

PERMANENT COUNCIL OF THE  
ORGANIZATION OF AMERICAN STATES  
COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

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

(Submitted by the Permanent Mission of Uruguay  
together with pertinent comments)

PERMANENT MISSION OF URUGUAY  
TO THE  
ORGANIZATION OF AMERICAN STATES

No. 378/88 - 27.14.1  
JLB/vd

Washington, June 24, 1988

Mr. Chairman:

I have the honor to address you regarding resolution AG/RES. 889 (XVII-0/87) and transmit the attached draft additional protocol to abolish the death penalty, as well as pertinent observations, pursuant to operative paragraph 1 of that resolution.

Accept, Mr. Chairman, the renewed assurances of my highest consideration.

José Luis Bruno  
Minister, Alternate Representative  
of Uruguay to the OAS

Ambassador Carlos Lemos Simmonds  
Chairman  
Committee on Juridical and Political Affairs  
Washington, D.C.

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The substantive provisions of the proposed draft protocol establish that:

- "1. No state party to this additional protocol shall apply the death penalty in its territory to any person subject to its jurisdiction.
2. This protocol shall remain open to all states parties to the American Convention on Human Rights for their signature and ratification or adherence.
3. For those states that ratify it or adhere to it, the protocol shall enter into force upon deposit of the corresponding instrument of ratification or adherence with the General Secretariat of the Organization of American States (OAS).

## I. Man's Right to Life and Dignity

1. The democratic concept of man leads to the recognition that "all members of the human family" (Universal Declaration of Human Rights, preambular paragraph 1), "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Article 2, Universal Declaration of Human Rights), are entitled to enjoy certain essential rights that are referred to worldwide as "Fundamental Rights." Among them, the right to life is included as the "minimum human right," but clearly also as the "supreme human right," the precept on which all other rights are based.

2. Therefore, the complete abolition of the death penalty in all cases and situations is the undeniably logical extension of the right to life. This "crucial right" to life is seen as the right not only to "live," but also to prosper under conditions that are truly compatible with the "sovereign dignity" inherent to man and born of him. The demands unavoidably imposed by the acceptance of this "sovereign dignity" of human beings extend the concept of the right to life far beyond its strict original sense until it becomes not only a sufficient justification for demanding physical and intellectual well-being but also a permanent concept of justice.

## II. The Death Penalty and the American Convention on Human Rights

1. The American Convention on Human Rights stopped short of prohibiting the death penalty. Article 4, which recognizes and protects the right to life, had to be limited to freezing the existing situation to prevent the relaxation of criteria to be met for application of the death penalty (paragraph 2); to preventing its reestablishment (paragraph 3); to defining situations in which it cannot be applied (paragraphs 2, 4, and 5); and to defining the kinds of recourse against this penalty that must be available (paragraph 6).

The Inter-American Court of Human Rights issued an advisory opinion on the interpretation of these provisions, which has done much to clarify the problems posed by Article 4 (Advisory Opinion OC-3/83 of September 8, 1983, Series A and B, No. 3--comments and partial transcription).

The Court's opinion regarding the application of the death penalty included the following:

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.

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 favor, not one vote was cast against the motion. (See generally, Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7-22 de noviembre de 1969, Actas y Documentos, OEA/Ser.K/XVI/1.2, Washington, D.C. 1973.) The prevailing attitude, and clearly the majority view in the Conference, is reflected in the following declaration, submitted to the Final Plenary Session by fourteen of the nineteen delegations present at the Conference."

2. Nothing justifies the death penalty. Not only is it an unacceptable solution from the philosophical point of view; in terms of defending society, it has not been determined that its application helps in any way to reduce, mitigate or eliminate crime, or to protect society from the more reprehensible criminal acts. Without going into the criticism that the death penalty deserves, or providing a detailed philosophical, political, and criminological argument--since the great debate that has always surrounded this problem is common knowledge--it can be said that the elimination of the death penalty is the conclusion that must logically be reached by any domestic or international juridical system that truly respects the dignity and inalienable rights of the human being.

3. Uruguay has always fought for international prohibition of the death penalty. The necessary extension of a principle that was included in the 1917 constitution, it has been legally recognized since 1907. Uruguay demonstrated its unwavering commitment to this stand during the drafting of the American Convention on Human Rights, the Universal Declaration, and the international pacts. Its efforts, however, were unsuccessful.

During the final phase of adoption of the Pact of San José at the Specialized Conference in 1969, Uruguay attempted to secure prohibition of the death penalty. It was unsuccessful at that time, but together with Costa Rica, Colombia, Ecuador, El Salvador, Panama, Honduras, the Dominican Republic, Guatemala, Mexico, Venezuela, Nicaragua, Argentina, and Paraguay, it submitted a document that states:

The undersigned Delegations to the Specialized Conference on Human Rights, reflecting the sentiments expressed by a broad majority during the debates on prohibition of the death penalty, and in keeping with the highest humanistic values of our peoples, formally declare our determination to see that application of the death penalty is eliminated henceforth in the Americas, and our irrevocable commitment to spare no effort to secure the adoption in the near future of an Additional Protocol to the American Convention on Human Rights--the Pact

of San José, Costa Rica--to permanently abolish the death penalty and once more place the Americas at the forefront of the defense of the essential rights of man. (Proceedings of the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, p. 467).

