people favoured the retention of the death penalty (A/37/40, paragraph 82).

(f) The representative of Mali stated that while there was no movement in the country to abolish the death penalty it was an exceptional penalty and Mali would follow the decisions on the matter taken at the regional level in Africa (A/36/40, paragraph 246).

(g) The representative of Mongolia pointed out that the exemption of women from the death penalty was a significant step towards its complete abolition (A/35/40, paragraph 107).

(h) The representative of Poland stated that the Polish Government did not plan, and had not found it necessary, to modify the Penal Code in force (A/35/40, paragraph 64).

(i) The representative of Senegal informed the Committee that Senegal did not encourage, for the time being, the abolition of the death penalty (A/35/40, paragraph 224).

(j) The representative of Suriname stated that some members of Parliament had been unwilling to abolish the death penalty which was considered a deterrent (A/35/40, paragraph 298).

(k) The representative of Trinidad and Tobago informed the Committee that, as to the possible abolition of the death penalty, the subject had been discussed recently at a seminar convened by her country's Bar Association, but that her Government was looking for a wider public debate on the matter and a larger degree of consensus before taking any further action (A/40/40, paragraph 127).

(l) The representative of the Ukrainian Soviet Socialist Republic stated that the question of the possibility of repealing a death penalty was under consideration but preventive legislation made it necessary at present to retain that punishment for very serious crimes (A/34/40, paragraph 273).

(m) The representative of Yugoslavia explained that Yugoslav authorities continued to support retention of the death penalty for most serious crimes but that several campaigns were conducted through the media, calling for its abolition (A/39/40, paragraph 216).

(b) Comments by the Human Rights Committee

15. In cases where the State party to the Covenant had abolished the death penalty, members of the Committee expressed satisfaction or commended the Government. This was the case with Colombia (A/35/40, paragraph 248); France (A/38/40, paragraph 300); the Federal Republic of Germany (A/33/40, paragraph 341); Luxembourg (A/41/40, paragraph 61); Nicaragua (A/38/40, paragraph 229); Spain (A/34/40, paragraph 191) and Venezuela (A/36/40, paragraph 51). It was also noted with satisfaction that the death penalty had, in practice, been suspended in Canada (A/35/40, paragraph 162). Members of the Committee commended also the intention of the Netherlands to abolish the death penalty (A/37/40, paragraph 101).

16. On some occasions, the Human Rights Committee expressed its opinion on the question of the abolition of capital punishment. In examining the report of Mali, members noted that "the ultimate aim of the Covenant was to prevail upon countries to abandon the death penalty" (A/36/40, paragraph 235). In examining the report of Guinea, it was observed that "article 6, paragraph 6, clearly looked towards the abolition of the death penalty" (A/39/40, paragraph 145).

17. Most important are, however, the general comments on article 6 adopted by the Human Rights Committee at its 378th meeting (sixteenth session) held on 27 July 1982. In these comments the Committee notes that "the article also refers to abolition in terms which strongly suggest (paragraph 2(2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life...".

18. The full text of the relevant paragraph of the general comments reads as follows:

"While it follows from article 6(2) to (6) that States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the 'most serious crimes'. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the 'most serious crimes'. The article also refers generally to abolition in terms which strongly suggest (paragraphs 2(2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40, and should as such be reported to the Committee. The Committee notes that a number of States have already abolished the death penalty or suspended its application. Nevertheless, States' report show that progress made towards abolishing or limiting the application of the death penalty is quite inadequate.

The Committee is of the opinion that the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence" (A/37/40, annex V, pp.93-94).

B. The Death Penalty and other Human Rights Instruments

19. Human rights instruments adopted in the framework of the Council of Europe, the Organization of American States and the Organization of African Unity as well as the international humanitarian law contain provisions which are relevant to the death penalty and its abolition.

1. The Council of Europe

20. In the framework of the Council of Europe, particularly relevant is article 2 of the European Convention on Human Rights (1950) and the Sixth Additional Protocol thereto (1983).

(a) Article 2 of the European Convention on Human Rights 1/

21. The European Convention on Human Rights adopted on 4 November 1950 provides in its article 2, paragraph 1, that:

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

22. The basis for the drafting of this article was a proposal (E/CN.4/W.21) submitted by the Government of the United Kingdom for the draft International Covenant on Civil and Political Rights. The relevant paragraph of that proposal reads as follows:

"2. There shall be no exception to this rule save where death results, in those States where capital punishment is lawful, from the execution of such a penalty in accordance with the sentence of a court."

23. That proposal was contained in a United Nations document (A/770) reproducing the comments of Governments on the draft International Covenant and submitted by the Secretary-General of the Council of Europe to the Committee of Experts responsible for drawing up the draft European Convention.

24. In the Committee of Experts the United Kingdom expert proposed the following text:

"1. No one shall be deprived of his life intentionally save in the execution of the sentence of a court following his conviction of a crime for which this penalty is defined by law."

25. The Committee of Experts submitted two sets of proposals to the Committee of Ministers. Alternative A following the line of simply enumerating rights included the following draft on the right to life:

"Art. 2.1 (a). Everyone has the right to life, liberty and security of person."

Alternative B, which defined the rights in greater detail included the United Kingdom proposal reproduced above.

26. The Conference of Senior Officials which was instructed by the Committee of Ministers to prepare the ground for the political decisions to be taken adopted Alternative B as the basis of its work and tried to include in it certain general principles which were contained in Alternative A. The proposed relevant paragraph read as follows:

"2. No one shall be deprived of his life intentionally, save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

27. Preceded by the words "Everyone's right to life shall be protected by law", this text was adopted by the Committee of Ministers on 7 August 1950 and included in the European Convention as article 2, paragraph 1. As of 1 January 1987, the following 21 States were parties to the European Convention on Human Rights, which entered into force on 3 September 1953: Austria, Belgium, Cyprus, Denmark, France, Germany, Federal Republic of, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom.

(b) Protocol No. 6 to the European Convention on Human Rights

28. At the 354th meeting of the Ministers' Deputies on 6-10 December 1982 a Sixth Protocol to the European Convention on Human Rights concerning the Abolition of the Death Penalty was adopted and opened to signature by the member States of the Council of Europe on 28 April 1983.

29. The Parliamentary Assembly had, for its part, dealt with this question on several occasions, the most recent being in 1979 when its Legal Affairs Committee appointed Mr. Lidbom (Social Democrat, Sweden) rapporteur. On the basis of Lidbom's report (Doc. 4509) the Assembly adopted two texts on 22 April 1980 during its 32nd session: in resolution 727 it "appeals to the parliaments of those member States of the Council of Europe which have retained capital punishment for crimes committed in times of peace, to abolish it from their penal systems", while in recommendation 891 it recommends that the Committee of Ministers "amend article 2 of the European Convention on Human Rights to bring it into line with Resolution 727".

30. At the same time, the European Ministers of Justice dealt with this problem at the instigation of Mr. Broda, the Austrian Minister of Justice. At their 11th Conference (Copenhagen, 21-22 June 1978), they recommended that the Committee of Ministers of the Council of Europe "refer questions concerning the death penalty to the appropriate Council of Europe bodies for study as part of the Council's work programme". At their 12th Conference (Luxembourg, 20-21 May 1980), they considered that "article 2 of the European Convention on Human Rights does not adequately reflect the situation actually attained in regard to the death penalty in Europe" and went on to recommend the Committee of Ministers "to study the possibilities for the elaboration of new and appropriate European standards concerning the abolition of the death penalty". Finally, at an informal meeting at Montreux on 10 September 1981, the Conference "expressed a great interest in every national legislative action aimed at abolishing capital punishment and in the efforts undertaken in the same sense at international level, notably within the Council of Europe".

31. The most relevant propositions of the Sixth Protocol read as follows:

"Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary-General of the Council of Europe the relevant provisions of that law".

32. In an Explanatory Report (Council of Europe, Document H (83) 3, 14 February 1983), the Council of Europe adds the following commentary to those provisions:

"Article 1

This article, which should be read in conjunction with article 2, affirms the principle of abolition of the death penalty. Subject to the situations envisaged in Article 2, the State must, where appropriate, delete this penalty from its law in order to become a party to the Protocol. The second sentence of this article aims to underline the fact that the right guaranteed is a subjective right of the individual.

Article 2

This article clarifies the scope of the Protocol by limiting the obligation to abolish the death penalty to peace time. A State can in fact become a Party to the Protocol even if its law (present or future) makes provision for the death penalty in respect of acts committed in time of war or of imminent threat of war. It is however, specified that where this is so, the death penalty shall be

applied only in the instance laid down in the law and in accordance with its provisions. Furthermore, the State whose law makes provision for the death penalty in such cases must communicate the relevant provisions to the Secretary General of the Council of Europe. It is clear that any declaration made under this article may be withdrawn or modified by notification to the Secretary-General".

33. As of 1 January 1987, the following eight States were parties to the Sixth Protocol (see Annex III), which entered into force on 1 March 1985: Austria, Denmark, France, Luxembourg, Netherlands, Portugal, Spain, Sweden. In addition, the Protocol has been signed by the following States: Belgium, Germany, Federal Republic of, Greece, Ireland, Italy, Norway, Switzerland.

2. The Organization of American States

34. Particularly relevant for the abolition of the death penalty is article 4 of the American Convention on Human Rights adopted on 22 November 1969, the advisory opinion of the Inter-American Court on Human Rights of 8 September 1983 and resolutions of the Inter-American Commission on Human Rights.

(a) Article 4 of the American Convention on Human Rights 2/

35. In 1945 the Inter-American Conference on the Problems of War and Peace adopted at the proposal of Mexico a resolution XL entitled "International Protection of the Essential Rights of Man". The Conference entrusted the Inter-American Council of Jurists to prepare a preliminary draft on "Declaration of the Fundamental Rights and Duties of Man".

36. On the question of capital punishment, the Council of Jurists proposed the following text:

"Only in the case of conviction for grave crimes, those which are subject to capital punishment, will the State be able to withdraw its defence of the right to life."

37. On this provision, the Council added the following commentary:

"The Declaration recognizes that a person can lose his right to life as a consequence of criminal acts of the gravest character. Every State is free, in that case, to impose capital punishment upon those persons guilty of these crimes. Some States profess the principle that the imposition of the death penalty represents an element of moral degradation by the State that commits such an act. On this point the Council of Jurists refrains from comment, limiting itself to declare that the right to life does not exclude the individual from punishment established for the gravest of crimes."

38. The American Declaration on the Rights and Duties of Man adopted by the Bogota Conference in its resolution XXX of 2 May 1948 contained only a general article on the right to life: "Every human being has the right to life, liberty and personal security".

39. In 1959 the Ministers of Foreign Affairs requested the Inter-American Council of Jurists to elaborate a draft for an Inter-American human rights convention. The Uruguayan delegation to the Council presented the following draft article on the right to life:

"1. No one shall be arbitrarily deprived of their life. Every individual's right to life is protected by law.

2. In those countries where capital punishment exists, it may be imposed only for the most serious of crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment.

3. The death penalty shall not be imposed for political reasons."

40. After consideration by a special commission of jurists, the Council approved the following draft:

"1. The right to life is inherent to all persons. This right will be protected by law from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In those countries which have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.

3. The death penalty shall not be imposed for political reasons.

4. Capital punishment shall not be imposed upon persons who are under 18 years of age, nor shall it be applied to pregnant women."

41. The document was then sent to Governments for approval at the Second Special Inter-American Conference, held in Rio de Janeiro in 1965. Two more drafts were presented there alongside that of the Council of Jurists, from Chile and Uruguay. The Chilean proposition added a fifth paragraph to the clause, which read as follows:

"5. Every person condemned to death shall have the right to apply for amnesty, pardon or commutation of the sentence, which may be granted in all cases."

42. The Uruguayan proposal, in turn, stated the following with respect to the right to life:

"1. Every person has the right to have his life respected. This right shall be protected by law from the moment of conception. No one shall arbitrarily be deprived of his life.

2. All ratifying States must abolish the death penalty. Only reservations will be admitted for this disposition, with the condition that the death penalty can only be imposed as punishment for the most serious of crimes, pursuant to a final judgment rendered by an independent and impartial court, in accordance with a law establishing such punishment, enacted prior to the commission of the crime.

3. In no case shall capital punishment be inflicted for political offences or related common crimes.

4. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age, nor shall it be applied to pregnant women.

5. The granting of amnesty, pardon or commutation of the sentence shall be possible in all cases."

43. The Rio Conference resolved to send all these supporting documents to the Permanent Council of the Organization of American States (OAS) so that the final recommendations could be made and a date for the Convention be set. Once inside the OAS, the documents were sent to the Inter-American Commission on Human Rights (IACHR), for study.

44. On 4 November 1966 the President of the IACHR presented his report on the drafts to the OAS's Secretary-General, and said the following on the right to life article:

"The IACHR believes that we should prefer paragraphs 1, 2, 3 and 4 of the project from Uruguay, because they are more complete and precise than the ones presented by the Inter-American Council of Jurists. However, the Commission agreed to recommend the following changes: (a) in paragraph 1, add the words 'and in general' after the words 'by the law'; (b) in paragraph 2, substitute the expression 'most serious crimes' for 'exceptionally serious crimes'; (c) in paragraph 4, add after 'less than 18 years' the words 'or more than 70 years'."

45. The IACHR also suggested that paragraph 5 of the Chilean document be added to the article as a fifth paragraph. The following was then to be added to it: "Capital punishment shall not be imposed while such a petition is pending decision by competent authority".

46. As a result of these modifications, which were unanimously approved by the OAS's Permanent Council, the article on the right to life looked as follows:

"1. Every person has the right to have his life respected. This right shall be protected by law and in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. All ratifying States must abolish the death penalty. Only reservations will be submitted for this disposition, with the condition that the death penalty be imposed as punishment for exceptionally serious crimes, rendered by a competent independent and impartial court which culminated the legal process, and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.

3. In no case shall the death penalty be inflicted for political reasons.

4. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

5. Every person condemned to death shall have the right to apply for amnesty, pardon or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by a competent authority."

47. At the Inter-American Conference on Human Rights in 1969 a new paragraph was inserted between paragraph 2 and 3 of the draft reproduced above. This new third paragraph reads as follows:

"The death penalty shall not be re-established in States that have abolished it."

48. Consequently the final text of article 4 of the American Convention on Human Rights as approved by the Conference reads as follows:

"1. Every person has the right to have his life respected. This right shall be protected by law and in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be re-established in States that have abolished it.

4. In no case shall capital punishment be inflicted for political offences or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon or commutation of the sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by a competent authority."

49. The American Convention on Human Rights was adopted on 22 November 1969. As of 1 January 1987, the following 19 States are parties to the American Convention, which entered into force on 18 July 1978: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela.

(b) The Advisory Opinion of the Inter-American Court on Human Rights

50. An advisory opinion of 8 September 1983 of the Inter-American Court on Human Rights at the request of the Inter-American Commission on Human Rights has further clarified article 4 of the American Convention on Human Rights.

51. In reply to the question "May a Government apply the death penalty for crimes for which the domestic legislation did not provide such punishment at the time the American Convention on Human Rights entered into force for said state?", the Court was of the opinion by a unanimous vote that the Convention imposes an absolute prohibition on the extension of the death penalty and that, consequently, the Government of a State Party cannot apply the death penalty to crimes for which such a penalty was not previously provided for under its domestic law. The most relevant paragraphs of this advisory opinion are reproduced in appendix 3.

(c) Resolutions of the Inter-American Commission on Human Rights

52. At its 63rd session in 1984, the Inter-American Commission on Human Rights decided, in accordance with the spirit of article 4 of the American Convention on Human Rights and the universal trend to eliminate the death penalty, to call on all countries in the Americas to abolish the death penalty.

53. In its resolution No. 3/87 adopted at its 69th session on 27 March 1987 in Case No. 9647, the Inter-American Commission on Human Rights concluded, by 5 votes to 1, that the United States Government had violated article I (right to life) and article II (right to equality before the law) of the American Declaration of the Rights and Duties of Man in executing James Tery Roach and Jay Pinkerton for crimes which they perpetrated before their eighteenth birthday:

"Para. 63. For the Federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of State officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not primarily on the nature of the crime committed, but on the location where it was committed. Ceding to State legislatures the determination of whether a juvenile may be executed is not of the same category as granting States the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the Federal Government to pre-empt the States as regards this most fundamental right - the right to life - results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to article I and II of the American Declaration of the Rights and Duties of Man, respectively."

3. The Organization of African Unity

54. The African Charter on Human and People's Rights adopted on 26 June 1981 contains no specific provision on the death penalty. However, in its article 4 the African Charter provides that:

"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his life."

55. As of 1 January 1987, the following 31 States were parties to the African Charter on Human and People's Rights, which entered into force on 21 October 1986: Benin, Botswana, Burkina Faso, Central African Republic, Chad, Comoros, Congo, Democratic Saharoui Arab Republic, Egypt, Equatorial Guinea, Gabon, Gambia, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia, United Republic of Tanzania, Uganda, Zambia, Zimbabwe.

4. International humanitarian law 3/

56. The provisions of the law of Geneva concerning the death penalty are more elaborate with respect to international armed conflicts than with respect to non-international conflicts.

(a) The death penalty in international armed conflicts

57. The Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War (Third Geneva Convention) addresses itself at some length to the question of penal and disciplinary sanctions which can be imposed on prisoners of war (section VI, chapter III). The Convention first of all provides for certain limited penalties for what it calls disciplinary offences (section VI, chapter III, II) which do not include the death penalty. Article 83 enjoins the competent authorities of the detaining power, when choosing between the application of judicial or disciplinary proceedings, to "exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures". Moreover, no penalty (other than a disciplinary one) may be prescribed for a prisoner of war that may not be imposed on a member of the forces of the detaining power (article 82). In respect of all proceedings for judicial offences, elaborate provision is made for a fair trial and the right to appeal and petition for pardon (chapter III, III).

58. Particular safeguards are built in with regard to the death penalty:

Article 100

"Prisoners of war and the Protecting Powers shall be informed, as soon as possible, of the offences which are punishable by the death sentence under the laws of the Detaining Power.

"Other offences shall not thereafter be made punishable by the death penalty without concurrence of the Power upon which the prisoners of war depend.

"The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with article 87, second paragraph been particularly called to the fact since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will."

Article 101

"If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in article 107."

59. Greater protection is afforded a person protected by the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention). Article 68 significantly restricts the freedom of an occupying power to impose capital punishment. Its second, third and fourth paragraphs state:

"The penal provisions promulgated by the Occupying Power in accordance with articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of international offences which caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

"The death penalty may not be pronounced on a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

"In any case, the death penalty may not be pronounced on a protected person who was under 18 years of age at the time of the offence."

60. Not only is there restriction on the substance of the offences, but the punishment itself may be no heavier than would have been applied before the occupation. Nevertheless, there is cause for concern about the breadth of interpretation given by some jurisdictions to the terms "espionage" and "sabotage". It is not unknown for the former to be stretched to cover any unauthorized acquisition of State information, and the latter to cover the unauthorized divulging of such information.

61. The procedural requirements which have to be met before the death penalty may be carried out are contained in article 75 of the Fourth Geneva Convention:

"In no case shall persons condemned to death be deprived of the right to petition for pardon or reprieve.

"No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve.

"The six months' period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying

Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences."

62. This article supplements article 74, which provides for notification to the Protecting Power of any judgement involving a sentence of death or imprisonment for two years or more, as well as for the period of appeal to run only from the time when such notification is received.

63. The Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts has provided in its Protocol to the Geneva Convention of 12 August 1949 relative to the Protection of Victims of International Armed Conflict (Additional Protocol I), an article bringing the Conventions into line with the International Covenant on Civil and Political Rights. Article 76 states that pregnant women shall not be executed. The article following it ensures that no one may be executed who was under 18 when the offence was committed.

64. As of 1 January 1987, 165 States were parties to the Geneva Convention relative to the treatment of prisoners of war, which entered into force on 21 October 1950, and 66 States were parties to the Additional Protocol I of 8 June 1977, which entered into force on 7 December 1978.

(b) The death penalty in non-international armed conflicts

65. There is provision in article 3, common to the four Geneva Conventions, for regulation of the use of the death penalty in armed conflict which is not international. This article establishes the minimum international standard below which parties may not fall in their conduct of internal armed hostilities, and in respect of non-combatants, those who have laid down their arms and others placed hors de combat, prohibits

"... at any time and in any place whatsoever ... the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." (Emphasis added)

66. In preparation for the humanitarian Law Conference mentioned above, the International Committee of the Red Cross had prepared a Draft Protocol Additional to the Geneva Convention of 12 August 1949 relative to the Protection of Victims of Non-International Armed Conflicts (Draft Additional Protocol II). Article 10 of the Draft, which was the working document of the Conference for this area of concern, envisaged a radical extension of the protection contained in common article 3 of the four Geneva Conventions:

"The death penalty pronounced on any person found guilty of an offence in relation to the armed conflict shall not be carried out until the hostilities have ceased."

67. The provision was amended when adopted in committee (Committee I) by the third session of the Conference in 1976:

"In cases of prosecutions carried out against a person only by reason of his having taken part in hostilities, the court, when deciding upon the sentence, shall take into consideration, to the greatest possible extent, the fact that the accused respected the provisions of the present Protocol. In no such case shall a death penalty be carried out until the end of the armed conflict."

68. The first sentence originally constituted a separate paragraph of the article in question. The combination of the two paragraphs, proposed by Canada, "on the basis of consultations with a number of delegations" was adopted by consensus. This provision, if adopted, could have led to a significant reduction in the application of the death penalty; especially since paragraph 7 of the same article would have obliged the authorities in power to endeavour, at the end of hostilities, "to grant amnesty to as many as possible of those who have participated in the armed conflict". The same article would also preclude pronouncement of the death penalty on persons under 18 years of age, and prevent its being carried out on pregnant women and mothers of young children.

69. However, when this article (now article 6) was put to the vote at the final session of the Conference on 3 June 1977, it was decided to delete the paragraph quoted above. Only 12 countries voted against the deletion, 26 voting in favour. Forty-seven countries - a majority of those present and voting - abstained. While the protection of those under 18, pregnant women and mothers of young children stands, there is no reference to the death penalty in non-international armed conflict. As of 1 January 1987, 60 States were parties to Additional Protocol II of 8 June 1977, which entered into force on 7 December 1978.

C. The death penalty and the United Nations

70. In its resolution 2857 (XXVI) of 20 December 1971 the General Assembly affirmed that "in order fully to guarantee the right of life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries". (Emphasis added) This objective was reaffirmed by the General Assembly in its resolution 32/61 of 8 December 1977. In its resolution 35/172 of 15 December 1980 the General Assembly urged all Member States to "respect as a minimum standard the content of the provisions of articles 6, 14 and 15 of the International Covenant on Civil and Political Rights".

71. In its resolution 1984/50 adopted in May 1984 the Economic and Social Council adopted a series of safeguards guaranteeing protection of the rights of those facing the death penalty. Those safeguards were endorsed by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 which invited "all States retaining the death penalty and whose present standards fall short of the safeguards" to adopt them and to take the necessary steps to implement them. In its resolution 1986/10 of 21 May 1986 the Economic and Social

Council urged "Member States that have not abolished the death penalty to adopt the safeguards [...] and the measures for the implementation of the safeguards approved by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders [...]".

1. The death penalty in the world

72. In its resolution 1745 (LIV) of 16 May 1973 the Economic and Social Council invited the Secretary-General to present to the Council at five-year intervals periodic updated and analytical reports on the situation, trends and safeguards concerning capital punishment. The first report (E/5616 and Add.1 and Corr.1 and 2) based on information received from Member States for the period 1969-1973 was presented to the Council in 1975 and the second report (E/1980/9 and Corr.1 and 2 and Add.1 and Add.2 and 3) based on information received from Member States for the period 1974-1979 was presented to the Council in 1980. The third report (E/1985/43 and Add.1) covering the period 1979-1983 was presented to the Council in 1985.

73. An annex to the third report provides information on the status of capital punishment in 170 countries, territories and areas of the world. This survey as updated in document E/1985/43/Add.1 is based on official replies received from 64 countries. For non-responding countries, the information supplied is based on research carried out by the Secretariat. According to this survey:

(a) Twenty-nine countries are abolitionist by law, which means that the country's laws do not provide for the death penalty: Austria, Bolivia, Cape Verde, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Federal Republic of Germany, Holy See, Honduras, Iceland, Kiribati, Luxembourg, Monaco, Netherlands, Nicaragua, Norway, Panama, Portugal, Solomon Islands, Sweden, Tuvalu, Uruguay, Vanuatu and Venezuela [according to information provided by Amnesty International, Australia abolished the death penalty for ordinary offences in 1984 and for all offences in 1985; the Philippines abolished the death penalty for all offences in 1987; according to Amnesty International, El Salvador and Monaco are abolitionist by law for ordinary crimes only];

(b) Twelve countries are abolitionist by law for ordinary crimes only, which means that the death penalty is imposed for exceptional crimes, that is, those subject to military law and/or committed in exceptional circumstances, for example in wartime: Brazil, Canada, Israel, Italy, Malta, Mexico, Nepal, Papua New Guinea, San Marino, Spain, Switzerland and the United Kingdom [according to information provided by Amnesty International, Argentina, Cyprus, El Salvador, Fiji, Monaco, New Zealand and Peru belong also to this category; according to Amnesty International, Nepal is retentionist];

(c) Two countries are abolitionist by custom for at least 40 years, which means that, although the country's laws provide for the death penalty for ordinary crimes, either nobody has been sentenced to death for the past 40 years or more, or nobody sentenced to death during that period has been executed: Belgium and Suriname [according to Amnesty International, both countries are retentionist; however, with one exception during the First World War, there have been no executions in Belgium for common crimes since 1863];

(d) Nine countries are abolitionist de facto at least for the past 10 years, which means that nobody has been reported executed for at least the last 10 years: Argentina, Brunei, Cyprus, Greece, Guyana, Ireland, Madagascar, Mauritius and New Zealand [according to Amnesty International those countries are retentionist, with the exception of Argentina, Cyprus and New Zealand which belong to the category of countries abolitionist for ordinary crimes only].

74. The other countries are reported retentionist:

(a) Nineteen belong to North Africa and the Middle East (Algeria, Bahrain, Democratic Yemen, Egypt, Islamic Republic of Iran, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Morocco, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, Tunisia, Turkey, United Arab Emirates, Yemen);

(b) Forty-three belong to Africa south of the Sahara (Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Djibouti, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mozambique, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Uganda, United Republic of Tanzania, Zaire, Zambia, Zimbabwe);

(c) Twenty-three belong to Asia and the Pacific (Afghanistan, Bangladesh, Bhutan, Burma, China, Democratic Kampuchea, Democratic People's Republic of Korea, Fiji, India, Indonesia, Japan, Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, Pakistan, Republic of Korea, Samoa, Singapore, Sri Lanka, Thailand, Tonga, Viet Nam);

(d) Eleven belong to Eastern Europe (Albania, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia);

(e) Seventeen belong to Latin America and the Caribbean (Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Chile, Cuba, Dominica, Grenada, Guatemala, Haiti, Jamaica, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago);

(f) In the Western group only Liechtenstein and certain States of the United States of America are retentionist [however, according to Amnesty International, there has been no execution in Liechtenstein since 1785].

75. According to information provided by Amnesty International, the following States have abolished the death penalty in recent years (1975-1987):

1975: Mexico abolished the death penalty for ordinary offences.

1976: Canada abolished the death penalty for ordinary offences.

1977: Portugal abolished the death penalty for all offences.

1978: Spain abolished the death penalty for ordinary offences; Denmark abolished the death penalty for all offences.

- 1979: Luxembourg, Nicaragua and Norway abolished the death penalty for all offences; Brazil and Fiji abolished the death penalty for ordinary offences.
- 1980: Peru abolished the death penalty for ordinary offences.
- 1981: France abolished the death penalty for all offences.
- 1982: The Netherlands abolished the death penalty for all offences.
- 1983: Cyprus and El Salvador abolished the death penalty for ordinary offences.
- 1984: Argentina and Australia abolished the death penalty for ordinary offences.
- 1985: Australia abolished the death penalty for all offences.
- 1987: Haiti and the Philippines abolished the death penalty for all offences.

2. Issues raised by the death penalty

76. According to the third report of the Secretary-General (E/1985/43 and Add.1) three factors seemed to have played a major role in the abolition of capital punishment:

(a) Most decisions to abolish capital punishment were substantiated by empirical evidence which showed that this punishment had no perceptible effect on the overall crime rate or on rates of specific types of crime;

(b) According to several Governments, capital punishment could not be reconciled with observance of the fundamental right to life and that it was a duty of government to ascertain the full protection of life by not taking it even in the name of law;

(c) Some Governments referred to the role of public opinion in directing political will to abolish capital punishment.

77. The third report of the Secretary-General summarizes also a study on "Main trends in research on capital punishment, 1979-1983" by the United Nations Social Defence Research Institute (UNSDRI) in Rome. According to this study, the majority of available criminological literature concentrated on five issues:

(a) A new trend for additional procedural safeguards in order to decrease arbitrariness in the capital sentencing process was noted. It was observed, however, that procedural devices did not exclude extra-legal factors in death sentencing nor did they reduce to satisfactory levels, the capacity of the criminal justice system to produce consistent results;

(b) More than half of the studies reviewed, with one exception coming from one country, dealt with the issue of "discriminatory justice" suggesting that capital punishment might be misused in that a disproportionate number of non-whites were sentenced to death;

(c) Research questioned the earlier findings that support for capital punishment was fundamentally based on belief in its deterrent effects. It was noted that opinion polls, the results of which too often were used to support prevailing beliefs on the issue, simply reflected the public's strongly held though uncritical views;

(d) A number of studies reported no significant relationship between capital punishment and rates of criminal homicide and that, among abolitionist countries, abolition of capital punishment was frequently followed by a decrease in homicide rates;

(e) Studies of death row inmates suggested that present procedures for assessing the sanity of those awaiting death were inadequate.

In conclusion, the Institute's review suggested that, as most of the studies concerned the western developed countries only, no global conclusions could be made.

78. An updated version of this report "Main Trends in Research on Capital Punishment 1979-1986" has been prepared by the United Nations Social Defence Research Institute (UNSDRI) for the International Conference on the Death Penalty organized by the International Institute of Higher Studies in Criminal Sciences in Siracusa (Italy) from 17 to 22 May 1987. As a supplement to this report a very extensive "International Bibliography on Capital Punishment" (150 pp.) was compiled by UNSDRI in March 1987.

79. According to Amnesty International (E/1985/NGO/1, para. 4):

- (a) Everywhere, in capital cases, the process of judgment is inherently arbitrary; nowhere has the death penalty been proved to act as a unique deterrent; and whatever the method, whether by shooting, electrocution, hanging, stoning, decapitation or injection of poison, the execution of a human being always involves acute physical and mental suffering;
- (b) The death penalty is inflicted disproportionately on the poor and the disadvantaged. It is used also as an instrument of racial oppression; and to repress ethnic and religious groups thought to be hostile to the Government;
- (c) Use of the death penalty against political opponents is frequent and it is often used as a means of political repression. In some cases people are executed for non-violent political activity;
- (d) In capital cases, in many parts of the world, procedural safeguards are deficient or absent. Cases are heard in special courts, often in secret, without adequate legal representation for the defendant and before judges who are not always competent or independent. In some countries, executions are carried out within hours of sentencing, leaving no time for appeals or petitions for pardon, commutation or reprieve.

80. According to a recent Amnesty International publication (United States of America: the Death Penalty, 1987, p. 189):

"The death penalty denies the right to life. It is a cruel and inhuman punishment, brutalizing to all who are involved in the process. It serves no useful penal purpose and denies the widely accepted principle of rehabilitating the offender. It serves neither to protect society nor to alleviate the suffering caused to the victims of crime. It is irreversible and, even with the most stringent judicial safeguards, may be inflicted on an innocent person.

No means of limiting the death penalty can prevent its being imposed arbitrarily or unfairly."

Notes

- 1/ See: Ramcharan, B.G., "The Drafting History of Article 2 of the European Convention on Human Rights", in Ramcharan, B.G., (Editor), The Right to Life in International Law, Dordrecht, Nijhoff, 1985, 57-61.
- 2/ See: Colon-Collazzo, J., "A Legislative History of the Right to Life in the Inter-American Legal System", in Ramcharan, B.G., (Editor), The Right to Life in International Law, Dordrecht, Nijhoff, 1985, 57-61.
- 3/ See: Amnesty International, The Death Penalty, London, 1979, pp.21-24.

PART TWO

II. A PROPOSED SECOND OPTIONAL PROTOCOL TO THE COVENANT

81. At the initiative of the Federal Republic of Germany a debate has taken place in several United Nations organs leading to the appointment by the Economic and Social Council of a Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities entrusted with the preparation of an analysis concerning the proposition to elaborate a second optional protocol aiming at the abolition of the death penalty. Views on this proposition have been expressed by Governments in written form at the request and orally at the Third Committee of the General Assembly and at the Commission on Human Rights. This proposition was also discussed in the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. The analysis of those views and discussions will be followed by a draft second optional protocol prepared by the Special Rapporteur.

A. Views of Governments on a Proposed Second Optional Protocol

82. Governments have expressed their views on a proposed Optional Protocol in written form at the request of the Secretary-General and in oral statements at the Third Committee of the General Assembly and at the Commission on Human Rights.

1. Written Comments of Governments on a Proposed Second Optional Protocol

83. By its decision 35/437 of 15 December 1980, the General Assembly requested the Secretary-General to transmit the text of a draft resolution entitled "measures aiming at the ultimate abolition of capital punishment (draft Second Optional Protocol to the International Covenant on Civil and Political Rights)" (A/C.3/35/L.75) submitted by Austria, Costa Rica, the Dominican Republic, the Federal Republic of Germany, Italy, Portugal and Sweden, to Governments for their comments and observations. The replies of the 35 Governments were reproduced in reports of the Secretary-General presented to the General Assembly in 1981 and 1982: A/36/441 and Add.1 and 2 and A/37/407 and Add.1. The replies were almost evenly divided between retentionist (17) and abolitionist (18) countries. In addition, the Government of Australia informed the Special Rapporteur on 25 July 1986 that it would support international moves to abolish the death penalty.

(a) Replies by Retentionist Governments

84. Besides information on their criminal legislation, a few retentionist countries gave reasons for their position, which are summarized below:

(a) The Government of Botswana (28 April 1981) holds the view that a nation has the sovereign right to determine in advance the suitable punishment to be meted out to any of its number for the commission of any specified offence; that the imposition of capital punishment is not per se arbitrary deprivation of life; that the abolition of a punishment of the magnitude of capital punishment must be consistent with the will of the people; that the people of Botswana still consider capital punishment a necessary deterrent (A/36/441, p. 5-6);

(b) According to the Government of the Philippines (24 May 1982) the available data failed to prove points of deterrence more significant than the mere existence of legislation providing for capital punishment with higher rates of homicide compared with those States without capital punishment but with lower homicide rates. Sufficiently accurate comparability, however, is lacking. Moreover, a higher value should be placed on the life of the innocent victim than upon that of the convict. It is today a rarity for a person to be wrongfully convicted of a crime and, if so, the problem lies in the judicial system and not in the death penalty. Even more than in retribution, the intrinsic fairness of capital punishment lies in society's desire for justice, law and order in its emphatic disownment of heinous crime (A/37/407/Add.1, p. 4-6) [according to information provided by Amnesty International, the Philippines adopted on 2 February 1987 a new constitution which in its article 3, section 19, part 1, reads as follows: "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."];

(c) According to the Government of Japan (28 July 1981) the majority of the Japanese citizens support retention of the death penalty as a just punishment for criminals who have committed particularly heinous crimes and regard it as an effective deterrent to such crimes (A/36/441, p. 11);

(d) According to the Government of the United Republic of Cameroon (21 August 1981), the death penalty is deterrent in nature, promotes public safety and is, on the whole, equitable, while the fact remains that it would be difficult, in all fairness, to become involved in protecting the right to life of those who have so little regard for the life of others (A/36/441, p. 19);

(e) According to the Governments of the Syrian Arab Republic (12 August 1981, A/36/441, p. 18) and of Qatar (27 May 1982, A/37/407, p. 9-10) the death penalty is a just deterrent and decisive penalty;

(f) The Governments of Egypt (28 October 1981, A/36/441/Add.1, p. 3-4), Senegal (7 July 1981, A/36/441, p. 14), Saint Vincent and the Grenadines (14 July 1981, A/36/441, p. 14) and Zimbabwe (7 May 1981, A/36/441, p. 20) declared their intention to retain the death penalty and the Governments of Barbados (19 May 1982, A/37/407/Add.1, p. 2), Guatemala (23 June 1981, A/36/441, p. 10), Pakistan (30 August 1982, A/37/407, p. 8), and Yugoslavia (27 August 1982, A/37/407, p. 11-12) felt unable to support the draft resolution;

(g) According to the Government of Algeria (24 March 1982), it is not inconceivable that, in time, a de facto abolition of capital punishment will be witnessed (A/37/407, p. 3);

(h) The Government of Togo (23 July 1982) follows very closely the efforts to have the Second Optional Protocol adopted as a way of encouraging those countries which are already advanced in criminology to pursue their policy of liberalization, until such time as it may gradually be extended to all the Member States (A/37/407, p. 10-11);

(i) The Government of the United States of America (15 June 1981) would have no reason to object if other countries wished to adopt and accede to the draft Protocol (A/36/441, p. 20).

(b) Replies by Abolitionist Governments

85. Replies of abolitionist Governments are summarized below:

(a) The Government of Cyprus (27 July 1982) noted a trend towards commuting a death sentence to life imprisonment (A/37/407, p. 5-7) and the Government of Madagascar (27 July 1981) reported that no sentence of death has actually been carried out for some 20 years in his country, but that the retention of the death penalty served as a deterrent (A/36/441, p. 12);

(b) The Government of the United Kingdom (11 August 1981) stressed that the issues surrounding capital punishment are diverse and complex and that diametrically opposed views are held by people whose moral integrity and respect for those rights cannot be called into question (A/36/441, p. 18-19);

(c) The Governments of Belgium (22 July 1982, A/37/407, p. 5), Spain (14 July 1981, A/36/441, p. 14-16) and Switzerland (11 August 1981, A/36/441, p. 17-18) expressed a preference for keeping the possibility of providing capital punishment for military crimes in time of war;

(d) The Governments of the Dominican Republic (27 April 1981, A/36/441, p. 6-7; see also A/37/407/Add.1, p. 2-3), Finland (11 August 1981, A/36/441, p. 7), Ecuador (19 May 1982, A/37/407/Add.1, p. 3), the Netherlands (1 September 1981, A/36/441, p. 12-13) Norway (18 August 1981, A/36/441, p. 13), Sweden (28 April 1981, A/36/441, p. 17), Italy (1 October 1981, A/36/441/Add.1, p. 2; see also A/37/407, p. 8), Portugal (10 June 1982, A/37/407, p. 6), Denmark (7 August 1981, A/36/441, p. 6) and Greece (A/36/441, p. 9-10) expressed support for the draft Protocol;

(e) The Government of Austria (18 June 1982) insisted on the optional nature of the proposed Protocol, which would offer States which are not yet able to abolish death sentences the possibility of creating a favourable domestic climate, whereas other States would be in a position to adhere immediately to it. In particular, the Government of Austria believes that such a humanitarian endeavour should not be limited to the regional level [of the Council of Europe] (A/37/407, p. 4-5; see also A/36/441, p. 4-5);

(f) The Government of the Federal Republic of Germany (15 June 1982) is convinced tht the forces of society, especially its educational, penal and correctional systems, ought to be so powerful that the State has no need to deprive men of their lives to ensure its protection. As a matter of fact, crime statistics in many countries demonstrate that the abolition of capital punishment has no detrimental effect on the crime rate. On the other hand, experience has taught that miscarriages of justice and also misuse of the death penalty do create irrevocable facts. The optional protocol would give the debate at the restriction and abolition of capital punishment a new and precise direction by affording those States which are in a position to do so the opportunity to assume an obligation in this respect under international law. Such an instrument would act as a signal for the future and give a fresh

impulse and thrust to the discussion, with the ultimate objective of abolishing capital punishment world wide (A/37/407, p. 7; see also A/36/441, p. 7-9).

2. Views expressed in the Third Committee of the General Assembly

86. In its resolution 37/192 of 18 December 1982 adopted without a vote, the General Assembly requested the Commission on Human Rights to consider the idea of a second optional protocol. The adoption of that resolution was preceded by a debate in the Third Committee which led to the adoption of a draft resolution (A/C.3/37/L.60/Rev.1) by 52 votes against 23, with 53 abstentions. The views expressed at the thirty-sixth (1981) and the thirty-seventh (1982) sessions of the Third Committee of the General Assembly are reproduced below in the English alphabetical order of the States concerned.

(a) Views expressed by Governments which voted in favour of draft resolution A/C.3/37/L.60/Rev.1

87. Austria felt it useful to remember that in so far as public order was concerned, the abolition of capital punishment had nowhere resulted in an increase in disturbances and there appeared to be no difference in that respect between abolitionist and retentionist States. Maintenance of public order was therefore not a valid argument against abolition. Abolition of capital punishment was an issue which should be kept under continued discussion in order to stimulate public awareness. Universal abolition was a long-term process and would cause difficulties in certain countries (A/C.3/36/SR.29, paras. 1-4). In those countries which had abolished the death penalty, that action had not had adverse effects on the maintenance of public order; on the other hand, capital punishment involved great hazards, ranging from possible errors in verdicts to the most excessive form of capital punishment, mass execution. If Member States were to refrain from executing death sentences in all cases where national law provided for the possibility of clemency, that would constitute a small initial step towards the ultimate goal of eliminating the death penalty altogether (A/C.3/37/SR.55, paras. 63-65).

88. Canada, having abolished the death penalty in 1977, believed that there was merit in the elaboration of a second optional protocol. The subject was a difficult one and raised passions in a number of countries, but it deserved the attention of the General Assembly even if all States would not be in a position to adopt such a second optional protocol immediately. There was no doubt that the United Nations would be honouring human dignity by enshrining the principle of the abolition of the death penalty in an international instrument (A/C.3/36/SR.31, para. 9).

89. Chile voted in favour of the draft resolution because it was a procedural resolution which did not go into the substance of the question (A/C.3/37/SR.67, para. 86).

90. Costa Rica pointed out that the protocol would be purely optional and that States would be entirely free to choose whether to accede to it or not (A/C.3/37/SR.67, para. 58).

91. Finland, also speaking on behalf of Denmark, Iceland, Norway and Sweden said that every effort should be made to limit the imposition of the death

penalty and to formulate international norms so that more and more countries would refrain from using the death penalty. The proposal being considered was one possible way of promoting the attainment of that objective (A/C.3/37/SR.50, para. 1).

92. France agreed in principle with the proposed second optional protocol (A/C.3/36/SR.29, para. 9).

93. Germany (Federal Republic of) was pleased that some countries that could not, for the time being, accede to any such optional protocol had, nevertheless, recognized the humanitarian objectives on which the proposal was based (A/C.3/37/SR.55, para. 25).

94. Italy said that such a protocol would be of great value in the current circumstances when there was a growing outcry against mass and arbitrary executions wherever they occurred (A/C.3/37/SR.51, para. 33).

95. Japan fully understood the concern of delegations which feared that the death penalty might lead to arbitrary executions and could therefore be a violation of basic human rights. The Government of Japan believed, however, that it was inappropriate to create an international instrument which would not be applied uniformly throughout the world and that the majority public opinion in each country should be fully taken into account (A/C.3/36/SR.32, para. 44). Japan felt that the establishment of an international instrument on the matter would be inappropriate, since article 6 of the Covenant dealt already with the subject. Since the death penalty was viewed in Japan as an effective deterrent to particularly heinous crimes, Japan did not feel that it was desirable to abolish it at the current stage (A/C.3/37/SR.53, para. 4). While Japan voted in favour of the resolution, it felt that it was inappropriate to draft an international instrument applying to the whole world and aiming at the abolition of capital punishment. Japan considered that each Government should decide individually on the question (A/C.3/37/SR.67, para. 84).

96. Mauritania had made a mistake when voting in favour of the draft resolution. It was well known that the Islamic Republic of Mauritania was in favour of capital punishment and therefore against the draft resolution (A/C.3/37/SR.67, para. 84).

97. The Netherlands hoped that Member States would gradually agree that article 6 of the International Covenant on Civil and Political Rights needed further elaboration. The death penalty was irreversible and, since judicial errors did occur, it should not be utilized by any judicial system. Moreover, it was of doubtful value as a means of crime prevention. Since, the death penalty might contain elements of cruel, inhuman or degrading treatment, it might also violate article 7 of the International Covenant on Civil and Political rights. The Netherlands Government asked that those countries which did not yet support the abolition of the capital punishment should allow other countries to move forward in that direction (A/C.3/36/SR.27, paras. 26-31). The Netherlands' Parliament had on 11 May 1982 adopted an amendment to the Constitution abolishing capital punishment for all crimes, without exception. The question of the death penalty was very controversial. The Netherlands supported the proposal to go a step further than article 6 of the Covenant. The most suitable organ to undertake the elaboration of an additional protocol was the ~~Commission on Human Rights~~ (A/C.3/37/SR.50, paras. 32-33).

98. Nicaragua supported the proposal. The Statute of Rights and Safeguards for Nicaraguans, promulgated after the victory of the Sandinist revolution in 1979, provided that the right to life was an inviolable and inherent human right and that there should be no death penalty in Nicaragua (A/C.3/37/SR.55, para. 69).

99. Norway took a positive attitude towards the elaboration of a second optional protocol, but was aware of the arguments against establishing such a protocol and agreed that the idea needed further study (A/C.3/36/SR.35, para. 55).

100. Portugal admitted that different cultural, religious, social and political conditions, as well as different historical experiences, might make it difficult for some countries to abolish the death penalty. However, it was essential to give top priority to ensuring respect for the right to life because it was basic to all other rights (A/C.3/36/SR.35, paras. 36-37). A second optional protocol would develop article 6 of the Covenant and, given its optional character, a Government not yet in a position to consider abolishing the death penalty would not have to be a party to it. In a democracy humanitarian and progressive causes always won public support. It might take some time, but in the long run public opinion would favour abolition of the death penalty just as it had favoured the abolition of slavery and had condemned racial discrimination (A/C.3/37/SR.56, para. 6).

101. The United Kingdom said that the death penalty for ordinary crimes had been abolished for some time in the United Kingdom, but it was up to Members of Parliament to decide on the question according to their conscience. Since the question of the death penalty no longer came under Government policy in the United Kingdom, it was not in a position to support an international measure designed to abolish or suspend the death penalty. However, it did not see why the question could not be discussed and examined further. The United Kingdom voted therefore in favour of the draft resolution, which was basically a procedural text (A/C.3/37/SR.67, para. 91).

102. The United States of America voted in favour of the draft resolution because it was a procedural resolution (A/C.3/37/SR.67, para. 81).

103. Uruguay welcomed the initiative which it fully supported and urged States which had not already abolished it to consider doing so (A/C.3/36/SR.36, para. 48). Uruguay firmly endorsed the initiative. The new protocol, which because of its optional character, would be open to States which were prepared to commit themselves to abolishing the death penalty or to refrain from introducing it. States not yet ready to take such a step would not, however, be under any obligation to do so (A/C.3/37/SR.56, paras. 56-59).

104. Venezuela was especially gratified by the drawing up of a second optional protocol, since it was known for its defence of human rights, especially the right to life, and its opposition to the death penalty (A/C.3/37/SR.53, para. 11).

105. In addition, the following Governments also voted in favour of draft resolution A/C.3/37/L.60/Rev.1: Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Cape Verde, Colombia, Cyprus, Dominican Republic, Ecuador,

Fiji, Gabon, Greece, Grenada, Guatemala, Honduras, Ireland, Israel, Ivory Coast, Kenya, Luxembourg, Mexico, New Zealand, Panama, Papua New Guinea, Peru, Spain, Suriname, Togo, Turkey.

(b) Views expressed by Governments which voted against draft resolution A/C.3/37/L.60/Rev.1

106. Afghanistan would vote against the draft resolution because it was an Islamic country and the abolition of the death penalty was a very controversial issue (A/C.3/37/SR.37, para. 59).

107. Iran (Islamic Republic of) pointed out that Islamic Law prescribed the death penalty in certain cases and that his country had to apply the commandments of Islam. The draft was an attempt to violate the fundamental and inherent right of countries to practise their religious beliefs (A/C.3/37/SR.67, para. 49).

108. Iraq said that the draft resolution conflicted with its country's religion, historical heritage and cultural values (A/C.3/37/SR.67, para. 53).

109. Jordan said that the civil code, based on the code of conduct defined by the Islamic religion and on the socio-cultural traditions of the country, did not exclude the death penalty. During the past 10 years only two death sentences had been handed down and both had been for extremely violent crimes. Since the death penalty was rarely used, Jordan wished it to be retained as a deterrent (A/C.3/37/SR.67, para. 48).

110. Kuwait said that there could be no question of accepting the idea of abolishing the death penalty, because that would involve changing a cardinal principle of the Kuwaiti religion and national jurisdiction (A/C.3/37/SR.67, para. 47).

111. The Libyan Arab Jamahiriya said that the draft resolution was fundamentally incompatible with the requirements of Islam (A/C.3/37/SR.67, para. 52).

112. Oman was firmly convinced that the abolition of the death penalty was a substantive and controversial question which was inconsistent with the legal system of the Islamic countries for which the death penalty was of fundamental importance. For Islam, the right to life was a sacred right since human beings were the creation of Almighty God and, as such, must therefore be protected. However, if an individual wilfully took the life of another, Islamic law provided that the State must in turn take the life of that criminal, once his guilt was established by the courts. The death penalty, to the extent that it was an integral part of Islamic law, must be upheld at all costs (A/C.3/37/SR.67, para. 45).

113. Nigeria said that if someone was guilty of homicide, he must be punished accordingly (A/C.3/37/SR.67, para. 52).

114. The Philippines could not be a party to the draft optional protocol since the ratification of the Covenant was under consideration. A bill for the abolition of the death penalty was before the National Assembly (A/C.3/36/SR.33, para. 72; see also A/C.3/37/SR.56, para. 24).

115. Sierra Leone would carefully study the report of the Secretary-General and would make its views known at a later stage (A/C.3/36/SR.32, para. 16).

116. Somalia, as a Muslim country, was guided by the shari'ah which stipulated that the death penalty must be imposed for certain serious crimes such as premeditated murder (A/C.3/37/SR.67, para. 50).

117. Sudan said that the draft resolution was incompatible with the criminal code and legislation of Sudan based on the divine and sacred laws of Islam which were immutable (A/C.3/37/SR.67, para. 46).

118. In addition, the following Governments also voted against draft resolution A/C.3/37/L.60/Rev.1: Bahrain, Burundi, Guinea, Lebanon, Malaysia, Qatar, Saudi Arabia, Singapore, Syrian Arab Republic, United Arab Emirates and Yemen.

(c) Views expressed by Governments which abstained on
draft resolution A/C.3/37/L.60/Rev.1

119. The Central African Republic said that it would abstain since the problem was a very complex one and opinions were deeply divided (A/C.3/37/SR.67, para. 68).

120. Ethiopia abstained on the draft resolution, the spirit of which ran counter to Ethiopian laws (A/C.3/37/SR.67, para. 88).

121. The German Democratic Republic considered that the preparation of a second optional protocol would raise probably a great many problems. Article 6 of the International Covenant on Civil and Political Rights regulated the question of abolishing or retaining capital punishment in a balanced and flexible way and a new international instrument was not absolutely necessary (A/C.3/36/SR.30, para. 5). It was not enough to talk of abolishing or restricting the application of the death penalty while remaining silent about the arbitrary, mass death sentences to which millions of people were condemned by wars of aggression, acts of genocide or the failure of States to help the needy (A/C.3/37/SR.52, para. 5).

122. Hungary noted that socialist criminal law advocated the eventual abolition of capital punishment, but felt that at present the protection of society required the retention of capital punishment for crimes against humanity, for the gravest crimes against life and for acts of terrorism, which were proliferating at the international level (A/C.3/36/SR.34, para. 39).

123. India felt that it would be premature to take any substantive decision at the current stage (A/C.3/36/SR.32, para. 54).

124. Morocco felt that the only appropriate action which could be taken at present was to embark upon a debate on the question in order to enable all Member States to make known their views on the advisability of an international stance on the abolition of the death penalty (A/C.3/36/SR.31, para. 14). If capital punishment was still being retained in many countries, that was because it was deemed to be a preventive measure for the protection of citizens. While Morocco had a very clear position on the matter, it was

prepared to continue a dialogue with the countries concerned provided that that dialogue in no way committed its country, which was the sole sovereign and judge of its acts and its justice (A/C.3/37/SR.52, paras. 13-14).

125. Niger regarded the draft resolution as entirely procedural in nature (A/C.3/37/SR.67, para. 57).

126. Pakistan, as an Islamic country, had the sacred right to apply the political and legal system of Islam within its territory and that Muslim law prescribed the death penalty for certain particular heinous crimes. Since the draft resolution was purely procedural, it would abstain in any vote on the text (A/C.3/37/SR.67, para. 60).

127. Romania believed that the proposal raised several political and legal difficulties and that the question should be studied first by specialized bodies such as the Commission on Human Rights and the Committee on Crime Prevention and Control (A/C.3/36/SR.35, para. 67).

128. Senegal believed that the sponsor's philosophical and humanitarian motives were commendable but it did not share them. It was essential to consider that question in the light of the social and political situation of each country (A/C.3/37/SR.50, para. 21).

129. Tunisia was following with interest the efforts being made to ensure the right to life in general through such means as the achievement of nuclear disarmament and the strict limitation of the death penalty (A/C.3/37/SR.56, para. 8). Tunisia supported the efforts being made in the United Nations to guarantee enjoyment of human rights and the right to life. However, that did not mean that Tunisia, whose legislation was based on Islamic law, would accede to the second optional protocol; it meant only that it did not wish to stand in the way of efforts to safeguard human rights (A/C.3/37/SR.67, para. 67).

130. Uganda still considered the death penalty an effective deterrent to crime, taking into account the social context in each nation. Although opposed to the abolition of capital punishment, Uganda fully subscribed to a second protocol and encouraged all other countries which were in a position to do so to abolish the death penalty, since it did not oppose the adoption of the said protocol (A/C.3/36/SR.36, para. 23). Uganda felt that that question had to do with the domestic legislation of each State. However, if States were in a position to take action to abolish the death penalty, they should not be prevented from doing so (A/C.3/37/SR.67, para. 89).

131. The Ukrainian SSR stated that the idea had already provoked considerable disagreement which was only to be expected. Such a protocol would encroach on the prerogative of any sovereign State to decide how it planned to combat crime (A/C.3/36/SR.34, para. 28). The morality of a country was none the greater because none of the death sentences handed down against its citizens had been carried out for several years if, at the same time, that country destroyed millions of lives in another (A/C.3/37/SR.52, para. 18).

132. Zaire said that any attempt to introduce an instrument on that subject to be uniformly applied throughout the world was clearly unwarranted, the more so since most countries had not abolished the death penalty, and the issue had philosophical, cultural, historical, religious and legal implications which

could not be dealt with superficially without calling into question the principle of the autonomy and cultural identity of peoples (A/C.3/36/SR.35, para. 69).

133. In addition, the following Governments also abstained on draft resolution A/C.3/37/L.60/Rev.1: Algeria, Angola, Bahamas, Bangladesh, Barbados, Benin, Buthan, Botswana, Bulgaria, Byelorussian Soviet Socialist Republic, Chad, Congo, Cuba, Czechoslovakia, Egypt, El Salvador, Guinea-Bissau, Guyana, Jamaica, Lesotho, Liberia, Madagascar, Malawi, Mali, Mongolia, Nepal, Paraguay, Poland, Rwanda, Sri Lanka, Thailand, Trinidad and Tobago, Union of Soviet Socialist Republics, United Republic of Cameroon, United Republic of Tanzania, Upper Volta, Viet Nam, Yugoslavia and Zambia.

3. Views expressed in the Commission on Human Rights

134. In its resolution 1984/19 of 6 March 1984 adopted without a vote the Commission on Human Rights invited the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to consider the idea of elaborating a draft second optional protocol. During the discussion preceding the adoption of this resolution, at the 15th, 17th and 18th meetings of the fortieth session of the Commission on Human Rights held on 16 and 17 February 1984, members expressed views on the idea of elaborating a second optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty. Those views are reproduced below in the English alphabetical order of the States concerned.

135. Argentina supported the proposal of the Federal Republic of Germany and other delegations (E/CN.4/1984/SR.18, para. 79).

136. Bangladesh supported the abolition of the death penalty out of respect for the right to life. There could never be absolute certainty that a miscarriage of justice would not take place, although it was necessary to provide some deterrent to ensure the security of others. In any event, article 6 of the International Covenant on Civil and Political Rights should be strictly adhered to, so that individuals could be sure that they would receive a fair hearing (E/CN.4/1984/SR.18, para. 49).

137. Canada, which had abolished capital punishment in 1976 for offences under the Criminal Code, supported in principle the idea of drafting such an optional protocol. Since the protocol in question would be optional, it would of course be for each country to determine whether it wished to become a party to it (E/CN.4/1984/SR.17, para. 58).

138. France, which had abolished capital punishment on 9 October 1981, welcomed the proposal of the Federal Republic of Germany and had no objection to the Sub-Commission expressing an opinion on the form which a draft protocol might take. However, at the appropriate time, a working group comprising representatives of Member States should be established (E/CN.4/1984/SR.18, para. 74).

139. The German Democratic Republic reiterated its view that the draft would give rise to a great number of problems. Article 6 of the Covenant regulated the question of abolishing or maintaining capital punishment in a balanced and flexible manner that took account of the possible practice of all States (E/CN.4/1984/SR.17, para. 7).

140. The Federal Republic of Germany outlined the background of its initiative based on its belief that the abolition of the death penalty was an important way of expressing fundamental and unconditional respect for the right to life. That conviction, which was shared by a growing number of countries, had two underlying reasons: first, the fact that the death penalty was not needed, since the forces of society, and more particularly its educational, penal and correctional systems, could be so powerful that the State had no need to deprive anybody of his life to ensure the maintenance of its constitutional and legal system; and, secondly, the fact that miscarriages of justice and misuse of the death penalty were unfortunately by no means unknown. The Federal Republic respected the sovereign decision of every State based on its own historical influences, legal traditions and religious persuasions. Consequently, it would be careful to ensure that its initiative was not to the prejudice of those countries and that it did not pronounce judgement on their legal systems. It was for that reason that the proposed protocol was an optional one. It was designed to enable countries which undertook publicly to abolish capital punishment or not to introduce it, to make their convictions known in an internationally binding instrument (E/CN.4/1984/SR.15, paras. 54-55).

141. The Netherlands stressed that there was a trend towards progressively restricting the number of offences to which the death penalty could apply. Pending consideration by the Commission and the Sub-Commission's proposals, it was essential that all countries where the death penalty continued to exist should take account of the general comments made by the Human Rights Committee with regard to the procedural guarantees mentioned explicitly in article 6 of the Covenant. The Committee had rightly stressed that the right of life was a right which should not be interpreted narrowly (E/CN.4/1984/SR.17, para. 51).

142. Spain said that the setting up of the technical and legal machinery to give effect to the rights set forth in the Universal Declaration of Human Rights was continuing with the draft second optional protocol which would be aimed at abolishing the death penalty (E/CN.4/1984/SR.15, para. 46).

143. Sweden considered that all ways and means available within the United Nations should be explored in order to promote gradual abolition of the death penalty and, in that context, it supported the initiative taken by the Federal Republic of Germany. The General Assembly and the Economic and Social Council had already adopted a number of resolutions to achieve gradual abolition of capital punishment, but unfortunately, the death penalty was still being widely applied in many countries and even becoming more frequent in some of them (E/CN.4/1984/SR.17, para. 23).

B. Views expressed in the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities

144. At the 14th, 15th and 16th meetings of the thirty-seventh session of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities on 15 and 16 August 1984 several members, observers and representatives of non-governmental organizations expressed views on the idea of elaborating a second optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.

145. The following members of the Sub-Commission participated in the discussion: Mr. Marc BOSSUYT (Belgium) (E/CN.4/Sub.2/1984/SR.14, paras. 29-30); Mr. Louis JOINET (France) (*Ibid.*, para. 31); Mr. Justice Abu Sayeed CHOWDHURY (Bangladesh) (*Ibid.*, para. 39); Mr. Jules DESCHENES (Canada) (*Ibid.*, para. 42); Mr. Awn Shawkat AL KWASAWNEH (Jordan) (E/CN.4/Sub.2/1984/SR.15, paras. 10-15); Mr. Viktor M. TCHIKVADZE (Union of Soviet Socialist Republics) (*Ibid.*, paras. 18-19); Mr. Murlidhar Chandrakant BHANDARE (India) (*Ibid.*, paras. 25-27); Mr. John P. ROCHE (United States of America) (*Ibid.*, para. 35); Mr. Benjamin C.G. WHITAKER (United Kingdom of Great Britain and Northern Ireland) (*Ibid.*, para. 41); Mrs. Erica-Irene A. DAES (Greece) (E/CN.4/Sub.2/1984/SR.16, para. 7); Mr. Miquel ALFONSO MARTINEZ (Cuba) (*Ibid.*, para. 11); Mr. Dumitru MAZILU (Romania) (*Ibid.*, para. 15); Mr. Ahmed M. KHALIFA (Egypt) (*Ibid.*, para. 19).

146. Some observers and NGO representatives at the Sub-Commission also expressed views on the question of a second optional protocol: the Observers for the Federal Republic of Germany (E/CN.4/Sub.2/1984/SR.15, paras. 42-45) and for Argentina (*Ibid.*, para. 46) and representatives of Amnesty International (E/CN.4/Sub.2/1984/SR.16, paras. 37-42); Pax Romana (*Ibid.*, paras. 51-54) and Friends World Committee for Consultation (*Ibid.*, paras. 55-57). As editorial policy does not allow for the reproduction of the relevant summary records, the views expressed at the Sub-Commission are briefly summarized below.

147. Several speakers recognized that the abolition of the death penalty was complex or controversial and that varying positions on this question were based on differing legal traditions and differing philosophical, religious and social backgrounds (Al Kwasawneh, Tchikvadze, Roche, Alfonso Martinez, Mazilu, Federal Republic of Germany). Some speakers expressed support for the abolition of the death penalty in general terms (Joinet, Deschênes, Khalifa, Daes, Argentina).

148. One speaker stressed the point that the Sub-Commission was required to consider the possibility of drawing up a second optional protocol, not the pros and cons of capital punishment itself (Khalifa). Another speaker said that a second optional protocol would become a pole of attraction for States that were considering the abolition of the death penalty (Bossuyt). An observer stressed the point that no derogation concerning the death penalty should be allowed in times of public emergency (Friends World Committee for Consultation).

149. Some speakers invoked the following arguments against the abolition of the death penalty:

The death penalty could act as a deterrent for organized crime and terrorism (Tchikvadze, Mazilu).

There was no sense in elaborating an "optional" protocol unless the bulk of the international community was ready to adopt it or unless States could be persuaded to do so in the near future (Al Kwasawneh);

A protocol on preventing or minimizing any possible abuse of capital punishment would be more promising (Al Kwasawneh).

150. Most speakers invoked the following arguments in favour of the abolition of the death penalty:

Judicial error in this matter is irrevocable (Chowdhury, Bhandare, Whitaker, Amnesty International, Friends World Committee for Consultation);

The death penalty has no deterrent effect (Chowdhury, Bhandare, Whitaker, Amnesty International, Pax Romana, Friends World Committee for Consultation);

The death penalty is incompatible with rehabilitation (Bhandare, Mazilu, Amnesty International);

Abolition of the death penalty is the best means of preventing possible abuses (Chowdhury, Federal Republic of Germany, Amnesty International);

The forces of society could be so powerful as to render capital punishment unnecessary (Federal Republic of Germany);

The death penalty is cruel punishment, brutalizing to all involved in the process and accelerating the cycle of violence (Amnesty International, Pax Romana, Friends World Committee for Consultation);

The death penalty is incompatible with respect for the sanctity of life (Pax Romana, Friends World Committee for Consultation).

* * *

151. In its resolution 1984/7 of 28 August 1984 adopted without a vote the Sub-Commission proposed to entrust the present 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.

152. On 14 December 1984 the General Assembly requested in its resolution 39/137 the Commission and the Sub-Commission to consider further the idea of elaborating a draft of a second optional protocol. This resolution was adopted by 64 votes to 19, with 55 abstentions. The vote was recorded as follows:

In favour: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Burundi, Canada, Cape Verde, Central African Republic, Chile, Colombia, Costa Rica, Cyprus, Denmark, Dominican Republic, Ecuador, El Salvador, Fiji, Finland, France, Federal Republic of Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Iceland, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Liberia, Luxembourg, Mali, Malta, Mauritania, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Papua New Guinea, Peru, Portugal, Rwanda, Samoa, Sao Tome and Principe, Seychelles, Spain, Sweden, Togo, Trinidad and Tobago, Turkey, United Kingdom, United States, Uruguay, Venezuela.

Against Bahrain, Bangladesh, Islamic Republic of Iran, Iraq, Jordan, Kuwait, Libya, Maldives, Oman, Pakistan, Qatar, Saudi Arabia, Senegal, Singapore, Somalia, Sudan, Syria, United Arab Emirates, Yemen.

Abstaining: Afghanistan, Algeria, Angola, Bahamas, Barbados, Belize, Benin, Bhutan, Botswana, Brunei Darussalam, Bulgaria, Burkina Faso, Burma, Byelorussian Soviet Socialist Republic, Cameroon, China, Congo, Cuba, Czechoslovakia, Democratic Kampuchea, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, German Democratic Republic, Hungary, India, Lao People's Democratic Republic, Lebanon, Lesotho, Madagascar, Malawi, Malaysia, Mauritius, Mongolia, Nepal, Niger, Nigeria, Paraguay, Poland, Saint Vincent, Sri Lanka, Swaziland, Thailand, Tunisia, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Republic of Tanzania, Viet Nam, Yugoslavia, Zaire, Zambia, Zimbabwe.

153. In its resolution 1985/46 of 14 March 1985 adopted without a vote, the Commission on Human Rights recommended the Economic and Social Council to authorize the Sub-Commission to entrust the present Special Rapporteur with the preparation of the said analysis. This recommendation was enacted by the Economic and Social Council in its resolution 1985/41 of 30 May 1985 adopted without a vote.

C. A Draft Second Optional Protocol prepared by the Special Rapporteur

154. The Special Rapporteur has carefully examined the draft second optional protocol to the International Covenant on Civil and Political Rights submitted by Austria, Costa Rica, the Dominican Republic, Germany, Federal Republic of, Italy, Portugal and Sweden (A/C.3/35/L.75, annex; see annex II) and the comments of Governments on this draft (A/36/441 and Add. 1 and 2 and A/37/407 and Add. 1). It has to be noted that most comments concerned the desirability or not of the abolition of capital punishment. Very few comments concerned the drafting of the second optional protocol itself. On the basis of the examination of this draft and those comments and of the present analysis, the Special Rapporteur proposes a number of modifications to the draft second optional protocol.

155. In the seven Powers' draft space for preambular paragraphs was left open. In order to provide a full drafting of a second optional protocol, the Special Rapporteur suggests a few preambular paragraphs setting the framework of the second optional protocol and containing considerations which motivate States in a position to become eventually parties to this protocol.

156. A first preambular paragraph could mention in general terms that the abolition of the death penalty could contribute to enhance human dignity and to develop progressively human rights. The second preambular paragraph could refer briefly to the basic international provisions concerning the right to life: article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights. The third and

fourth preambular paragraph could recall the most relevant general comments concerning the abolition of the death penalty adopted without a vote by the Human Rights Committee in 1982. The fifth and last preambular paragraph could express the purpose of the second optional protocol: to undertake the international commitment to abolish the death penalty.

157. The preambular paragraphs could read as follows:

"The States parties to the present Protocol

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights adopted on 10 December 1948 and article 6 of the International Covenant on Civil and Political Rights adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms which strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:".

158. As far as article 1 is concerned, the Special Rapporteur takes duly into account the following comments of the Netherlands (A/36/441, p. 12):

"some provisions might be worded in such a way as to enable those States parties where constitutional law so permits, to regard them 'self-executing' and thus to put them into effect from the very moment of ratification".

159. Indeed, it should be made clear in the first paragraph of the first article that "no one shall be executed". The draft of that paragraph has to be formulated in a manner sufficiently clear and complete in order to confer an individual right based on the second optional protocol itself in those States parties where the constitutional system allows for the direct application of self-sufficient provisions of treaties incorporated in domestic law.

160. At variance with the proposal of the Netherlands, the Special Rapporteur prefers to have mentioned in the first paragraph the right of the individual not to be executed, followed immediately and in the same article by the obligation of the State to abolish the death penalty. In a convention on human rights the right of the individual is of prime concern. The first paragraph is confined to the essential object of the second optional protocol.

161. The article would thus read as follows:

"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."

162. The Special Rapporteur considers unnecessary a provision such as that included in article 2, paragraph 2, of the seven Powers' draft second optional protocol: "The death penalty shall not be re-established in States that have abolished it". Such a provision is useful in a convention as the American Convention on Human Rights, where there is no obligation to abolish the death penalty, but there is no need for such a provision in an optional protocol which explicitly abolishes capital punishment in all States which are parties to it. It is obvious that a State party to the second optional protocol could not re-establish the death penalty without manifestly violating that protocol. Indeed, a re-establishment of capital punishment would be contrary to the very object and purpose of the second optional protocol.

163. Also at variance with the seven Powers' draft, the Special Rapporteur considers it necessary to provide the possibility of an exception for crimes of a military nature during wartime. The Special Rapporteur took note of the fact that about a dozen States have abolished the death penalty for ordinary crimes, but retain it for crimes under military law or crimes committed in exceptional circumstances such as in wartime.

164. Moreover, the Special Rapporteur took note of the fact that after the submission of the seven Powers' draft in the Third Committee of the General Assembly in November 1980, five of those Powers adopted in December 1982, within the framework of the Council of Europe, a Sixth Additional Protocol containing an article 2 which reads as follows:

"A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary-General of the Council of Europe the relevant provisions of that law".

165. In providing a similar provision, the Special Rapporteur hopes that a greater number of States may find it possible to become parties to the second optional protocol. In any case, it may be unrealistic to assume that States would be willing to accept obligations in the framework of the United Nations which are substantially more extensive than those which they are willing to accept in the framework of a regional system for the protection of human rights.

166. It should be made clear that such a provision constitutes an exception to the rule of the abolition of the death penalty set forth by the second optional protocol. As such, the provision must be couched in narrow terms. The best legal technique for such an exception seems to consist in providing ~~for a possibility for making a reservation to that effect. This would only~~

apply if the State which becomes a party to the Protocol makes a declaration to that effect at the moment of ratification or adherence. As any other reservation would very likely be incompatible with the object and purpose of the second optional protocol, it seems preferable to state that only such a reservation would be admissible.

167. There seems no sufficiently valid reason why in time of war the death penalty should be imposed for ordinary crimes. For this reason, in the opinion of the Special Rapporteur, the exception should be limited to a most serious crime of a military nature committed during wartime. The crimes thus envisaged are those provided for in the military code. As, however, some States do not have a military code separate from the Penal Code, the larger notion of "crimes of a military nature" is proposed. It is obvious that the scope of the reservation is necessarily limited by the State's obligations under international humanitarian law, in particular those contained in the Geneva Conventions of 1949 and, when applicable, its Additional Protocols I and II of 1977.

168. The exception requires (a) a communication at the time of making the reservation of the relevant provisions of legislation applicable in wartime; and (b) a notification of the beginning and end of a state of war. The notion "state of war" would cover as well "time of war" as "time of imminent threat of war". Particularly in case of an "imminent threat to war", it is not the factual situation itself, but the legal declaration of such a situation which provides to the individual the necessary legal security with regard to the applicable law.

169. Article 2 would read as follows:

"Article 2

1. No reservation is admissible to the present Protocol except for a reservation made at the time of ratification or accession which provides for 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.

2. The State party making such a reservation will at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State party having made such a reservation will notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory."

170. As far as the monitoring of the obligations under the second optional protocol is concerned, the legal position of the States parties to it should preferably be the same as with respect to the Covenant and to the (First) Optional Protocol. This concerns both the reporting obligation and the possibility for the Human Rights Committee to examine inter-State and/or individual communications.

171. While it would be unnecessary to provide for a reporting obligation separate from the one under the Covenant, that obligation should nevertheless extend to the second optional protocol. As there is certainly no need for additional reports, the relevant information should be included in the reports submitted under the Covenant to the Human Rights Committee. The Special Rapporteur considers an explicit provision to that effect necessary and therefore proposes a new article 3.

172. Article 3 would read as follows:

"Article 3

The States parties to the present Protocol shall include in the reports which they submit to the Human Rights Committee in accordance with article 40 of the Covenant information on the measures they have adopted to give effect to the present Protocol."

173. With respect to the optional procedures for the examination of inter-State and individual communications in particular, the legal position of the States parties to the second optional protocol should as much as possible be the same as with respect to the Covenant and to the (First) Optional Protocol. It should, however, be made possible for a State party to adopt a different position if it so wishes. For these reasons, and taking note of the comments of the Government of the Netherlands to that effect, the Special Rapporteur has drafted new articles 4 and 5 which provide for the same legal situation with respect to article 41 of the Covenant and the (First) Optional Protocol, "unless the State party concerned has made at the moment of ratification of or accession to the present Protocol a statement to the contrary."

174. Articles 4 and 5 would read as follows:

"Article 4

With respect to the States parties to the Covenant who have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications that a State party claims that another State party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State party concerned has made a statement to the contrary at the moment of ratification or accession."

"Article 5

With respect to the States parties to the (First) Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State party concerned has made a statement to the contrary at the moment of ratification or accession."

175. Since any execution of the death penalty necessarily precludes the victim from complaining of a violation of the Protocol, a communication to the Human Rights Committee should be considered admissible as soon as a person is

subject to a potential threat of execution. The fact that a person would have to live under a threat of execution would in itself violate the obligation of a State party to the second optional protocol in view of its article 1, paragraph 2, which requires to take all necessary measures to abolish the death penalty.

176. In view of the wording of new article 5, article 6 of the draft submitted by the seven Powers becomes obsolete.

177. For all other purposes, it may be deemed necessary to state in clear language that the provisions of the second optional protocol shall apply as additional provisions to the Covenant. Such a provision may be useful in order to emphasize that the relevant provisions of the Covenant, and in particular article 14 with respect to the requirements of fair trial and article 5, paragraph 2, with respect to other provisions more favourable to the individual are also applicable to the second optional protocol. In the framework of article 5, paragraph 2, of the Covenant, articles 3, 100 and 101 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War are particularly relevant.

178. The Special Rapporteur considers that the (new) article 2 is sufficient to make clear that only where a reservation is made in conformity with this article can there be admitted a derogation "in time of public emergency which threatens the life of the nation". Nevertheless, in order to avoid any misunderstanding as to the inapplicability of article 4 of the Covenant to the second optional protocol, despite article 6, paragraph 1, of the second optional protocol, an additional paragraph 2 to article 6 of the second optional protocol explicitly rules out the applicability of article 4 of the Covenant to the provisions of the second optional protocol. It seems appropriate to start that paragraph with the "without prejudice" formula with respect to the possibility of a reservation under article 2 of the second optional protocol.

179. Article 6 would read as follows:

"Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.

2. Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant."

180. Except for a renumbering of the articles and explicit references in article 10 to the new articles 2, 4 and 5, the Special Rapporteur does not propose any drafting changes to the other articles of the draft as submitted by the seven Powers.

181. The draft second optional protocol to the International Covenant on Civil and Political Rights concerning the abolition of the death penalty as prepared by the Special Rapporteur appears in annex I.

III. CONCLUSIONS

182. It is not the purpose of the present analysis to press States to abolish capital punishment or to become parties to a second optional protocol. In the framework of the present analysis the Special Rapporteur confines himself to take note of the growing trend in the world today towards abolition of the death penalty.

183. Indeed, a growing number of States have taken in recent years the decision to abolish the death penalty in their domestic legislation. Some States have already accepted international commitments with respect to the abolition of the death penalty in a regional framework. In addition several States have expressed the wish to make their commitment to the abolition of the death penalty the object of an international obligation in the framework of the International Covenant on Civil and Political Rights.

184. Already at the time of the drafting of the Covenant, as amplified by the study of the "travaux préparatoires" of its article 6, there was a strong presumption in favour of the abolition of the death penalty. In questions put by its members and in "general comments" adopted by consensus, the Human Rights Committee established under the Covenant has made clear that "all measures of abolition [of the death penalty] should be considered as progress in the enjoyment of the right to life".

185. There appears to be too often a confusion between the issue of the possibility for a given State to abolish hic and nunc the death penalty and the desirability of adopting a second optional protocol aiming at the abolition of the death penalty. In examining the comments of Governments the Special Rapporteur noted with special interest that an abolitionist Government stated that it felt unable to lend its support to a proposed second optional protocol (A/36/441, p. 18-19), while two retentionist Governments did not see any reason to object if other countries wished to adopt and accede to a second optional protocol (see A/36/441, p. 20, A/C.3/36/SR.36, para. 23 and A/C.3/37/SR.67, para. 89). In most cases, however, Governments expressed their views on the desirability of abolition of the death penalty rather than on the desirability of drafting a second optional protocol. There is nevertheless a considerable difference between not being able at the present moment to accept such a commitment and preventing others from accepting that commitment.

186. It is evident that no State should - or could - ever be forced to accept such an international undertaking. However, the Special Rapporteur 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. The Special Rapporteur hopes that his analysis will contribute to clarifying the issues at stake and that the draft proposal for a second optional protocol annexed to the present analysis will facilitate a decision by the competent United Nations organs, keeping in mind that the Human Rights Committee considers that all measures of abolition of the death penalty constitute progress in the enjoyment of the most fundamental of all human rights: the right to life.

Annex I

DRAFT SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS AIMING AT THE ABOLITION OF THE
DEATH PENALTY PREPARED BY THE SPECIAL RAPPORTEUR

The States parties to the present Protocol

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights adopted on 10 December 1948 and article 6 of the International Covenant on Civil and Political Rights adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms which strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:

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.

Article 2

1. No reservation is admissible to the present Protocol except for a reservation made at the time of ratification or accession which provides for 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.

2. The State party making such a reservation will at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State party having made such a reservation will notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

Article 3

The States parties to the present Protocol shall include in the reports they submit to the Human Rights Committee in accordance with article 40 of the Covenant information on the measures they have adopted to give effect to the present Protocol.

Article 4

With respect to the States parties to the Covenant which have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications that a State party claims that another State party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States parties to the (First) Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.

2. Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

Article 7

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

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

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

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

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

Article 8

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

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

Article 9

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

Article 10

The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

- (a) Reservations, communications and notifications under article 2 of the present Protocol;
- (b) Statements made under its articles 4 or 5;
- (c) Signatures, ratifications and accessions under its article 7;
- (d) The date of the entry into force of the present Protocol under its article 8.

Article 11

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

Annex II

DRAFT SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS SUBMITTED BY AUSTRIA, COSTA RICA,
THE DOMINICAN REPUBLIC, GERMANY, FEDERAL REPUBLIC OF, ITALY,
PORTUGAL AND SWEDEN (A/36/441, ANNEX AND A/C.3/35/L.75)

The States parties to the present Protocol

...

...

...

have agreed as follows:

Article 1

1. Each State party shall abolish the death penalty in its territory and shall no longer foresee the use of it against any individual subject to its jurisdiction nor impose nor execute it.

2. The death penalty shall not be re-established in States that have abolished it.

Article 2

1. As between the States parties article 1 of the present Protocol shall be regarded as an additional article to the International Covenant on Civil and Political Rights of 19 December 1966. The provisions of the Covenant shall apply accordingly.

2. Nevertheless, the competence of the Human Rights Committee established under article 28 of the Covenant to receive and consider communications, resulting from a declaration in accordance with article 41 of the Covenant, shall not be effective in relation to the present Protocol unless the State party concerned has made a statement recognizing such competence in respect of article 1 of the present Protocol.

3. Furthermore, no derogation from article 1 of the present Protocol may be made by virtue of article 4 of the International Covenant on Civil and Political Rights.

Article 3

The present Protocol shall also supplement the Optional Protocol of 19 December 1966 to the International Covenant on Civil and Political Rights of 19 December 1966, provided that the competence of the Committee pursuant to the Optional Protocol shall not be effective in relation to the present Protocol unless the State party concerned has made a statement recognizing the

competence of the Committee to receive and consider communications from individuals subject to its jurisdiction also in respect of article 1 of the present Protocol.

Article 4

1. The present Protocol is open for signature by any State which has signed the Covenant.
2. The present Protocol is subject to ratification by any State which has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State which has ratified the Covenant or acceded to it.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 5

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 6

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

Article 7

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

Article 8

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

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

Article 9

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

Annex III

PROTOCOL No.6 TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS CONCERNING THE ABOLITION OF THE DEATH PENALTY

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty,

Have agreed as follows:

Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary-General of the Council of Europe the relevant provisions of that law.

Article 3

No derogation from the provisions of this Protocol shall be made under article 15 of the Convention.

Article 4

No reservation may be made under article 64 of the Convention in respect of the provisions of this Protocol.

Article 5

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary-General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of

such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such a declaration by the Secretary-General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary-General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary-General.

Article 6

As between the States parties the provisions of articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 7

This Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of Europe.

Article 8

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of article 7.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

Article 9

The Secretary-General of the Council of Europe shall notify the member States of the Council of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with articles 5 and 8;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Strasbourg, the twenty-eighth April one thousand nine hundred and eight-three, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary-General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Appendix I

THE RELEVANT "TRAVAUX PREPARATOIRES" OF ARTICLE 6 OF THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS a/

1. Article 6, paragraph 1

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

1. In the Commission on Human Rights (Cf. A/2929, chap.VI, paragraph 1), one view was that the Covenant should enunciate that no one should be deprived of life under any circumstances. It was maintained that in drafting an article on the right to life, which was the most fundamental of all rights, no mention should be made of circumstances under which the taking of life might seem condoned [Cf. the Ukrainian SSR (E/CN.4/SR.98, p.9) and Uruguay (E/CN.4/SR.152, paragraph 28)]. Against this view, it was contended that the Covenant must be realistic: that circumstances existed under which the taking of life was justified [Cf. United Kingdom (E/CN.4/SR.139, paragraph 15 and E/CN.4/SR.199, paragraph 90), Lebanon (E/CN.4/SR.144, paragraph 18), France (E/CN.4/SR.199, paragraph 88), United States (E/CN.4/SR.310, p.8)].

2. A second view (Cf. A/2929, chap.VII, paragraph 2) was that in a covenant which would not admit progressive implementation of its provisions, it was desirable to define as precisely as possible the exact scope of the right and the limitations thereto in order that contracting States would be under no uncertainty about their obligations [Cf. United Kingdom (E/CN.4/SR.98, p.5, E/CN.4/SR.139, paragraphs 15 and 24, E/CN.4/SR.144, paragraph 11, E/CN.4/SR.309, pp.3 and 7), Lebanon (E/CN.4/SR.98, pp.6 and 11, E/CN.4/SR.152, paragraph 18), India (E/CN.4/SR.98, p.10)]. Among the exceptions proposed were, inter alia, execution of death sentence proposed in accordance with the law. Against this view it was maintained that any enumeration of limitations would necessarily be incomplete and would, moreover, tend to convey the impression that greater importance was being given to the exception than to the right [Cf. USSR (E/CN.4/SR.98, pp.2-3 and 10, E/CN.4/SR.309, p.5), Philippines (E/CN.4/SR.98, p.8), Chile (E/CN.4/SR.98, p.9, E/CN.4/SR.140, paragraph 2, E/CN.4/SR.309, p.7), United States (E/CN.4/SR.139, paragraphs 7 and 11, E/CN.4/SR.140, paragraph 34, E/CN.4/SR.152, paragraphs 4-5, E/CN.4/SR.309, p.4, E/CN.4/SR.310, p.8), India (E/CN.4/SR.140, paragraphs 13 and 42), France (E/CN.4/SR.309, p.4), Ukrainian SSR (E/CN.4/SR.310, p.9); see also Third Committee, A/3764, paragraph 115]. An article drafted in such terms would seem to authorize killing rather than safeguard the right to life [Cf. United States (E/CN.4/SR.139, paragraph 9), USSR (E/CN.4/SR.309, p.6, E/CN.4/SR.310, p.15)].

2. Article 6, paragraph 2

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes, in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. In the Commission on Human Rights (Cf. A/2929, chap.VI, paragraph 5), some opposition was expressed to the inclusion in the article of provisions dealing with capital punishment since it might give the impression that the practice was sanctioned by the international community [Cf. Egypt (E/CN.4/SR.144, paragraph 15), Uruguay (E/CN.4/SR.311, p.7)]. The opinion was expressed that respect for human life required that a covenant on human rights should, as one of its main principles, provide for the abolition of capital punishment. On the other hand, it was pointed out that capital punishment existed in certain countries [Cf. USSR (E/CN.4/SR.93, p.9), France (E/CN.4/SR.93, p.12), Uruguay (E/CN.4/SR.310, p.10), Sweden (E/CN.4/SR.311, p.3)]. It was recognized, however, that adequate safeguards should be provided in order that the death penalty would not be imposed unjustly or capriciously in disregard of human rights [Cf. Uruguay (E/CN.4/SR.139, paragraphs 28-29, E/CN.4/SR.140, paragraph 46), China (E/CN.4/SR.139, paragraph 44), Poland (E/CN.4/SR.144, paragraph 23)]. It was agreed that the death sentence should be imposed only (a) as a penalty for the most serious crimes [Cf. Chile (E/CN.4/SR.309, p.9), United States (E/CN.4/SR.310, p.7)], (b) pursuant to the sentence of a competent court [Cf. Chile (E/CN.4/SR.309, p.6), and (c) in accordance with the law not contrary to the principles of the Universal Declaration of Human Rights or to the Convention on the Prevention and Punishment of the Crime of Genocide.

4. In the Commission on Human Rights (Cf. A/2929, chap.VI, paragraph 6), the phrase "most serious crimes" was criticized as lacking precision, since the concept of "serious crimes" differed from one country to another [Cf. Chile (E/CN.4/SR.140, paragraph 39), Uruguay (E/CN.4/SR.149, paragraph 33), United Kingdom (E/CN.4/SR.149, paragraph 35), United States (E/CN.4/SR.149, paragraph 46)]. It was therefore suggested that the term should be more clearly defined [Cf. Chile (E/CN.4/SR.140, paragraph 4), France (E/CN.4/SR.149, paragraph 61), Egypt (E/CN.4/SR.152, paragraph 37), United Kingdom (E/CN.4/SR.153, paragraph 14)]. A suggestion was also made that "political crimes" should not entail the death penalty [Cf. USSR (E/CN.4/SR.98, p.4)].

5. There was agreement (Cf. A/2929, chap.VI, paragraph 7) that the death penalty should be imposed by a "competent court" [Cf. Egypt (E/CN.4/SR.139, paragraph 32 and E/CN.4/SR.152, paragraph 37), Philippines (E/CN.4/SR.153, paragraph 15)].

6. Also in the Commission on Human Rights (Cf. A/2929, chap.VI, paragraph 8) it was stated that the clause providing that a death sentence must be imposed in accordance with law "not contrary to the principles of the Universal Declaration of Human Rights" was intended to ensure that no person should be deprived of his life pursuant to unjust laws [Cf. Egypt (E/CN.4/SR.98, p.9), United States (E/CN.4/SR.98, p.9), Chile (E/CN.4/SR.140, paragraph 4), Yugoslavia (E/CN.4/SR.149, paragraphs 58-59), France (E/CN.4/SR.149, paragraphs 60-61 and 64)]. The law invoked must not be contrary to the spirit of the Universal Declaration [Cf. France (E/CN.4/SR.152, paragraphs 12-13), Yugoslavia (E/CN.4/SR.152, paragraphs 12-13), Uruguay (E/CN.4/SR.152, paragraph 25), Chile (E/CN.4/SR.309, p.7), Egypt (E/CN.4/SR.310, p.16); see also Pakistan (A/C.3/SR.810, paragraph 27)]. However, the reference to the Universal Declaration was opposed on the ground that the Declaration was a statement of ideas, necessarily broad and vague and lacking in legal precision [Cf. United Kingdom (E/CN.4/SR.140, paragraph 20 and E/CN.4/SR.153,

paragraph 14), United States (E/CN.4/SR.152, paragraph 2), Australia (E/CN.4/SR.153, paragraph 13); see also Netherlands (A/C.3/SR.809, paragraph 25), Iran (A/C.3/SR.810, paragraph 6), Australia (A/C.3/SR.812, paragraph 24)]. Mere reference to that document could not prevent the adoption or execution of unjust laws [Cf. France (E/CN.4/SR.310, p.5 and E/CN.4/SR.311, p.5), Pakistan (E/CN.4/SR.310, p.6), United Kingdom (E/CN.4/SR.310, p.7), Yugoslavia (E/CN.4/SR.310, pp.12-13)]. The reference to the Convention on the Prevention and Punishment of the Crime of Genocide was intended to provide a further yardstick to which national laws authorizing the imposition of the death sentence should conform.

7. In the Third Committee of the General Assembly (Cf. A/3764, paragraph 11), one issue discussed was whether or not article 6 should provide for the abolition of capital punishment. The question arose in connection with the second part of the amendment proposed by Colombia and Uruguay (A/C.3/L.644), which provided that "death penalty shall not be imposed on any person". Those supporting the clause maintained that article 6, which guaranteed the right to life should not in any way sanction the taking of life but should prohibit the death penalty [Cf. Brazil (A/C.3/SR.289, paragraph 25), Uruguay (A/C.3/SR.573, paragraph 19, A/C.3/SR.810, paragraphs 22-24, A/C.3/SR.810, paragraph 32, A/C.3/SR.818, paragraph 11), Colombia (A/C.3/SR.811, paragraphs 10-13), Costa Rica (A/C.3/SR.812, paragraph 10), Peru (A/C.3/SR.812, paragraph 12), Ecuador (A/C.3/SR.815, paragraphs 27-28)]. The existence of capital punishment could not be justified and was contrary to the modern concept of penalty, which was to bring about the rehabilitation of the offender [Cf. Uruguay (A/C.3/SR.810, paragraphs 22-23), Panama (A/C.3/SR.813, paragraph 28)]. Moreover, it was always possible that an innocent person might be convicted; rectification of any error would be precluded if the convicted person were executed [Cf. Uruguay (A/C.3/SR.810, paragraph 22), Finland (A/C.3/SR.811, paragraph 2), Colombia (A/C.3/SR.811, paragraph 14)]. It was also pointed out that capital punishment had no deterrent effect on crimes, as a comparison of criminal statistics of various countries would show [Cf. Finland (A/C.3/SR.811, paragraph 2), Panama (A/C.3/SR.813, paragraph 28)].

8. On the other hand, a majority of representatives, while appreciating the humanitarian motives inspiring the amendment, felt that its adoption would create difficulties for countries where capital punishment existed [Cf. France (A/C.3/SR.810, paragraph 11, A/C.3/SR.811, paragraph 26), Pakistan (A/C.3/SR.810, paragraph 26, A/C.3/SR.818, paragraph 13), USSR (A/C.3/SR.810, paragraph 31, South Africa (A/C.3/SR.811, paragraph 20), United Kingdom (A/C.3/SR.811, paragraph 40), Guatemala (A/C.3/SR.812, paragraph 5), Venezuela (A/C.3/SR.812, paragraphs 18 and 21), Portugal (A/C.3/SR.812, paragraph 22), Indonesia (A/C.3/SR.812, paragraph 30), Greece (A/C.3/SR.812, paragraph 34), Morocco (A/C.3/SR.813, paragraph 21), Bulgaria (A/C.3/SR.813, paragraph 39), Japan (A/C.3/SR.814, paragraph 18), Israel (A/C.3/SR.814, paragraph 22), Romania (A/C.3/SR.814, paragraph 26), Canada (A/C.3/SR.814, paragraph 35), New Zealand (A/C.3/SR.814, paragraph 46), Philippines (A/C.3/SR.815, paragraphs 13-14), Chile (A/C.3/SR.815, paragraph 24, A/C.3/SR.819, paragraph 39), Norway (A/C.3/SR.818, paragraph 1), Yugoslavia (A/C.3/SR.818, paragraph 2), Ukrainian SSR (A/C.3/SR.819, paragraph 4), Denmark (A/C.3/SR.819, paragraph 13), Ghana (A/C.3/SR.819, paragraph 29)]. The abolition of capital punishment was a highly controversial question; it was better to leave the problem to each State concerned to resolve

[Cf. El Salvador (A/C.3/SR.811, paragraph 7), Brazil (A/C.3/SR.811, paragraph 35), Mexico (A/C.3/SR.812, paragraph 9), Australia (A/C.3/SR.812, paragraph 21), Belgium (A/C.3/SR.812, paragraph 6), Poland (A/C.3/SR.814, paragraph 52), Canada (A/C.3/SR.814, paragraph 37), Indonesia (A/C.3/SR.819, paragraph 49)].

9. However, in order to avoid the impression that the Covenant sanctioned capital punishment, it was agreed to add a clause to the effect that nothing in the article should be invoked to delay or prevent the abolition of capital punishment by any State party to the Covenant [Cf. France (A/C.3/SR.811, paragraph 27), Ireland (A/C.3/SR.813, paragraph 41), Italy (A/C.3/SR.814, paragraph 11), Ecuador (A/C.3/SR.815, paragraph 28)]. Some representatives preferred a more positive text such as that originally proposed by Panama (A/C.3/L.653), by which States parties would "recognize the propriety of promoting the abolition of the death penalty" [Cf. Uruguay (A/C.3/SR.811, paragraph 31), Panama (A/C.3/SR.813, paragraph 29), Italy (A/C.3/SR.814, paragraph 14), Venezuela (A/C.3/SR.816, paragraph 7), El Salvador (A/C.3/SR.817, paragraph 29), Colombia (A/C.3/SR.820, paragraph 28)]. It was suggested that the concrete measures designed to promote the abolition of the death penalty should be taken [Cf. Colombia (A/C.3/SR.813, paragraph 12), Panama (A/C.3/SR.819, paragraph 24)]. For example, seminars might be organized or studies made on the subject by the United Nations [Cf. Sweden (A/C.3/SR.813, paragraph 24), Finland (A/C.3/SR.819, paragraph 11), Ghana (A/C.3/SR.819; paragraph 29)].

10. In the Third Committee of the General Assembly (Cf. A/3764, paragraph 87), Colombia and Uruguay proposed an amendment (A/C.3/L.644) consisting in replacing the text of article 6 by the following:

"Every human being has the inherent right to life. The death penalty shall not be imposed on any person."

The second sentence of the amendment was rejected by 51 votes to 9, with 12 abstentions (A/C.3/SR.820, paragraph 7). The first sentence was adopted by 65 votes to 3, with 4 abstentions (A/C.3/SR.820, paragraph 8).

11. The amendment (A/C.3/L.653) proposed by Panama

"The right to life is inherent in the human person. The States parties to the Covenant recognize the propriety of promoting the abolition of the death penalty."

was withdrawn in the Working Party on article 6 established by the Third Committee to try to bring together in harmonized form the amendments and suggestions which had been put forward in the Committee (A/3764, paragraph 96).

12. With respect to the clause to the effect that the death sentence might not be imposed except in accordance with the law "in force at the time of the commission of the offence", it was pointed out in the Third Committee of the General Assembly (Cf. A/3764, paragraph 116) that such a clause was intended to ensure that no law imposing the death penalty could be made retroactive [(Cf. El Salvador (A/C.3/SR.811, paragraph 7), Pakistan (A/C.3/SR.818, paragraph 15), Indonesia (A/C.3/SR.819, paragraph 50)].

3. Article 6, paragraph 4

Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

13. In the Commission on Human Rights (A/2929, chap.VI, paragraph 9) the inclusion of the provision of paragraph 4 was supported for humanitarian reasons [Cf. USSR (E/CN.4/SR.98, p.5)]. It was thought essential to mitigate the death penalty in countries where it was still imposed by giving persons sentenced to death the right "to seek pardon or commutation of the sentence" [Cf. Lebanon (E/CN.4/SR.153, paragraph 18)]. In an earlier draft it was stipulated that "anyone sentenced to death shall have the right to seek amnesty, or pardon, or commutation of the sentence". The reference to the right to seek "amnesty" was deleted, since it was felt that, amnesty being a measure decided proprio motu by the executive and being in nature of a collective pardon, it was inappropriate to envisage that an individual should seek it [Cf. France (E/CN.4/SR.309, p.8), Chile (E/CN.4/SR.309, p.7), Greece (E/CN.4/SR.310, p.7)]. It was generally agreed, however, that it was appropriate to retain the reference to amnesty in the second sentence of paragraph 4, dealing with the granting of amnesty, pardon or commutation of death in all cases. The French amendment to delete the word "amnesty" in the first sentence of paragraph 5 was adopted by 11 votes to 4, with 3 abstentions; the paragraph as a whole was adopted by 13 votes to 1, with 4 abstentions (E/CN.4/SR.311, p.6).

14. In the Third Committee [Cf. A/3764, paragraph 120 (k)] the words "in all cases" in the second sentence of paragraph 4 were voted on separately at the request of Belgium and adopted by 57 votes to 1, with 13 abstentions; paragraph 4 as a whole was adopted by 69 votes to none, with 2 abstentions (A/C.3/SR.820, paragraph 17).

4. Article 6, paragraph 5

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

15. Another question dealt with in the Third Committee (A/3764, paragraph 119) was whether protection against the death penalty should be extended to minors, as proposed in the Japanese amendment (A/C.3/L.650). Those favouring the amendment explained that minors were accorded preferential treatment under the criminal legislation of most countries [Cf. Guatemala (A/C.3/SR.812, paragraph 6), Peru (A/C.3/SR.812, paragraph 15), Panama (A/C.3/SR.813, paragraph 32), Japan (A/C.3/SR.814, paragraph 19), Greece (A/C.3/SR.819, paragraph 37)]. Under firm moral and intellectual guidance, the delinquent minor could become a useful member of society (Guatemala (A/C.3/SR.812, paragraph 6)]. On the other hand, those opposing the amendment pointed out that it was for the legislation of each State to specify the classes of persons not liable to the death penalty. [...].

16. Objection was made to the Japanese amendment to the effect that the word "minors" should be replaced by "children and young persons" on the ground that

it would create difficulties for countries where the offender's age at the time of conviction rather than his age at the time of the commission of the offence was taken into account in passing sentence upon him [Cf. Canada (A/C.3/SR.814, paragraph 42), New Zealand (A/C.3/SR.821, paragraph 7)]. It was suggested that the clause should read "Sentence to death shall not be imposed on children and young persons ..." (A/C.3/L.656) [Cf. Ireland (A/C.3/SR.813, paragraph 44), New Zealand (A/C.3/SR.814, paragraph 49), United Kingdom (A/C.3/SR.815, paragraph 45, A/C.3/SR.816, paragraph 3 and A/C.3/SR.817, paragraph 18), Japan (A/C.3/SR.819, paragraph 1)]. In reply, it was pointed out that this formulation would not prevent the imposition of the death penalty on a person who had committed an offence while still a minor, but whose arrest or conviction did not take place until after he had come of age [Cf. Poland (A/C.3/SR.814, paragraph 8), Japan (A/C.3/SR.815, paragraph 53 and A/C.3/SR.816, paragraph 17), United Kingdom (A/C.3/SR.816, paragraph 3), Guatemala (A/C.3/SR.818, paragraph 24)]. Some dissatisfaction was expressed in the Committee over the use of the term "children and young persons" [Cf. Ireland (A/C.3/SR.817, paragraph 36), Pakistan (A/C.3/SR.818, paragraph 16), Ghana (A/C.3/SR.819, paragraph 29), United Kingdom (A/C.3/SR.821, paragraph 1)]. The term "minors" [Cf. Philippines (A/C.3/SR.815, paragraph 21), United Kingdom (A/C.3/SR.815, paragraph 43 and A/C.3/SR.820, paragraph 3), Yugoslavia (A/C.3/SR.818, paragraph 5), Panama (A/C.3/SR.819, paragraph 23), Chile (A/C.3/SR.819, paragraph 41), Indonesia (A/C.3/SR.819, paragraph 52), Spain (A/C.3/SR.820, paragraph 3)], "persons below eighteen years of age" [Cf. Belgium (A/C.3/SR.813, paragraph 9), El Salvador (A/C.3/SR.817, paragraph 28), Australia (A/C.3/SR.817, paragraph 33), Byelorussian SSR (A/C.3/SR.818, paragraph 9), Japan (A/C.3/SR.819, paragraph 2), Finland (A/C.3/SR.819, paragraph 10), Chile (A/C.3/SR.819, paragraph 41)] and "juveniles" [Cf. South Africa (A/C.3/SR.817, paragraph 40), Philippines (A/C.3/SR.818, paragraph 23)] were suggested as alternatives. The Committee decided to adopt the words "persons below eighteen years of age" [Cf. A/3764, paragraph 120 (m)]. The last substitution was adopted by 21 votes to 19, with 28 abstentions (A/C.3/SR.820, paragraph 21).

17. It seemed in the Commission on Human Rights (A/2929, chap.VI, paragraph 10) that the intention of paragraph 5 which was inspired by humanitarian considerations and by consideration for the interests of the unborn child, was that death sentence, if it concerned a pregnant woman, should not be carried out at all. It was pointed out, however, that the provision in its present formulation, might be interpreted as applying solely to the period preceding childbirth [Cf. Belgium (A/CN.4/SR.311, p.7)].

18. In the Third Committee (A/3764, paragraph 118), a number of representatives were of the opinion that the clause sought to prevent the carrying out of the sentence of death before the child was born [China (A/C.3/SR.809, paragraph 27), Belgium (A/C.3/SR.810, paragraph 2), Iran (A/C.3/SR.810, paragraph 7), Indonesia (A/C.3/SR.812, paragraph 32), Canada (A/C.3/SR.814, paragraph 42)]. However, others thought that the death sentence should not be carried out at all if it concerned a pregnant woman [Peru (A/C.3/SR.810, paragraph 14), South Africa (A/C.3/SR.811, paragraph 24)]. The normal development of the unborn child might be affected if the mother were to live in constant fear that, after the birth of her child, the death sentence would be carried out.

5. Article 6, paragraph 6

Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant.

19. In the Third Committee (A/3764, paragraph 111) it was stated that because the abolition of capital punishment was a highly controversial question, it was better to leave the problem to each State concerned to resolve. However, in order to avoid the impression that the Covenant sanctioned capital punishment, it was agreed to add a clause to the effect that nothing in the article should be invoked to delay or prevent the abolition of capital punishment by any State party to the Covenant. The text of paragraph 6 was adopted by 54 votes to 4, with 1 abstention (A/C.3/SR.820, paragraph 26).

Note

a/ Excerpts from BOSSUYT, Marc J., Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights, Dordrecht, Nijhoff, 1987, pp.113-146.

Appendix II

INFORMATION ON THE DEATH PENALTY PROVIDED TO THE HUMAN RIGHTS COMMITTEE

1. In replying to questions by members of the Human Rights Committee many Governments of States parties to the International Covenant on Civil and Political Rights provided information on the situation with respect to the death penalty in their country. The replies are reproduced in the English alphabetical order of the States concerned.
 2. The representative of Afghanistan stated that in no case had the death penalty been imposed contrary to the provisions of national law or of the Covenant or other human rights instruments, and that many persons condemned to death had been pardoned (A/40/40, para. 615).
 3. The representative of Australia informed the Committee that the last instance of the implementation of the death penalty in Australia had been in 1967, just six years before its abolishment in all areas of Commonwealth jurisdiction, including the Northern Territory; that although there was still a theoretical possibility of its being imposed in some States for some crimes, which was a survival of the colonial régime, the possibility was purely theoretical and that legislation was now to be prepared to provide for the severing of most of Australia's remaining links with its colonial past (A/38/40, para. 164).
 4. The representative of Barbados referred to the Sentence of Death (Expectant Mothers) Act which provided that, where a woman convicted of an offence punishable by death was found to be pregnant, the sentence passed on her should be life imprisonment instead of death (A/36/40, para. 173).
 5. The representative of Bulgaria pointed out that the death penalty applied only to the most serious crimes and that these did not include any economic crime (A/34/40, para. 137).
 6. The representative of the Byelorussian SSR stressed the fact that capital punishment in the Byelorussian SSR was an exceptional and provisional measure pending its abolition in the future. It was applied for treason, espionage, terrorism, terrorist acts against representatives of foreign States, banditry, premeditated murder in aggravating circumstances, group rape or rape by a dangerous recidivist. Every article of the Criminal Code of the Byelorussian SSR envisaging the death penalty provided for an alternative in the form of a prison term. No crime punished by the death penalty had been committed in the Byelorussian SSR during the last 10 to 15 years. As an example of "State crimes" involving capital punishment, he cited the crimes of two State criminals who had participated in the mass annihilation of Soviet citizens during the Second World War (A/33/40, para. 542).
- The representative of the Byelorussian SSR stated that during the past six years the death sentence had been pronounced only for premeditated murder with aggravating circumstances and for very serious crimes, but that it was not mandatory (A/40/40, para. 335).
7. The representative of Canada stated that domestic provisions authorizing the death sentence had been abrogated, and therefore abolished, in 1976 by amendments to the Criminal Code. While that penalty was retained under the

National Defence Act, it had not been imposed either during or since the Second World War. The Canadian forces were now studying a comprehensive revision of the National Defence Act and the concerns expressed by the Committee, particularly regarding the need for proportionality between the offence and punishment (A/40/40, para. 227).

8. The representative of Chile stated that under article 21 of the Penal Code, crimes punishable by the death sentence were those of exceptional seriousness, such as aggravated homicide, treason in wartime and terrorist acts which resulted in death. The death penalty was difficult to apply because in no case was it envisaged as the sole penalty. The court had the power to apply one of a range of penalties, depending on the seriousness of the offence and any aggravating or mitigating circumstances. Furthermore, article 77 of the Chilean Penal Code stated that under certain conditions the alternative of life imprisonment should be imposed. In addition, the death penalty could not be passed in the second instance except by a unanimous vote of the Court. The file relating to the case had to go to the President of the Republic for decision, with the Court's opinion as to whether or not there were grounds for commuting the sentence or for pardon. In the past 10 years, the death penalty had been imposed in only one instance, where two security officers who had committed abuses had been sentenced to death and executed (A/39/40, para. 458).

9. The representative of Czechoslovakia referring to the death penalty, informed the Committee that it was not mandatory and that it was applicable only in cases of murder, sedition, terrorism, sabotage, espionage, high treason, acts endangering the safety of transport aircraft and the hijacking of aircraft (A/33/40, para. 139).

The representative of Czechoslovakia said that, although the death penalty was still applicable to a number of offences it was resorted to very infrequently, usually only for murder. Only 15 death sentences had been imposed during the last five years and only 10 of them - all involving murder - had actually been carried out. In fact the death penalty in Czechoslovakia had become a very exceptional measure limited to multiple deaths and particularly odious crimes of violence, but, under the present circumstances, it could not yet be fully abolished (A/41/40, para. 331).

10. The representative of the Democratic People's Republic of Korea stated that the death penalty was reserved for special offences such as espionage and premeditated murder. There were no political criminals in the Democratic People's Republic of Korea except spies (A/39/40, para. 392).

11. The representative of Egypt stated that capital punishment was imposed only on persons jeopardizing the independence or integrity of the State, who voluntarily joined an army hostile to Egypt or who had been found guilty of wilful homicide or homicide accompanied by theft (A/39/40, para. 307).

12. The representative of the German Democratic Republic stated that the death penalty had not been abolished in the German Democratic Republic because the Government regarded it as an effective weapon against racialism, fascism and war criminals (A/33/40, para. 171).

The representative of the German Democratic Republic explained that the ~~death penalty was applicable only to a very few serious crimes, including~~

crimes against peace and humanity, genocide and war crimes, high treason, espionage and very serious cases of murder. He stressed that even in the case of military crimes the death penalty was only applicable when the German Democratic Republic was the victim of aggression and was in a state of national defence. In practice, since the first periodic report, there had been no cases of death sentences either imposed or executed (A/39/40, para. 492).

13. The representative of Hungary informed the Committee that the Criminal Code prescribed the death penalty as an exceptional measure for only a few offences of particular gravity; offences against the State, including armed conspiracy, sedition, sabotage, treason and espionage - none of which had been committed in Hungary in the previous decade; offences against humanity, including genocide and war crimes; offences against the person, including homicide when committed with premeditation, out of greed with particular cruelty or by a confirmed offender; offences against public order, including acts of terrorism or the hijacking of an aircraft when they caused death; and military offences. In the past 10 years, the death penalty had been enforced in 25 cases (A/41/40, para. 388).

14. The representative of India observed that the death penalty could be imposed only for six types of serious offences. He added that for each sentence special reasons had to be recorded and recourse to the Government or President for remission was possible. As an illustration, out of 17,627 prosecutions for murder in 1977, only nine had resulted in executions. In 1980, there had been only two executions (A/39/40, para. 278).

15. The representative of the Islamic Republic of Iran stated that capital punishment was limited by law to specific crimes of exceptional seriousness and could be carried out only pursuant to a final judgement rendered by the competent tribunal. Over the past two years, he maintained, the number of death sentences handed down and executed had been decreasing continuously (A/33/40, para. 323). The representative of the Islamic Republic of Iran informed the Committee that, in the event of a death sentence being imposed, an appeal for clemency might be submitted, which would be examined by a Committee consisting of the President of the Association for the Protection of Prisoners, the Chief Prosecutor of Teheran, the head of the Bureau of Identification and a judge appointed by the Supreme Court of Iran. Notification of the acceptance or rejection of appeals for clemency was made within 15 days (A/37/40, para. 326).

16. The representative of Iraq stressed that the only crimes for which the death penalty was imposed were spying, crimes against the security of the State, crimes relating to drug trafficking, crimes of homicide with aggravating circumstances and crimes against the national economy (A/35/40, para. 145).

17. The representative of Japan informed the Committee that the Legislative Council had concluded that the categories of crimes for which the death penalty could be imposed should be reduced from 17 to 9. The code was expected to be revised along the lines recommended by the Council. He also stated that, as a result of strict regulations, the number of executions had decreased in recent years and that during the period 1975-1980, only 15 persons had been executed (A/37/40, para. 82).

18. The representative of Madagascar pointed out that the death penalty applied only to extremely serious crimes, such as premeditated murder, parricide, poisoning, murder with aggravating circumstances and violent armed robbery (A/33/40, para. 282).

19. The representative of Mali pointed out that the death penalty was implemented only in cases of serious crimes such as human sacrifices and genocide; and that it could be imposed, as indeed had been the case in a number of cases, on an official whose economic crimes exceeded the equivalent of \$100,000, in accordance with legislation enacted in 1977 to deal with corruption. He agreed that the death penalty imposed for attacks on government officials, in accordance with a law enacted to deal with the uprising by the Tuareg tribes in the north of the country during the period 1964-1967, could now be revoked since the problem no longer existed. He also informed the Committee that persons under 18 years of age were given a maximum of 20 years' imprisonment and could not receive the death penalty; that neither pregnant women nor mothers were ever executed in his country (A/36/40, para. 246).

20. The representative of Mauritius stated that the last execution in Mauritius had taken place in 1958. Since then, although death sentences had been passed, they had not been carried out (A/33/40, para. 513).

21. The representative of Mexico stated that the death penalty had last been applied in Mexico in 1929 but conceded that the retention in the Constitution of that penalty for various offences, while abolishing it in the Federal and State Penal Codes could give rise to certain interpretations. He explained the offences punishable by the death penalty under military law, but stated that he would inform his Government of comments made in the Committee to the effect that there was an inconsistency between the Covenant and the Constitution, in so far as the former allowed the death penalty only for the most serious crimes, while the latter made provision for it, inter alia, in the case of offences of doubtful gravity such as highway robbery (A/38/40, para. 86).

22. The representative of Mongolia stated that, under mongolian law, the death penalty was an exceptional measure imposed for a number of particularly heinous crimes; that the imposition of this penalty was not obligatory for courts; that in all cases provision was made for alternative punishment; that over the last 10 years, with the exception of certain cases of premeditated murder with aggravating circumstances and large-scale misappropriation of socialist property, there had been no cases of the imposition of the death penalty; and that the number of times the death penalty was imposed amounted to an average of three a year (A/35/40, para. 107).

23. The representative of Mongolia stated that the death penalty was rarely imposed except for particularly heinous murders and it had been resorted to less frequently in the past seven years than in the preceding 10-year period (A/41/40, para. 238).

24. The representative of Morocco stated that several persons facing the death sentence had recently been pardoned by the King, that there were currently two such persons in prison who had asked to be pardoned, that no

capital punishment could be carried out unless preceded by a petition for reprieve which has been refused, and that there were no women facing the death penalty in Morocco (A/37/40, para. 157).

25. The representative of the Netherlands informed the Committee that in the Netherlands Antilles the death penalty was provided for in cases of offences against State security, breaches of military obligations such as desertion, violence against the sick or wounded, espionage, and treason and voluntary services for the enemy in time of war (A/37/40, para. 121).

26. The representative of Norway pointed out that his Government had recently decided, in principle, to abolish the death penalty and intended to present a bill to that effect to the Parliament in the near future. No death penalty had been imposed in Norway since the trials following the Second World War (A/33/40, para. 248).

The representative of Norway stated that the abolition of the death penalty had deeply split public opinion in his country. In Parliament the division had been determined by political considerations and the abolitionists had only just carried the day (A/36/40, para. 339).

27. The representative of Peru stated that Parliament had not been presented with any draft legislation designed to increase the number of cases which would be subject to the death penalty and that the trial for treason during a foreign war was conducted under the Military Code of Justice (A/38/40, para. 280).

28. The representative of Poland pointed out that the death penalty could be imposed on persons who organized or directed the seizure of goods of high value to the detriment of a unit of the socialized economy and provoked serious disturbances in the functioning of the national economy; and that since the Penal Code had come into force on 1 January 1970, the death penalty had never been imposed on those grounds (A/35/40, para. 64).

29. The representative of Portugal explained that capital punishment had been abolished in Portugal in 1867 (A/36/40, para. 322).

30. The representative of Romania stated that the death penalty, which was an exceptional measure, was currently resorted to for a small number of very serious offences, which he named, as an alternative to imprisonment of 15 to 20 years; that during the past 15 years it had not been applied in a single case involving an offence against State property and that it was not applied in cases of offences committed without intent. He added that the scope of application of the death penalty had been considerably reduced in new Romanian legislation being drafted and that the penalty would be applied exclusively as an exceptional and alternative measure in cases of homicide, treason, espionage and aerial piracy having particularly serious consequences (A/34/40, para. 167).

31. The representative of Rwanda informed the Committee that so far only two death sentences had been passed by the Court of State Security but that they had not been carried out because there was still a possibility of appeal, that since the stabilization of the situation in his country, following the

upheavals of 1974, when the country had undergone a spate of organized attacks, all death sentences had been commuted to life imprisonment (A/37/40, para. 237).

32. The representative of Senegal stated that since the ratification of the Covenant, the death penalty had not been carried out in Senegal and that only two persons had been sentenced to death since 1963. Pregnant women sentenced to death could not be executed before giving birth (A/35/40, para. 224).

33. The representative of Spain said that the death penalty had been abolished in Spain, except as provided in military criminal law applicable in time of war. Since the Penal Code reform in 1983, the death penalty had also been abolished for the crime of genocide (A/40/40, para. 483).

34. The representative of Sri Lanka said that no one had been executed since 1977 (A/39/40, para. 124).

35. The representative of Suriname stated that the death penalty had not been enforced in his country for more than 50 years and he doubted whether it would ever again be applied. The death sentence could, according to the law, be imposed only for murder, first degree manslaughter and piracy (A/35/40, para. 298).

36. The representative of Sweden stressed that the death penalty had been abolished in Sweden long ago, the last execution having taken place in 1911. In various United Nations and other bodies, Sweden had striven to promote the gradual abolition of the death penalty and would continue to do so despite seemingly stiffening resistance (A/41/40, para. 119).

37. The representative of the Syrian Arab Republic said that the death sentence may be imposed only for the most serious crimes, in accordance with the Penal Code. It was carried out rarely, only in cases of offences against society or against the security of the State. Most of the time, death penalties were commuted to imprisonment for life or hard labour (A/32/44, para. 115 (c)).

38. The representative of Trinidad and Tobago stressed that no convicted prisoner on death row had been executed in her country within the past five years (A/40/40, para. 127).

39. The representative of Tunisia stated that capital punishment was imposed only for the gravest crimes such as parricide, and that it was rarely carried out. A request for pardon was automatically sent to the Head of State (A/32/44, para. 121 (e)).

40. The representative of the Ukrainian SSR stressed that the death penalty was an extreme form of punishment applied in the case of premeditated murder in extreme circumstances, rape bringing about death, and in a number of the extreme crimes (A/34/40, para. 273).

41. The representative of the USSR stressed that the death penalty in the Soviet penal legislation was an exceptional measure for such grave crimes as terrorism, banditry, premeditated murder and group rape, which was seldom applied, pending its full abolition in the future. It was not mandatory and

could be replaced by deprivation of liberty (A/33/40, para. 436). The representative of the Soviet Union informed the Committee that the death penalty was always an exceptional form of punishment applied only to persons who had been found guilty of extremely serious crimes defined by law, that the Presidium of the Supreme Soviet had in fact reduced the number of crimes for which it could be imposed by a Decree dated 28 April 1980 and that article 121 of the Constitution gave the Presidium of the Supreme Soviet the right to issue all-Union acts of amnesty and to exercise the right of pardon (A/40/40, para. 273).

42. The representative of Yugoslavia pointed out that the death penalty was applied only in the case of the cruellest offences and those seriously affecting human rights and the independence of the country, and that it was always provided as an alternative punishment (A/33/40, para. 387). The representative of Yugoslavia explained that while the number of offences subject to the death penalty seemed high, these were quite exceptional cases related to exceptional situations endangering the internal or external security of the State (A/39/40, para. 216).

Appendix III

EXCERPTS OF THE ADVISORY OPINION OF 8 SEPTEMBER 1983
OF THE INTER-AMERICAN COURT ON HUMAN RIGHTS

1. The scope of article 4 of the American Convention has been further clarified by the advisory opinion of the Inter-American Court of Human Rights of 8 September 1983 at the request of the Inter-American Commission on Human Rights. The most relevant paragraphs of the advisory opinion of 8 September 1983 the Inter-American Court on Human Rights read as follows:

52. The purpose of Article 4 of the Convention is to protect the right to life. But this article, after proclaiming the objective in general terms in its first paragraph, devotes the next five paragraphs to the application of the death penalty. The text of the article as a whole reveals a clear tendency to restrict the scope of this penalty both as far as its imposition and its application are concerned.

53. The subject is governed by a substantive principle laid down in the first paragraph, which proclaims that 'every person has the right to have his life respected', and by the procedural principle that 'no one shall arbitrarily be deprived of his life'. Moreover, in countries which have not abolished the death penalty, it may not be imposed except 'pursuant to a final judgement rendered by a competent court and in accordance with a law establishing such punishment; enacted prior to the commission of the crime'. [Article 4(2)] The fact that these guarantees are envisaged in addition to those stipulated in Articles 8 and 9 clearly indicates that the Convention sought to define narrowly the conditions under which the application of the death penalty would not violate the Convention in those countries that had not abolished it.

54. The Convention imposes another set of restrictions that apply to the different types of crimes punishable by the death penalty. Thus, while the death penalty may be imposed only for the most serious crimes, [Article 4(2)] its application to political offences or related common crimes is prohibited in absolute terms. [Article 4(4)] The fact that the Convention limits the imposition of the death penalty to the most serious of common crimes not related to political offences indicates that it was designed to be applied in truly exceptional circumstances only. Moreover, viewed in relation to the condemned individual, the Convention prohibits the imposition of the death penalty on those who, at the time the crime was committed, were under 18 or over 70 years of age; it may also not be applied to pregnant women. [Article 4(5)]

55. Thus, three types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offences. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.

56. The tendency to restrict the application of the death penalty, which is reflected in Article 4 of the Convention, is even clearer and more apparent when viewed in yet another light. Thus, under Article 4 (2), in fine, 'the application of such punishment shall not be extended to crimes to which it does not presently apply'. Article 4(3) declares, moreover, that 'the death penalty shall not be re-established in States that have abolished it'. Here it is no longer a question of imposing strict conditions on the exceptional application or execution of the death penalty, but rather of establishing a cut off as far as the penalty is concerned and doing so by means of a progressive and irreversible process applicable to countries which have not decided to abolish the death penalty altogether as well as to those countries which have done so. Although in the one case the Convention does not abolish the death penalty, it does forbid extending its application and imposition to crimes for which it did not previously apply. In this manner any expansion of the list of offences subject to the death penalty has been prevented. In the second case, the re-establishment of the death penalty for any type of offence whatsoever is absolutely prohibited, with the result that a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, ipso jure, a final and irrevocable decision.

57. On this entire subject, the Convention adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance.

58. The preparatory work of the Convention confirms the meaning to be derived from the literal interpretation of Article 4. Thus, although the proposal of various delegations that the death penalty be totally abolished did not carry because it failed to receive the requisite number of votes in its favour, not one vote was cast against the motion. [See generally, Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7-22 Noviembre de 1969, Actas y Documentos, OEA/Ser. K/XVI/1.2, Washington, D.C. 1973 (Hereinafter cited as Actas y documentos), repr. 1978, esp. pp.161, 295-96 and 440-41.] The prevailing attitude, and clearly the majority view in the Conference, is reflected in the following declaration, submitted to the Final Plenary Session by 14 of the 19 delegations present at the Conference (Costa Rica, Uruguay, Colombia, Ecuador, El Salvador, Panama, Honduras, the Dominican Republic, Guatemala, Mexico, Venezuela, Nicaragua, Argentina and Paraguay):

The undersigned delegations, participants in the Specialized Inter-American Conference on Human Rights, in response to the majority sentiment expressed in the course of the debates on the prohibition of the death penalty, in agreement with the most pure humanistic traditions of our peoples, solemnly declare our firm hope of seeing the application of the death penalty eradicated from 'the American' environment as of the present and our unwavering goal of making all possible efforts so that, in a short time, an additional

protocol to the American Convention on Human Rights - Pact of San José, Costa Rica - may consecrate the final abolition of the death penalty and place America once again in the vanguard of the defence of the fundamental rights of man (Actas y Documentos, supra. p.467).

This view is borne out by the observations of the Rapporteur of Committee I who noted that in this article 'the Committee registered its firm belief in the suppression of the death penalty' (Actas y Documentos, supra. p.296).

59. It follows that, in interpreting the last sentence of Article 4 (2) 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' [Vienna Convention, Art. 31 (1) there cannot be the slightest doubt that Article 4 (2) contains an absolute prohibition that no State Party may apply the death penalty to crimes for which it was not provided previously under the domestic law of that State. No provision of the Convention can be relied upon to give a different meaning to the very clear text of Article 4 (2), in fine. The only way to achieve a different result would be by means of timely reservation designed to exclude in some fashion the application of the aforementioned provision in relation to the State making the reservation. Such a reservation, of course, would have to be compatible with the object and purpose of the treaty".

2. Therefore, the Court was of the opinion in reply to the question "May a Government apply the death penalty for crimes for which the domestic legislation did not provide such punishment at the time the American Convention on Human Rights entered into force for said State?" by a unanimous vote that the Convention imposes an absolute prohibition on the extension of the death penalty and that, consequently, the Government of a State party cannot apply the death penalty to crimes for which such a penalty was not previously provided for under its domestic law.