

MASTER

INTERNATIONAL COMMISSION  
OF JURISTS

SWISS COMMITTEE  
AGAINST TORTURE

**Torture:  
How to Make the  
International Convention  
Effective**

A DRAFT OPTIONAL PROTOCOL

*With articles by*

Niall MacDermot  
† Eric Martin

Jean-Jacques Gautier  
François de Vargas

*and comments by*

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*Opinions expressed in the Comments are those of the authors.*

## Introduction

On March 6, 1980 the government of the Republic of Costa Rica formally submitted to the UN Commission on Human Rights the Draft Optional Protocol to the Convention Against Torture which is published in this pamphlet.

This draft *Optional Protocol* was proposed by the International Commission of Jurists and the Swiss Committee against Torture. Its object is to make more effective the implementation of the draft *Convention Against Torture*, which has been under examination since 1978 by the UN Commission on Human Rights, by creating a system of visits to places of detention of all kinds.

This pamphlet contains the text of the protocol, sets out the reasons why a legal instrument of this nature is necessary and retraces the steps by which the idea has progressed from its original conception to its official presentation by the government of Costa Rica.

Some distinguished personalities have contributed short comments on the problem of torture and, in particular, on the draft optional protocol. The appendices contain the two texts which have served as the basis for preparing the draft Convention against Torture, namely the Swedish government draft and that of the International Association of Penal Law.

In presenting the draft optional protocol the Costa Rican government has asked that it should not be examined by the Commission on Human Rights until the consideration of the draft convention has been completed. In this way, any delay in reaching agreement on the convention will be avoided.

The governments of Barbados and Panama support the action taken by Costa Rica. Numerous governments from different continents have commented favourably upon the proposal, and the principal non-governmental organisations active in this sphere have given it their support (see page 49).

We wish to express our profound gratitude to the governments of Costa Rica, Barbados and Panama, as well as all the other governments and non-governmental organisations which support this initiative.

Geneva, May 1980

*International Commission of Jurists  
Swiss Committee against Torture*

N.B.: *This pamphlet is a revised and enlarged edition of a pamphlet published under the same title in February 1979. It appears simultaneously in English, French and Spanish.*

**Draft Optional Protocol  
to the Draft International Convention  
Against Torture and Other Cruel, Inhuman  
or Degrading Treatment or Punishment**

*The States Parties to the present Protocol,*

*Considering that* in order further to achieve the purpose of the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and the implementation of its provisions, it would be appropriate to establish an independent International Committee authorized to arrange visits to places of detention of all kinds under the jurisdiction of the States Parties to the present Protocol and to report thereon with recommendations to the governments concerned.

*Have agreed as follows:*

*Article 1*

1. A State Party to the Convention that becomes a party to the present Protocol agrees to permit visits in accordance with the terms of the present Protocol to any place (hereinafter referred to as a place of detention) subject to the jurisdiction of a State Party where persons are held who have been deprived of their liberty for any reason, including persons under investigation by the law enforcement authorities, civil or military, persons in preventive, administrative or re-educative detention, persons who are being prosecuted or punished for any offence and persons in custody for medical reasons.

2. A place of detention within the meaning of this Article shall not include any place which representatives or delegates of a Protecting Power or of the International Committee of the Red Cross are entitled to visit and do visit pursuant to the Geneva Conventions of 1949 and their additional protocols of 1977.

#### *Article 2*

Exceptional circumstances, such as a state of war, state of siege, state of emergency or the passing of emergency legislation shall not suspend the application of the present Protocol.

#### *Article 3*

1. The States Parties to the present Protocol shall meet in Assembly once a year. They shall be convened by the Government of... or such other Government as may accept their request to do so.

2. The Assembly shall elect the members of an International Committee responsible for the application of the present Protocol (hereinafter referred to as the Committee). The Assembly shall adopt the budget for implementing the present Protocol, shall consider the general reports of the Committee and any other matters relating to the present Protocol and its application, and shall give general directions to the Committee.

#### *Article 4*

1. The Committee shall be composed of 10 members until such time as there are not less than 25 States Parties to the present Protocol. Thereafter the Committee shall be composed of 18 members.

2. The members of the Committee shall be persons of high moral character and recognized competence in the field of human rights and in the matters dealt with in the Convention and the present Protocol.

3. The members of the Committee shall be elected and shall serve in their personal capacity.



### *Article 5*

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in Article 4 and nominated for the purpose by the States Parties to the present Protocol.
2. Each State Party may nominate not more than four persons or, where there are not less than 25 States Parties, not more than two persons. These persons shall be nationals of the nominating State.
3. A person shall be eligible for renomination.

### *Article 6*

1. The members of the Committee shall be elected for a term of 4 years. However, at the first election half of the members shall be elected for 2 years. Thereafter, elections shall be held every two years for half of the members of the Committee.
2. Initially the Committee shall not include more than 2 members from the same State. When there are more than 10 States Parties to the present Protocol, the Committee shall not include more than one member from the same State, save that members elected while there were 10 States Parties or less shall continue to serve for the unexpired portion of their term.
3. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the different legal systems.

### *Article 7*

1. The Committee shall meet for regular sessions twice a year, and for special sessions at the initiative of its Chairman or at the request of not less than one third of its members.
2. The Committee shall adopt its own rules of procedure. Its decisions shall be taken by a majority of its members present and voting.
3. Half of the members shall constitute a quorum.

### *Article 8*

1. The Committee shall be responsible for arranging visits to places of detention subject to the jurisdiction of the States Parties to the present Protocol.
2. The Committee shall establish a programme of regular visits to each of the said State Parties and shall arrange such further visits as may appear necessary from time to time.

### *Article 9*

1. The Committee may nominate as its delegates to carry out such visits one or more persons being members of the Committee or members of a panel of qualified persons chosen by the Committee from among the nationals of the States Parties to the present Protocol.
2. Members of the said panel shall be nominated for periods of 3 years. Their names shall be communicated to the States Parties to the present Protocol.
3. A State Party may exceptionally and for reasons given confidentially to the Committee declare that a particular delegate will not be acceptable as a visitor to its territory.

### *Article 10*

1. Subject to the provisions of Article 9, paragraph 3, when the Government of a State Party to the present Protocol has been informed of a mission assigned to one or more delegate(s), the latter shall be authorized to visit in all circumstances and without previous notice any place of detention within the jurisdiction of the State Party.
2. The delegates shall receive from the State Party concerned all facilities for the accomplishment of their task. They may, in particular, obtain all information about the places where there are persons deprived of their liberty and interview them there without witnesses and at leisure.
3. Delegates may enter into contact with the families, friends and lawyers of persons deprived of their liberty.
4. During each visit, the delegates shall verify that persons de-

prived of their liberty are being treated in conformity with the provisions of the Convention.

5. If appropriate, they shall at once submit observations and recommendations to the competent authorities of the State Party concerned.

6. They shall submit a full report on their mission, with their observations and recommendations, to the Committee.

#### *Article 11*

1. The Committee, after considering a report of its delegates, shall inform the State Party concerned in confidence of its findings and, if necessary, make recommendations. It may initiate consultations with the State Party with a view to furthering the protection of persons deprived of their liberty.

2. In the event of a disagreement between the State Party concerned and the Committee as to the Committee's findings or as to the implementation of its recommendations, the Committee may at its discretion publish its findings or recommendations or both in whole or in part.

3. The Committee shall submit to the annual Assembly a general report which shall be made public.

#### *Article 12*

1. The Committee shall appoint a Secretary-General and one or more assistants.

2. Under the authority of the Committee the Secretary-General shall carry out the tasks assigned to him by the Committee and shall be responsible for the day to day administration in the implementation of the present Protocol. He shall appoint the members of the secretariat.

3. He shall collect information from all available sources pertaining to the treatment of persons deprived of their liberty within the jurisdiction of the States Parties. He shall not communicate the source of any such information to the State Party concerned without the consent of the informant.

4. Between sessions of the Committee, if it appears to the Secre-

tary-General that an urgent mission is required to one or more places of detention within the jurisdiction of a State Party, the Secretary-General may, with the agreement of the Chairman of the Committee, organize a mission to the State Party concerned and such mission shall be entitled to the same rights and facilities as a mission authorized by the Committee.

#### *Article 13*

1. Each State Party shall contribute to the expenditure incurred in the implementation of the present Protocol on the basis of the scale used by the United Nations Organization.
2. The draft annual budget, after approval by the Committee, shall be submitted by the Secretary-General to the annual Assembly of the States Parties.

#### *Article 14*

1. The present Protocol is open for signature by any State which has signed the Convention.
2. The present Protocol is subject to ratification or accession by any State which has ratified or acceded to the Convention. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.
3. 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 15*

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

*Article 16*

Any State party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall inform the other States Parties and the Committee. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. Denunciation shall not affect the execution of measures authorized prior to it.

## Torture, a Disgrace in Our Day

by † *Eric Martin*\*

Contrary to what might have been hoped or claimed, it is now evident that torture is not a remnant of a barbaric age destined to disappear with the progress of civilization. Virtually eliminated from European States by the end of the 19th century, it has come back in full force, even within nations that claim to be in the forefront of social and legal progress.

For the last twenty years, violence in all its forms has been spreading over the planet in a frightening manner. Modern techniques, derived from a misuse of science, increase the cruelty and horror of the methods of torture used.

Under medical supervision, the processes used can be continued and intensified, their cruelty and virulence increased, without killing the victims.

In some States torture actually constitutes a method of governing; in others the use of torture is common and widely tolerated.

A doctor knows the physical and psychological pain caused by illnesses or accidents, by cancer which spreads throughout the body, by certain illnesses of the nervous system; he is often able to relieve this suffering and tries to do just that. A torturer creates pain instead of reducing it: he intensifies and maintains it.

The tortures and pseudo-scientific experiments inflicted by the Nazis show that under certain circumstances apparently normal

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\* Former Rector of the University of Geneva, former President of the International Committee of the Red Cross.

individuals can be transformed into executioners. "The boundary is fragile, the psychological threshold invisible, that separates the mild-mannered civil servant from the violent policeman, the common soldier from the brutal torturer, the free citizen from the man who is not free to speak." (L. Pettiti, President of the Paris Bar Association.)

If respect for dignity is the most basic human right and man's most precious possession, what is to be thought of a method which seeks to transform a torture victim into a worn out, beaten up wreck often irreparably damaged in body and mind?

It is not without reason that the International Committee of the Red Cross has described torture as a cancer which attacks the very foundations of our civilization.

To fight this cancer, all possible means should be used, from the humble letter of a member of Amnesty International, to visits by delegates of the ICRC, and to decisions by the United Nations.

The United Nations are currently preparing the text of a convention against torture. The purpose of this brochure is to propose a draft Optional Protocol with the aim of making this convention more effective.

If a legal mechanism could enable even one nation to resist the temptation of torture, it would deserve our support and total commitment.

RAFAEL CALDERA

A Universal Commitment  
to Renounce Torture

*Few violations of the dignity of the person and his physical and moral integrity are so abominable as torture. Torture is a deliberate and perfidious procedure aimed at causing physical or moral suffering with the purpose of obtaining information or a statement to be used for preconceived ends.*

*There are priorities in the struggle for the observance of human rights in all countries and under all regimes. The struggle against torture is one of the fundamental priorities. There must be a universal commitment to see that all governments, even those which recognise no limits to their arbitrariness, renounce the practice of torture. All mankind, and especially the free peoples of the world, should act as permanent watchdogs of any case of torture in any circumstance and under any political regime.*

*This struggle is of exceptional importance and deserves the warm support of a great universal movement. Anything done towards this end will contribute to a more effective protection of human rights throughout the world.*

Rafael Caldera  
Caracas  
Former President of the Republic  
of Venezuela  
President of the Council of the  
Inter-Parliamentary Union



FRIEDRICH T. WAHLEN

What Are the Priority Tasks?

*At a moment when we are approaching the end of a century among the most eventful in history, what are the priority tasks facing us when we turn towards the future? The continuation of an exponential economic growth? New technical progress? A deeper exploration of space? Certainly not! The principal problems, most urgently requiring solution, are still to ensure peace between nations, to guarantee the dignity of man and human rights in every State, the struggle against terrorism, and the elimination of every form of torture. It is particularly encouraging that in this latter field, the fight against torture, the establishment of an international convention is in sight.*

Friedrich Traugott Wahlen  
Berne  
Former President of the  
Swiss Confederation

KEBA Mbaye

No Longer Be Content to Condemn

*The execrable crimes of the Second World War seem to have accustomed the human soul to the worst forms of cruelty. It is as if the barbarity sleeping in every man has been liberated in some individuals. Those among them who hold a scrap of authority giving them the power to subdue or destroy their neighbour do not fail to use it. This is why torture and cruel treatment are widespread and perfected in technique. It is time that all nations which hold such crimes in horror should no longer be content to condemn them, but should agree to find together an international system of implementation capable of diminishing them if not of making them disappear.*

Keba Mbaye  
President of the Supreme Court  
of Senegal, Dakar  
President of the United Nations  
Commission on Human Rights, 1978

## How to Enforce the Torture Convention

*by Niall MacDermot\**

In 1977 the General Assembly asked the UN Commission on Human Rights to prepare a draft Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.

At the 1978 meeting of the Commission the Swedish Government introduced a draft Convention. This draft, together with another prepared by the International Association of Penal Law, was considered by a Working Group of the Commission at its 1978, 1979 and 1980 meetings. The discussions in the Working Group have been constructive and it appears that all countries represented on the Commission are genuinely concerned to reach agreement upon a draft. Unfortunately, owing to pressure of other business, the time allotted to the working group has been very restricted, with the result that the working group has, as yet, been able to consider only 16 articles of the Draft Convention and has not yet reached agreement on four or five of these. It is hoped that the Working Group may be authorised to meet for one week before the 1981 meeting of the Commission and that agreement may then be reached in the Working Group upon the remaining articles in the Convention, or at least upon those dealing with enforcement of the Convention.

The enforcement or, to use the United Nations term, the implementation provisions are the crux of the Convention. As is well

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\* Secretary-General of the International Commission of Jurists.

known, governments have shown themselves generally reluctant to adopt effective measures for the international implementation of human rights covenants and conventions, and such procedures as exist have often been rendered even less effective by delaying tactics and obstruction on the part of the governments concerned. Both the Swedish government and the International Association of Penal Law have, believing it to be the realistic course, proposed reporting, communications or enquiry procedures which largely follow the procedures to be found in existing conventions.

The International Commission of Jurists believes that if there is one subject on which agreement might be reached for a more effective means of implementation, it should be that of torture. Accordingly, it has put forward a proposal for a Draft Optional Protocol to the Convention against Torture. This is based on proposals first made by M. Jean-Jacques Gautier. It is, in brief, that those states which are prepared to agree to the procedure would set up a Committee of Experts who would be authorised to send delegates on a regular basis and on special occasions as required, to any place of detention in territory under the jurisdiction of those states. The Committee would then report confidentially to the government concerned.

The implementation proposals contained in the Swedish Government's Draft Convention, the International Association of Penal Law's Draft Convention, and the draft Optional Protocol of the International Commission of Jurists will now be compared.

### **The Swedish Proposals**

The Swedish government's draft convention proposes three methods of implementation.

First it proposes in Article 16 a system of *reports* to be submitted by the States Parties to the Human Rights Committee established by the International Covenant on Civil and Political Rights. These reports would set out the measures taken to suppress and punish torture. States Parties are to supply them "when so requested" by the Committee, and the Committee is to consider them in accordance with the procedures set out in the Covenant and its Rules of Procedure. This means that the Committee

shall study them, and then transmit them to the States Parties with such general comments as it considers appropriate. It may also transmit them to the Economic and Social Council of the United Nations. The Committee, when examining these reports, would question a representative of the State Party concerned, and may ask for additional information.

The second proposal, in Article 17, would entitle the Human Rights Committee, if it receives information that torture is being *systematically* practiced in a country, to designate one or more of its members to carry out an *inquiry* and report urgently to the Committee. The way in which this inquiry is to be conducted is left open, save that it is proposed that the inquiry "may include a visit to the State concerned, provided that the government... gives its consent". There is no requirement that the government should afford any particular facilities to the members of the inquiry, such as to permit them to visit places of detention or to speak alone to prisoners, or their lawyers or families. Experience shows that to obtain a government's consent to an inquiry of this kind tends to be a protracted procedure.

The third proposal, in Articles 18–20, is that the Human Rights Committee established under the International Covenant on Civil and Political Rights should be able to receive communications alleging that a State Party is not complying with its obligations under the Convention, providing that the State Party concerned has made a formal declaration agreeing to submit itself to the procedure of the relevant type of communication. Communications may be of two types, namely those coming from other States Parties who have agreed to submit themselves to this procedure, or those from individuals claiming to be victims of torture.

These communications are to be dealt with under the procedures of the Human Rights Committee. These involve a prolonged examination. First the Committee has to examine whether the communication is admissible, which may involve further inquiries on such matters as whether all domestic remedies have been exhausted.

Communications from other States Parties are subjected to a complicated procedure with several stages, including attempts to settle the matter by good offices and by an *ad hoc* Conciliation Commission.

Communications from individuals would be dealt with in accordance with the procedures laid down in the Optional protocol to the Covenant on Civil and Political Rights and in the Human Rights Committee's rules of procedure. The State Party concerned is given 6 months within which to comment on the complaint. These comments are then referred back to the complainant for his comments. When the Committee has obtained the information it requires, or at least such as it is able to obtain, it considers the matter in closed meetings and then forwards its "views" to the State Party and to the individual complainant. The Committee has no power to impose any sanction or order compensation to be paid if they find the complaint well-founded. These procedures would be likely to last at least one year and probably up to two years or more.

Finally, the Swedish draft proposes that the Human Rights Committee should include in its annual report to the General Assembly a summary of its activities under these various procedures. It seems improbable that these would describe particular cases.

A question has already been raised by a number of governments as to whether it is legally possible for the Human Rights Committee established under one international treaty, namely the International Covenant on Civil and Political Rights, to be used as the means of implementation of a quite different treaty, namely the proposed Convention against Torture, which will presumably have different States Parties. The Human Rights Committee is not a United Nations organ. It was created by and is an organ of the States Parties of the International Covenant. This is so, even though it is serviced by the staff of the Human Rights Division of the UN Secretariat and its expenses (somewhat illogically) fall upon the general budget of the United Nations. This has already been the subject of a protest by one State which is not a party to the International Covenant, namely Argentina.

The Legal Adviser to the United Nations takes the view that the consent of every State Party to the International Covenant on Civil and Political Rights will be required to enable the Human Rights Committee to be used in this way.

Apart from the legal problems arising from attempting to make this Committee serve two sets of masters, there must be some doubt about the ability of the Human Rights Committee to deal

with sufficient alacrity with allegations of torture under the Convention, since it is already heavily overloaded with other work under the Covenant.

The arguments in favour of using the Human Rights Committee for this purpose, if it can be done, are that it would avoid having to create another special organ, and that it would avoid any possible conflict of jurisdiction between the implementation of the Convention Against Torture and the implementation of Article 7 of the Covenant on Civil and Political Rights, which contains a general prohibition of torture.

There would, of course, be some advantage in using the same organ if it is possible to do so, but if it results in a requirement for additional sessions for the Human Rights Committee, the financial saving might not be very great. If the Convention Against Torture had its own Committee, elected by its own members, concerned solely with torture questions and not with the other provisions of the Covenant, it would, one would hope, be able to deal with communications more speedily.

The question of overlapping jurisdiction does not, it is submitted, present any insuperable problem, and could be resolved in the same way as is now done with communications to the Human Rights Committee under the Covenant on Civil and Political Rights and communications to the UN Commission on Human Rights under its procedures. The question of conflicting jurisprudence hardly arises as neither body is a court pronouncing legal judgments.

### **The IAPL Proposals**

The draft Convention Against Torture of the International Association of Penal Law also proposes a system of States Parties reports to be submitted to the Human Rights Committee under the Covenant, but provides that the Committee should appoint five of its members who are nationals of States Parties to the Convention against Torture to consider these reports. There is no provision for any inquiry or communications procedure.

## The Draft Optional Protocol

The draft Optional Protocol published by the International Commission of Jurists (together with the Swiss Committee Against Torture) proposes that the States Parties to the Protocol shall meet annually in an Assembly

- to elect an international Committee of individual experts,
- to receive and consider the Committee's annual reports, and
- to approve the budget.

The expenses of administering this Protocol would fall on the States Parties to the Protocol and not on the budget of the United Nations. The Protocol would, therefore, be entirely under the control of its States Parties.

The Committee, with the assistance of its staff, would arrange regular visits by delegates to places of detention of all kinds, including interrogation centres, and, in addition, any *ad hoc* visits which appeared urgently necessary. The States Parties to the Protocol would undertake to give these delegates full facilities to carry out their mission, including access without notice to any place of detention and the right to talk alone with detainees or their lawyers or families.

The Committee and their delegates would be able to act upon information from any source in deciding which place to choose for these visits. The function of the delegates would be to verify that persons detained are being treated in conformity with the provisions of the Convention. If the Convention contains a general obligation to prevent other forms of cruel, inhuman or degrading treatment or punishment, the delegates would be concerned with the general conditions of detention and not solely with the question of torture.

The delegates would be entitled to make urgent representations to the government concerned, but would normally report first to the Committee, which would in turn communicate confidentially to the government concerned its findings and its recommendations, if any. Only in the event of an unresolved disagreement with the government concerned would the Committee be able to publish its findings or recommendations.

These proposals, as will be readily apparent, are based upon the experience of the International Committee of the Red Cross (ICRC) over many years in carrying out its programme of visits to prisons in some 80 countries, made under voluntary agreements with the countries concerned and not under any convention. The differences between this proposal and the present ICRC practice would be that the States Parties would accept the obligation

- to permit visits at all times, and not merely on specially agreed occasions;
- to permit visits to all places of detention, including interrogation centres, and not only to prisons, as is usual in the case of ICRC visits; and
- to accept the right of the Committee to make public any findings or recommendations which the government did not feel able to accept.

There can be little doubt that these visits, where they were allowed, would prove an effective means of preventing systematic practices of torture. On the rare occasions when the ICRC has been permitted to visit all places of detention, including interrogation centres and police stations (e.g. Greece in 1971 and Iran in 1977/78), the visits have had a marked effect in reducing torture practices.

*The sponsors of this proposal consider that its great advantage is that it does not involve any public attack or accusation being made against the government concerned. Consequently, the government is not thrown upon the defensive and has no incentive to impose delays, but rather has an incentive to cooperate under a confidential procedure in remedying any abuses which may exist. Also, it enables swift action to be taken without requiring lengthy legal procedures to be followed, both at the national and international level.*

Among those who have considered these proposals, including a number of governments, there has been little or no questioning of the merits of the proposal. Some have feared that consideration of the draft Optional Protocol would unduly delay agreement on the Convention. Others have doubted whether more



than a handful of governments would agree to submit to these procedures, and none in countries where torture practices are believed to exist.

One of the few doubts expressed about the efficacy of the procedure has been whether the Committee would be able effectively to check interrogation centres where torture occurs, as these are places which are usually kept secret. Experience shows, however, that it is not long before the existence and location of such centres becomes known and, as stated, the Committee would be able to act upon information from any source. Everything, of course, depends upon the good faith of the government concerned. No system of implementation will be effective against a government which is determined to vitiate it. If, for example, visits by delegates in such cases were delayed until all the victims and torture equipment had been removed from the interrogation centre, the delegates would be frustrated in ascertaining the facts. But in such a case, the obstruction would be obvious, and if it continued the Committee would be able to expose the obstruction they had met with, leading to the obvious conclusion that the torture complaints were true.

The objection that agreement on the Convention would be delayed is one which could be overcome if agreement could be reached to submit the Convention and the Optional Protocol to the General Assembly in two stages.

The objection that few governments would ratify is one which, perhaps unconsciously, pays tribute to the likely effectiveness of the procedure, and suggests that the procedures in the Swedish and IAPL drafts are less likely to embarrass a country which practices torture. Nevertheless, it is a curious argument to put forward against a proposal that is based on a practice which has been voluntarily adopted by some 80 countries, namely the prison visits of the International Committee of the Red Cross. This lends strong support to the view that the procedure would be less embarrassing to governments, as well as being more effective, and shows that there is no sound basis for the assumption that few State Parties to the Convention would be willing to ratify the Optional Protocol.

However, even if the assumption proved correct that relatively few countries would be willing to ratify the Protocol in the early

stages, this is not a sufficient reason against its adoption. There have been other Conventions, such as the Geneva Conventions on humanitarian law, which at first had relatively few ratifications, but later became almost universally accepted. It is believed that once the procedures of the Optional Protocol had been established and shown to be effective, many more States would adhere to it in time. From the soundings so far made of governments, there is reason to believe that a majority of the initial ratifications might well come from countries of the Third World.

It may be accepted that those countries which as a matter of government policy practice torture would also be unlikely to ratify the Convention. The Protocol could have a useful deterrent effect in cases where a government which had ratified it was succeeded by a more repressive regime which was tempted to torture its suspects. It would be very difficult for such a government to denounce the Protocol, and if it did, this would be a clear indication of its intention to resort to this hideous practice.

## CARDINAL PAULO EVARISTO ARNS

### Of the Greatest Importance for Our Time

*The widespread use of torture in the Southern Cone of America has been taking place in predominantly Christian nations. There, autocratic and aristocratic systems of government do not hesitate to invoke God's name and to seek the Church's approval for their allegedly anti-materialist crusades. These leaders assert that they support Christian principles as well as countless humanitarian instruments such as the Universal Declaration of Human Rights.*

*It is deplorable that the highest canons of divine and human wisdom have not served to inhibit or dissuade men intent on following extra-national aims. At the same time as promoting this important convention against torture, citizens and prominent organizations of the first world should join together to reveal the origins of repression in the third world. Only then would we attack the causes of torture. This is an eminently suitable way of supporting the efforts to eliminate a terrible evil that is a shame for mankind.*

**Paulo Evaristo, Cardinal Arns**  
Archbishop of Sao Paulo, Brazil

In sending this message to the International Commission of Jurists, Cardinal Arns commented: *"The project... is of the greatest importance for our time... I am glad to know that the proposal has already been officially submitted to the United Nations' Commission on Human Rights. We shall follow with great interest all developments related to the project, wishing perseverance to you and your associates in this crucial task."*

**REV. PHILIP POTTER**

**Shed Light on These Acts**

*As Christians, we are called to bear witness to the light which has come into the world through our Lord Jesus Christ. At the same time, we know "the judgement, that the light has come into the world, and men loved darkness more than light, because their deeds were evil. For everyone who does evil hates the light, lest his deeds be exposed" (John 3:19-20). One of the most heinous, most persistent, most deliberate and most cruel of all crimes against the human person, torture is an act which is almost always carried out behind closed doors, in the secrecy of the torture chambers. An international convention against torture, as it is presently being worked on within the context of the United Nations system, must necessarily serve to shed light on these acts, by means of a strong and transparent implementation procedure. The WCC Central Committee, 1977, realised the importance of this when it urged churches to "seek access to places of detention and interrogation centres in order to ensure that persons held there are not mistreated".*

**Philip Potter  
Secretary General of the  
World Council of Churches  
Geneva**

## JOAQUIN RUIZ-GIMENEZ

### A Highly Laudable Initiative

*The initiative to promote the adoption of an Optional Protocol to the Draft International Convention Against Torture is highly laudable and deserves to be brought quickly and fully into effect:*

- because the seriousness and extent of these practices, contrary to the dignity, integrity and life of human beings, compels those who cherish law and justice not to be satisfied with merely condemnatory statements, nor even with symbolic or ineffective agreements,*
- because with increasing force world public opinion demands that governments act consistently with their expressions of “principle” and with their formal acceptance of international legal covenants, and that these should not be violated in practice on alleged grounds of “public order”, “national security” or “raison d’état”, and*
- because international organisations (governmental and non-governmental) should cooperate tirelessly in this action to eradicate violence against human beings, under whatever symbol and whoever is responsible.*

**Professor Joaquin Ruiz-Gimenez  
Director, Department of Philosophy of Law  
and Human Rights  
University of Madrid**

HANS HAUG

The Red Cross Can Serve as a Model

*Torture is forbidden under public international law in peace as in war. What is lacking is an effective system of implementation to prevent and suppress torture. The problem is, how to create such a system. For this, the work of the International Committee of the Red Cross on behalf of prisoners of war, interned civilians and political detainees can serve as a model. Of course, it may be said that a Convention, or an Optional Protocol to a Convention, on these lines would at first be ratified by only a few States. It is, however, also possible — as in case of the Geneva Conventions of the Red Cross — that the example of a few will spread and gradually be followed in all parts of the world. When it is a question of the protection of the human person, it is not scepticism that is called for, but courage and faith.*

Hans Haug  
President of the Swiss Red Cross, Berne

WERNER KAEGI

Not to Build on Sand

*There is an almost excessive activity in the field of human rights leading to a dangerous inflation of declarations, proclamations and conventions. Many lawyers and politicians believe that the world will be changed by such documents with a tendency to universality.*

*The achievement of human rights is, however, a much more demanding task. Not to build on sand, one must — as the draft Optional Protocol proposes — begin with a more limited number of States and then try to enlarge it step by step. It must not be limited to the countries of Europe — this discredited continent which has often betrayed the great concepts it had of law. On the other hand, from the start one must insist upon the fundamental principle: "pacta sunt servanda" (treaties must be respected).*

Werner Kaegi  
Professor of Constitutional Law  
and International Public Law, Zurich

## The Case for an Effective and Realistic Procedure

*by Jean-Jacques Gautier\**

### Protection against torture is impossible without effective international implementation

In the fight against torture, the most acute problem at the present time is not so much the establishment of international norms as that of their application.

In point of fact, these norms are already in existence. Up to March 1980, the *International Covenant on Civil and Political Rights* (1966) had been ratified by 61 States. To this number should be added another dozen of States which, while not having ratified the Covenant itself, have ratified the European or American Conventions on Human Rights — both of which condemn torture in a most unequivocal manner. Hence, it is clear that, for an ever-increasing segment of the international community, the abolition of torture is no longer merely a moral obligation, emanating in particular from the Universal Declaration of Human Rights, but rather a *legal obligation of international law*.

How is it then that the coming into force of the 1966 Covenant on March 23, 1976, has not improved the condition of political prisoners in Uruguay and Guinea-Konakry, or detainees in psychiatric hospitals in the USSR — even though all these countries have ratified this Covenant?

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\* President of the Swiss Committee Against Torture

Different answers, each containing a part of the truth, can be given to this question. Some would say that not enough time has elapsed since the Covenant of 1966 became operative to evaluate its effects; others that the Covenant contains a too generalized prohibition of torture — hence the necessity for a specific convention against torture which lays down extremely precise obligations.

None the less, those who have addressed their minds to this problem have increasingly found that the most serious obstacle is the absence of an effective method of implementation. There is nothing to prove that a fresh undertaking by a State which has already violated treaty obligations will prevent it from repeating such violations. Indeed, there is a danger that, by multiplying the number of conventions without being able to check whether they are respected, harm is done to their credibility and even to the value of international law. Hence, there is legitimate reason to doubt the utility of a new convention if it does not strengthen the existing procedures for implementation.

### **Present implementation procedures**

For violations of human rights there exists a procedure which has been widely used within the framework of the European Convention and which also exists in the American Convention which entered into force on 11 July 1978. Certain elements of this procedure are to be found in the 1966 Covenant and other UN instruments and resolutions, as well as in the Swedish Draft Convention Against Torture.

This procedure involves giving a supranational body the power to carry out a sort of inquiry, either of its own accord or as a result of a complaint from an individual or a State. In general, then, this is a *quasi-judicial* system: a complaint is filed against a State, which therefore stands *accused*; it thus becomes necessary to seek to adduce *evidence in proof* of the complaint, leading to the *condemnation* of the accused State.

In the case of minor violations of human rights, this procedure can be followed without great difficulty and makes it possible to obtain useful results — as in the application of the European Con-



vention. On the other hand, in cases of torture, an odious and infamous crime, this type of implementation has three serious disadvantages:

- 1) The procedure is extremely time-consuming: from the moment when a State is put in the dock, it must be given the rights of defence accorded to all accused. The State must be able to adduce its own arguments in defence, call its own witnesses and cast doubt on those of the accuser. In addition, attempts at reconciliation and reaching a settlement out of court tend to be introduced in the procedure, so as to obviate the necessity for a condemnation that in itself is very serious morally and politically, though its consequences often remain purely theoretical. All this takes time. This inquiry procedure and the giving of the decision take *several years*. But the danger of being tortured is greatest during the hours, days and weeks immediately following arrest.
- 2) Faced with such a serious accusation, the State charged will do everything to avoid condemnation or even an inquiry on its soil — which it considers as a real insult. In its defence, it will have recourse to the support of States with which it has political ties or even merely important economic links. Hence, the case becomes greatly *politicized* — as has often happened at the United Nations — and loses a great part of its objectivity.
- 3) The absence of a procedure for investigating and verifying the allegations weakens considerably the procedure and makes it largely nugatory.

### Visits rather than an inquiry

It should be clear that the procedure in question nevertheless has advantages and is perhaps necessary. Indeed, it is not impossible that, with the passing of time, it will become stronger and more effective.

Even so, one may envisage the creation of another parallel system of verification, which is more speedy, less politicized and

does not involve a State being put on trial. In point of fact, it is not even necessary to invent this idea: in Geneva, a few yards away from the imposing building where the UN Commission on Human Rights meets, the *International Committee of the Red Cross* (ICRC) has carried out for more than a century a humanitarian activity one of whose most remarkable results has been the protection of other detainees, *prisoners of war*, from torture and ill-treatment with which they are threatened quite as much as political prisoners.

How has this been possible? Does the Red Cross have at its disposal any means of coercion or of sanctions against States which maltreat prisoners of war in their power? Obviously not. On the other hand, the ICRC has been granted by the Geneva Conventions the right to visit these prisoners and to inquire about their condition. Its continued use of this right has enabled it to ensure the humane treatment of prisoners of war protected by the Geneva Conventions even in political systems given to the practice of torture — as was the case under the Third Reich. None the less, it will be said, the ICRC also visits political prisoners in certain countries without being able to prevent the perpetration of the most atrocious forms of torture there. The reason for this is, however, quite simple: in this field, the ICRC does not possess any legal authority or jurisdiction based on the signing and ratification of a convention. Indeed, its visits depend on the goodwill of the governments concerned, and these governments usually take appropriate steps so as not to let the ICRC see their interrogation centres. Even so, it must be pointed out that remarkable results have been obtained in those relatively rare cases in which the ICRC has been authorised to visit *all* the detention centres in a particular country.

Hence, it is necessary to create a body capable of ensuring that these visits take place, and to clothe this body with the necessary authority and jurisdiction. This is the aim of the proposals in a draft convention prepared in May 1977 by a group of international experts, and put forward in June 1978 by the International Commission of Jurists in the form of an Optional Protocol to the draft convention currently before the United Nations.

The proposal is relatively simple: an international committee elected by an assembly of the Member States of the Protocol

would be empowered to send to the territory of each of these States on a regular basis delegates authorized to visit, without prior notification, any centre for interrogation, detention or imprisonment. The Committee will then inform the State concerned of the findings made by its delegates and will make an effort, if necessary, to bring about an improvement in the treatment of those in detention. In the event of disagreement as to the committee's findings or as to the implementation of its recommendations, the Committee will be able to publish its findings.

It goes without saying that the visits of the delegates will not extend to all the centres of detention. Rather, investigation will take the form of visits carried out on a sample basis. None the less, the data collated by the secretary of the Committee, the complaints reaching him, and the contacts made with the relatives of the detainees will enable visits to be made to those centres or police stations where the ill-treatment of detainees is suspected. The possibility of discussing matters with the detainees in the absence of witnesses will reassure them that they are not cut off from the world and delivered up, without any protection, into the hands of the forces of repression.

It will be immediately apparent what differentiates such a system of visits from the procedures of implementation laid down in other documents:

- instead of a dramatic enquiry, *routine visits* to which the State will agree to submit its territory;
- instead of a charge made against a State, a system of *mutual assistance and collaboration* to improve the protection of prisoners;
- instead of a State being found guilty of a violation, stress will be laid on *prevention*;
- instead of a time-consuming procedure, full of pitfalls, a possibility of *swift action*;
- instead of clashes between governments, *a nucleus of committed States* in the fight against torture, determined to ensure full openness in the treatment of their prisoners.

## A group of pioneers

It should be obvious that, at the present time, it is impossible to propose a system of regular visits to all States — or even to a majority of them. Hence, the Optional Protocol is likely to find its first supporters among those nations spared from the ravages of torture. It is they who will have to be the pioneers, to set up the system of visits, to test its effects, and give the international community an example and a model. To infer from this that the Protocol would be useless would be to look at the problem superficially. It would also be to condemn existing Optional Protocols — always addressed to the most advanced States — which have, however, become an invaluable element in international law. It would, finally, also constitute a refusal to look at the long-term implications of the problem. The eradication of torture is a long-term task and merits somewhat closer examination.

A classification of the various countries in the world in relation to torture would be as follows:

- 1) About forty percent of all States are spared the ravages of torture at the present time. It would be an illusion, however, to think that they are not threatened. Indeed, the history of the twentieth century has shown that no people and no race has been immunized against this virus. Hence, it is necessary to adopt prophylactic measures to avoid new victims. A system of visits would seem to be the most effective means of preventing the creation of new sites of infection. In theory, it is possible that, following a change of government, a signatory State might withdraw from the Protocol. But experience has shown that, for obvious reasons of prestige, even the most repressive States refrain from having recourse to this step. Hence, the existence of the Protocol would have a deterrent effect the importance of which it would be wrong to underestimate.
- 2) The second category, also consisting of about forty percent of all States, is constituted by those in which resort is had to torture, especially by subordinate authorities. Tolerated or ignored to a greater or less degree by the governments concerned, torture occurs more or less sporadically. It is disapproved of by the majority of the population and often even by members

of the ruling classes themselves. It would be unrealistic to expect that these States, or even some of them, will hasten to sign the Optional Protocol. Indeed, only a prolonged effort, patient and persistent work can bring some of these governments to the point where they become conscious of their responsibilities. This work is already being done, and begins to be on a substantial scale. The existence of the Optional Protocol will provide both a tool and a concrete objective for use by the enemies of torture. It is hardly meaningful to demand of governments who deny the existence of torture within their frontiers that they abolish it in their own countries. On the other hand, they can be asked to sign and ratify a Protocol. Moreover, the encouraging number of ratifications of the Optional Protocol to the International Covenant on Civil and Political Rights indicates that a number of countries in this category might be willing to do so.

- 3) It is in the remaining twenty percent of all States, in the brutal regimes, that torture constitutes a systematic instrument of government, perpetrated with the aid of the most terrifying technological sophistication. It has been frequently pointed out that such regimes are often also the most fragile. The use of torture enables them to remain in power by terror. But this is a two-edged weapon, since it makes increasingly odious the regimes using it, until the day when they are overthrown. None the less, it would be naive to believe that the overthrow of a government which practises torture suffices to abolish torture *per se*. Thus, one year following the fall of the dictatorship in Portugal, new cases of torture occurred there. The discovery of the "tiger cages" certainly contributed to the discrediting and the fall of the Thieu regime in South Vietnam. But reports continue to be received of ill-treatment of detainees under the new regime.

It is quite legitimate for an opposition which has been decimated by a cruelly repressive government to denounce that government's crimes and detail its horrors in order to obtain help and sympathy — especially from abroad. In that case, it is equally legitimate to ask of that opposition a guarantee that it does not itself commit the very errors it condemns. The only way to ob-

tain more than a vague declaration of good intentions is to demand an undertaking that, once established in power, it will adhere to the Optional Protocol. But, for that, it is necessary that the Protocol be already in existence.

The foregoing remarks are certainly too sketchy in character to deal with all the problems posed by the fight against torture. Their only aim is to show that one can reasonably expect from the Optional Protocol lasting and valuable benefits under many different circumstances.

It is almost a matter of common knowledge that a negative correlation exists between the effectiveness of a convention and the number of States disposed to ratify it. Were it necessary to choose between a text having the support of the great majority of States but having also rather limited practical results (a convention, once signed, can only with the greatest difficulty be improved) and a more demanding text which would take more time to become widely accepted, one would be faced with a difficult choice. Fortunately, however, this choice is not necessary. Nothing prevents adding to a widely acceptable convention a stronger Optional Protocol, enabling some States to pioneer the way to a more radical solution.

The difficulty of the task and what is at stake in this struggle fully justify the simultaneous use of the two instruments.

## WILLY SPUEHLER

### Ensure International Inspection

*The systematic use of torture is one of the most traumatic phenomena of our time. In numerous countries it is officially ordered or tolerated. Consequently, it should be combatted by official means and institutions, that is to say, ones established by public international law. A convention between States should ensure international inspection of places of detention. Switzerland, guarantor of the Red Cross ideal, should do all it can to bring about an international agreement of this kind for the fight against torture.*

Willy Spuehler, Zurich  
Former President of the Swiss Confederation

## FRANCIS BLANCHARD

### A New and Simple Idea

*No one can remain indifferent to the growth and increasing horror of the use of torture. Every person of good will should support those who seek ways and means to strive more actively against this scourge. From the start I have followed with keen interest the development of Mr. Jean-Jacques Gautier's idea, which has the virtue of being new and simple. Launched in a spirit of hope and conviction which does him credit, it has, thanks to the successive efforts of a number of international experts, resulted in the draft Optional Protocol now put forward by the International Commission of Jurists. This Protocol seems to me worthy of the greatest interest. I hope that it will attract the support of all who have decided to fight against torture.*

Francis Blanchard  
Director General,  
International Labour Office, Geneva

## DENIS SZABO

### To Extinguish the Temptation of Reasons of State

*I have been very glad to have been associated with the "Gautier Proposal," whose noble inspiration in no way excludes a pragmatism of sterling worth. The practice of torture is a grave sickness of the human condition. No one can remain indifferent to it. Pressures should be brought to bear, and quasi-judicial organs should be conceived and created, to extinguish this permanent temptation which is sought to be justified by the perversion of "reasons of State." The Gautier Proposal constitutes an important step in the right direction.*

Denis Szabo  
Director, International Centre of  
Comparative Criminology, Montreal  
President, International Society  
of Criminology

## PIERRE MENDES FRANCE

### One of the Most Revolting Sores

*There is no need for me to say that I favour without reserve the high-minded proposal of Mr. Jean-Jacques Gautier. If adopted at first by a few governments, the monitoring system it involves would gradually extend to a greater number of countries; it would thus contribute to eradicating one of the most revolting sores of the world of today, with practices to be found, alas, even in countries considered up to this point as set on the road to progress.*

Pierre Mendès France

Paris

Former Prime Minister of France

## MARC SCHREIBER

### To Verify the Implementation of International Instruments

*It would be unworthy of our age to accept the continuation of the relentless and systematic torture practices, physical and mental, which have been revealed by numerous and alarming reports. The unconditional prohibitions against torture accepted by States in solemn international instruments should be accompanied by measures permitting verification of the reality of their implementation. The proposals worked out on the initiative of Mr. Jean-Jacques Gautier have benefitted from the collaboration of persons who, in different ways, have been able to gauge the scope of the problem. Adapting procedures whose beneficial effect has been proved in other spheres, these proposals merit close study by governments anxious to find effective ways of fighting against a scourge which disgraces our civilization.*

† Marc Schreiber, Brussels

Former Director of the United Nations

Division of Human Rights



## History of a Campaign

*by François de Vargas\**

The spread of the distressing phenomenon of torture since the 1960's has awakened throughout the world an increasingly strong reaction and a will on the part of many people to do everything possible to end this scourge. There is no doubt that this growing awareness is due partly to the horror awakened by information circulated daily in the press, but mainly to the decision taken by Amnesty International in 1973 to begin a worldwide campaign against torture. This campaign has born considerable fruit, and continues to increase in intensity.

It was not the first of its kind. There had been other attempts to combat torture in many countries. In Switzerland, for example, in December 1970 a member of the federal parliament, Werner Schmid from Zurich, introduced a motion asking the Government to prepare an international convention for the protection of political prisoners. This motion was accepted without opposition the following year by both chambers of the federal parliament and by the government, which in the autumn of 1971 commissioned the Henry-Dunant Institute of Geneva to make a thorough study of this question. This study took several years.

### 1974: The birth of an idea

It was also in Geneva that during the autumn of 1974 Jean-Jacques Gautier, a lawyer and former banker who had taken an

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\* Secretary of the Swiss Committee Against Torture.

early retirement, decided to devote his time to the struggle against what he considered the cruellest and most serious violation of the rights of the individual, since its goal was not only to cause atrocious suffering but also to destroy the personality and soul of the victim. He undertook a systematic analysis of all the means which could be used to halt the progression of the torture epidemic and, little by little, to reduce its hold.

Having studied all the different means of action already in use (appeals to public opinion; letter campaigns; pressure by States, churches, humanitarian organizations, and trade unions; hunger strikes, etc.) Gautier nonetheless observed that in the domain of international law, and especially of international verification, almost nothing had been accomplished. Whereas victims of war are protected by the Geneva Conventions and by the activity of the International Red Cross, no protection is afforded outside conventional armed conflicts. Yet torture is practiced nowadays above all against civilians. Though international conventions and covenants strongly condemn the practice of torture, they do not provide effective instruments for its prevention.

The idea then struck Jean-Jacques Gautier that the only effective weapon against torture would be a system of inspection through regular visits to all the places of detention. It was clear that, at first, this system could be carried out only in a limited number of States. To aim from the outset at universality would only result in repeating the declarations of intent found in so many international instruments, which, as everyone knows, have had little practical effect.

### **A first Swiss plan**

On making his idea known to the Swiss Ministry of Foreign Affairs, Gautier was invited by a senior official to take part in a study being undertaken by the Henry-Dunant Institute at the request of the Swiss government. This enabled Gautier to draft the conclusions of the study and in this way his proposal was submitted to the Swiss government in March 1976. Some months later it was published in the press and in a short pamphlet with contributions from well-known personalities in Switzerland.

In January 1977 the Swiss Committee Against Torture was formed in Geneva to work towards the realisation of the proposal of Jean-Jacques Gautier.

A first draft of a "Convention for the Treatment of Persons Deprived of their Liberty" was prepared in May 1977 by a group of experts under the chairmanship of Professor Christian Dominicé of Geneva, giving for the first time a legal form to the Gautier proposal. This draft convention did not define torture, nor did it demand changes in the legislation of States. It merely proposed the creation of a Commission which would be empowered to send delegates to visit, at any time, all places of detention (including police stations, interrogation centres, and psychiatric hospitals) of the States Parties. The Commission would have no powers and could impose no sanctions. It would simply make a report after each visit which it would have the right to publish in case the State concerned refused to put an end to any abuses which were denounced in the report. As Professor Dominicé said during the press conference in which the proposal was presented: "We are asking for a little and a lot at the same time. The authorization of visits is a small thing. But at the same time it is immense, since we are asking States to lift the veil from the very thing they are most anxious to hide."

In June 1977 the Swiss government published its report on the Schmid Motion. It rejected the proposal of the Henry-Dunant Institute considering it to be idealistic and fearing that it might compromise the efforts of the Red Cross. This last argument was surprising since the International Committee of the Red Cross had made known in April 1976 that it would support the proposal.

The Swiss Parliament, however, adopted an attitude totally different from the government and requested the latter to pursue its efforts to realise the proposed convention.

## **Two proposals presented to the United Nations**

In February 1978, two draft conventions against torture were presented at the 34th session of the United Nations Commission on Human Rights in Geneva. The first came from the Swedish

Government<sup>1</sup>, the second from the International Association of Penal Law<sup>2</sup>. Both begin by defining torture, and then set out the measures that should be taken by States in the legislative, penal, judicial, political and other spheres in order to prevent and suppress torture. However, the weakness of both projects lies in the lack of any monitoring system.

It is true that in the Swedish draft the Commission of Human Rights would be entitled to institute an inquiry, but only if there was already sufficient evidence of abuse. This inquiry might include a visit to the State concerned (no mention is made of visiting prisons), but only with the consent of the government concerned. In other words, the proposed system of investigation is extremely problematical.

For this reason, the submission of the two drafts to the United Nations in no way lessened the importance of the Geneva draft convention, whose emphasis is on the monitoring system.

So, at the beginning of 1978, there were three draft conventions against torture. Though it was heartening to see that this scourge was the object of so much attention, this multiplicity was nevertheless unfortunate because of the dispersal of efforts which it provoked.

### **The Proposal of the International Commission of Jurists**

It was then that Mr. Niall MacDermot, Secretary-General of the International Commission of Jurists, proposed to Mr. Gautier that his draft for a convention should be transformed into an optional protocol to the convention being considered by the Human Rights Commission. This would retain Gautier's idea that at first it is necessary to apply the system to a few states only, but at the same time would bring an end to the competition among the drafts, and could be integrated into the system of the United Nations, outside which it is practically impossible today to make any progress in international law.

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1) See Appendix 1, p. 50.

2) See Appendix 2, p. 55.

The idea was well-received by Mr. Gautier and by the Swiss Committee Against Torture. Mr. MacDermot was able to present the proposal at a conference at the end of June 1978, organised by some professors of the University of St. Gall, on the three drafts of the convention against torture. Despite some reservation that work on an optional protocol might slow down progress on the convention itself, the participants expressed great interest in Mr. MacDermot's proposal. The idea marked a considerable progress in the area of implementation, and the form of the optional protocol eliminated the competition between the drafts: henceforth there would not be three drafts but only one (the Swedish and the IAPL being easily fused into one) with a draft optional protocol.

### **Support of non-governmental organisations**

Soon after the conference of Saint Gall, the text of the proposed optional protocol was drafted and the International Commission of Jurists submitted it to various personalities and to the foreign ministers of a number of countries. In February 1979, during the 35th session of the Commission of Human Rights at Geneva the first edition of this brochure was published in French and English (now there is also a Spanish version).

The publication of this brochure was positively received by the International Red Cross and by Amnesty International who saw in it a step forward in the protection of prisoners against torture.

One should also mention several seminars which have been organised on the problem of torture, especially by the Marangopoulos Foundation for Human Rights at Athens and by the International Institute of Humanitarian Law at San Remo (Italy). At the end of the two seminars resolutions in favour of the draft optional protocol were adopted. In May 1979 a symposium organised in Baghdad by the Association of Arab Lawyers on "Human Rights in the Arab World" adopted a resolution requesting the Arab states to support the draft optional protocol. Many other organisations have also expressed their support (see list on page 49).

## Four Latin American countries submit the draft to the United Nations

With regard to governments their reactions have surpassed expectations. Although many sceptics had predicted that third world countries would refuse on principle all surveillance which they would consider an interference, it is the third world, and in particular Latin America, which have shown the strongest support. Three Latin American States have declared that they are prepared to submit the optional protocol to the Human Rights Commission at the opportune moment. Several western countries, especially Sweden, sponsor of the draft convention, and Switzerland, whose feelings on the matter have become more positive, have expressed themselves in favour of the Optional Protocol providing it is not submitted for discussion before work on the convention itself has been finished.

Finally, on 6 March 1980, the government of the Republic of Costa Rica submitted to the director of the Human Rights Division of the United Nations the draft Optional Protocol, requesting at the same time that it be examined only after conclusion of the draft convention itself. In this way delay in obtaining agreement on the convention would be avoided.

The governments of Barbados, Nicaragua and Panama support the initiative of Costa Rica.

NIGEL RODLEY

### An Antidote Spreading Progressively

*In my view, the provisions of the Optional Protocol to implement the Convention against Torture, establishing a monitoring system in a small but hopefully growing number of countries, are both realistic and balanced. What is especially attractive about this draft is that, confronted by the cancer of torture, it has been possible to develop an antidote whose effects would spread gradually through the world body politic.*

Nigel Rodley  
Legal Adviser, Amnesty International, London

FELIX MARTI AMBEL

Mobilise All Our Capacities of  
Imagination and Action

*In the image of every human being subjected to torture we contemplate Jesus being led to death by paths of humiliation and cruelty. In the victory of Jesus over evil and death are based our commitments and our hopes for human brotherhood without violence and without resorting to torture.*

*Torture is practiced in our time in the service of structures of domination and as expression of hatred towards men and women who are bearers of new aspirations in the realm of human rights. The struggles for freedom and justice are often repressed by means that destroy physically and morally even the strongest persons.*

*We could not consider ourselves human beings if we were not conscious of the seriousness and urgency of this problem. We could not call ourselves Christians if we did not offer our lives to prevent torture and to share the clamours and the dreams of the tortured.*

*We believe that a world without torture can exist, that the agents of these practices can be humanised and can be forgiven. To achieve such an important transformation we must mobilise all our capacities of imagination and action in the struggle against torture. In this sense, we should support the draft Protocol to reinforce the International Convention Against Torture.*

Felix Marti Ambel  
Madrid  
President of the International Catholic  
Movement for Intellectual and Cultural Affairs  
(Pax Romana)

JEANNE HERSCH

Effectiveness Rather Than Universality

*The originality of this draft Optional Protocol lies in the fact that, while it is open to all, it is not established at first at a universal level, but only between a number of consenting nations who are ready to put it into force at once in such a way that no political pressures, internal or external, could obstruct it.*

*It must be said that in the world as it is today any effective action against violations of human rights are fettered and even neutralized if they depend upon world-wide organisations. One is led to ask whether some initiatives, which could have limited but real results in certain States, are not totally emasculated by the world-wide scope which is sought to be given to them.*

*It is, indeed, within those States where public opinion is not able to exercise an effective check that unannounced visits to places of detention are most needed. Nevertheless, the fact that on the world stage some countries were prepared to submit themselves mutually to a right of inspection, thus exposing themselves of their own free will to international verification, would serve to denounce before world public opinion those who reject it, as having something serious to hide. That would be no mean form of pressure.*

*The idea of the Protocol is of an impressive simplicity: open to all, voluntary accession, mutual inspection, and publication of the results. It contains something which is immediate for the present and contagious for the future. Moreover, it is in the best tradition of the Red Cross.*

Jeanne Hersch  
Geneva

Professor of Philosophy and writer  
former Member of the Executive Council  
of UNESCO



## **Non-Governmental Organisations Supporting the Draft Optional Protocol**

Amnesty International, London

Association of Arab Jurists, Baghdad

Christian Action for the Abolition of Torture, Paris

Commission of the Churches on International Affairs  
(World Council of Churches), Geneva

International Federation of Human Rights, Paris

International Federation of Women in Legal Careers, Paris

International Institute of Humanitarian Law, San Remo

International League for Human Rights, New York

Marangopoulos Foundation for Human Rights, Athens

Pax Christi International, Anvers

Pax Romana, Geneva

Quakers United Nations Office and Quaker Peace and Service,  
New York and London

Union of Arab Lawyers, Damascus

## Appendix 1

# The Swedish Draft of an International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(Preamble to be elaborated)

### *Article 1*

1. For the purpose of the present Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

### *Article 2*

1. Each State Party undertakes to ensure that torture or other cruel, inhuman or degrading treatment or punishment does not take place within its jurisdiction. Under no circumstances shall any State Party permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

### *Article 3*

Each State Party shall, in accordance with the provisions of the present Convention, take legislative, administrative, judicial and other measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction.

### *Article 4*

No State Party may expel or extradite a person to a State where there are reasonable grounds to believe that he may be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.

### *Article 5*

1. Each State Party shall ensure that education and information regarding the prohibition against torture and other cruel, inhuman or degrading treatment or punishment are fully included in the curricula of the training of law enforcement personnel and of other public officials as well as medical personnel who may be responsible for persons deprived of their liberty.

2. Each State Party shall include this prohibition in the general rules or instructions issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of persons deprived of their liberty.

### *Article 6*

Each State Party shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.

### *Article 7*

1. Each State Party shall ensure that all acts of torture as defined in article 1 are offences under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.

2. Each State Party undertakes to make the offences referred to in paragraph 1 of this article punishable by severe penalties.

### *Article 8*

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 7 in the following cases:

- (a) when the offences are committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State;

(c) when the victim is a national of that State.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these offences in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 14 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

#### *Article 9*

Each State Party shall guarantee to any individual who alleges to have been subjected within its jurisdiction to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of its public officials, the right to complain to and to have his case impartially examined by its competent authorities without threat of further torture or other cruel, inhuman or degrading treatment or punishment.

#### *Article 10*

Each State Party shall ensure that, even if there has been no formal complaint, its competent authorities proceed to an impartial, speedy and effective investigation, wherever there is reasonable ground to believe that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed within its jurisdiction.

#### *Article 11*

1. Each State Party shall, except in the cases referred to in article 14, ensure that criminal proceedings are instituted in accordance with its national law against an alleged offender who is present in its territory, if its competent authorities establish that an act of torture as defined in article 1 appears to have been committed and if that State Party has jurisdiction over the offence in accordance with article 8.

2. