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COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

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OBSERVATIONS TO THE DRAFT ADDITIONAL PROTOCOL
TO THE AMERICAN CONVENTION ON HUMAN RIGHTS
TO ABOLISH THE DEATH PENALTY

Colombia

PERMANENT MISSION OF COLOMBIA
to the
ORGANIZATION OF AMERICAN STATES
1609 22nd Street, N.W.
Washington, D.C. 20008

No. 87

January 30, 1990

Excellency:

I have the honor to address Your Excellency to present the following observations of the Government of Colombia to the Draft Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty:

1. Legal instrument that should be used

The draft presented by the Government of Uruguay makes use of the mechanism of "additional protocol" envisaged in Article 77 of the American Convention on Human Rights "with a view to gradually including other rights and freedoms within its system of protection." According to this text, there is a reasonable doubt regarding the use of an additional protocol since the matter here is not the inclusion of a new human right. Moreover, Article 4 of the Pact of San José of 1969 does not prohibit the death penalty, only its reestablishment in the states that have abolished it. Regarding the states that do have the death penalty, it only limits its imposition to the most serious crimes and prohibits it only in cases of political offenses or related common crimes, or in the case of persons under 18 or over 70 years of age, and pregnant women. This means that if the purpose is the complete abolition of the death penalty, the proper avenue would be a proposal of amendment of the Convention in accordance with Article 39 of the Vienna Convention on the Law of Treaties.

His Excellency
Dr. Didier Opertti
Chairman of the Permanent Council
of the Organization of American States
Washington, D.C.

Therefore, the Government of Colombia would propose eliminating the word "additional" and adding the expression "of amendment," or simply leaving the word "Protocol" with no qualifier. Obviously, those states wishing to ratify the Protocol should first ratify the American Convention on Human Rights, since the Protocol cannot stand alone because it is not a separate convention apart from the Pact of San José.

2. Reasons justifying the abolition of the death penalty

The literature suggests the following reasons for abolishing the death penalty:

- a) It makes it impossible to guarantee the enjoyment of the right to life;
- b) It violates the right of every person not to receive cruel, infamous or unusual punishment established in Article XXVI of the American Declaration of the Rights and Duties of Man of 1948 and in Article 5 of the American Convention on Human Rights;
- c) The death penalty is neither proportionate nor by degree: it is either imposed or not imposed;
- d) Upon its application, there is no possibility of remedying a judicial error;
- e) Capital punishment eliminates any possibility of changing or rehabilitating the convicted;
- f) Imposition of the death penalty does not allow for humanization of punishment and runs counter to the trend of resocialization of delinquents;

3. Reservations to the Protocol

The Government of Colombia believes that reservations to the Protocol should not be accepted. In this sense, it prescribes following the provisions of Article 4 of Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms regarding the abolition of the death penalty, which says: "No reservation may be made under Article 64 of the Convention in respect of the provisions of this Protocol."

It is clear that, were this formula not adopted and reservations allowed, the Protocol would be ineffective inasmuch as the rule of Article 4 of the Convention would be sufficient, having been the subject of reservations and interpretations.

The purpose of the Protocol is to abolish the death penalty, and thus any reservation would seriously restrict its application. Moreover, the right to life cannot be suspended, even in a state of emergency (Article 27 of the American Convention on Human Rights).

4. Abolition of the death penalty in Colombia

Spanish law applicable in Colombia in colonial times provided for the imposition of the death penalty. The rule continued in effect after independence in 1810. In 1833 a law was enacted imposing the death penalty for political offenses and instituting what amounted to summary proceedings for its application. A law enacted on May 2, 1849, did away with capital punishment for political offenses, leaving it in force for common crimes and granting the Supreme Court the power to commute the punishment. With the 1863 Constitution, the death penalty was abolished. Later on, Article 11 of the Constitutional Reform Agreement of 1886 said that capital punishment could only be imposed for serious military offenses and heinous common crimes. The 1886 Constitution allowed the death penalty for certain serious crimes such as treason in time of foreign wars, patricide, murder, arson, gang assault, piracy and certain military offenses defined under military law. Similarly, it provided that political offenses would not carry the death penalty. This rule was in effect until 1910 when Legislative Act No. 3 provided that "in no event may legislators impose the death penalty." This constitutional rule is still in effect. Furthermore, under Article 4 of the American Convention on Human Rights, which it ratified after approving Law 16 of 1972, Colombia may not reinstate the death penalty.

Accept, Excellency, the renewed assurances of my highest consideration.

Leopoldo Villar Borda
Ambassador