### III. Abolition of the Death Penalty in Uruguay

In the first years of its independence, Uruguay was already concerned with the death penalty problem.

In 1831, only a year after the signing of our first constitution, Father Dámaso Antonio Larrañaga submitted to the nation's first senate his initiative calling for abolition of the death penalty and its replacement with other punishments: limited or life sentences of hard labor. The Larrañaga proposal was inspired by a generous humanitarian desire for justice, and public opinion had strongly supported it. Upon submitting his proposal, Father Larrañaga made a speech expounding his liberal, philanthropic, and humanitarian ideals. In his book Historia de los Partidos y de las ideas políticas en el Uruguay (history of Uruguayan political parties and thought), published in Montevideo in 1956, the Uruguayan historian Prof. Juan E. Pivel Devoto transcribes part of that speech:

"Mr. Tracy, one of the most profound thinkers of our day, has just made the important philanthropic motion for absolute abolition of capital punishment in the Chamber of Deputies of France, that modern-day Areopagus--highly esteemed as that of the Greeks--whose decisions shake all of the thrones of Europe.

A single revolution of the great French people and the repercussions it sent to this hemisphere brought about our independence and our liberty. Forty years later those effects are still being felt; a new, more glorious revolution is now concerned with restoring to man the final element of his dignity." "It seeks to make the sovereign people as inviolable as kings." "Has a more important question even been submitted to the opinion of men?" "At question is nothing less than his very inviolability, his life, his existence, the most primordial statement of the human species." (Transcription in op. cit., p. 245.)

Larrañaga went on to provide philosophical reasoning for his proposal, and after stating that justice by "the Gods" was preferable to justice by men, he addressed the Uruguayan reality of that time. Judges were unable to find juries willing to convict defendants of homicide, he said, because the death penalty was repugnant to them. Larrañaga maintained that justice could not continue to be exercised in such a definitive manner. "The death penalty is unnecessary," he stressed,

pointing out that "the immortal Lafayette, that illustrious citizen of both worlds, said not long ago that as long as man's judgment was fallible, he would be for the abolition of capital punishment."

In 1833, Brigadier General Juan Antonio Lavalleja also published his opposition to capital punishment: "Every humanist, every distinguished figure, every philosopher has raised the voice of justice against capital punishment. And if opinion has not yet called for its outright abolition, the consensus is that it should be applied only in very rare and specific cases."

In 1907 the president of the republic, Claudio Williman, following the precedent and thought on the matter of his predecessor José Battle y Ordóñez, approved Law No. 3238 of September 23. Its first article states: "The death penalty established by the Penal Code is hereby repealed. The death penalty established by the Military Code is also hereby repealed." Article 8 stipulated: "All provisions of the Penal Code and of the Military Code that are in opposition to this law are hereby repealed."

IV. Proposals of the Inter-American Commission on Human Rights (IACHR) and the Delegation of Uruguay at the XVII Session of the OAS General Assembly

At the seventeenth session of the OAS General Assembly in November 1987, Uruguay proposed to the states parties to the Convention, pursuant to Article 77 of that instrument, the adoption of an Additional Protocol to the Pact of San José prohibiting the death penalty in the states parties to that protocol.

The Inter-American Commission on Human Rights took the same position in its Annual Report.

Article 77 of the Pact of San José reads:

1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.

2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it.

The proposed protocol would apply only to the states parties to it. For the states not parties, the stipulations of paragraphs 2, 3, 4, 5, and 6 of Article 4 of the Pact of San José would remain in force.

Through its resolution AG/RES. 889 (XVII-0/87) adopted at its XVII session, the General Assembly resolved:

1. To request the governments of the States Parties to the American Convention on Human Rights to submit before June 30, 1988, their observations in respect of the adoption of an Additional Protocol to the American Convention on Human Rights to prohibit the death penalty.

2. To instruct the Permanent Council to submit to the General Assembly at its eighteenth regular session a draft additional protocol to the aforementioned Convention that would prohibit the application of the death penalty, and should be based on the initiative of the Government of Uruguay and the draft presented by the Inter-American Commission on Human Rights in its Annual Report, as well as on the observations presented by the States Parties.

V. Draft Additional Protocol to Abolish the Death Penalty

As mandated in resolution AG/RES. 889 (XVII-0/87), the Government of Uruguay has chosen to prepare a very simple draft protocol to prohibit the death penalty in those states that become parties to it. Therefore, those states parties to the Convention that are not parties to the protocol will not be affected, and their obligation will remain limited to the terms of Article 4 of the Pact of San José.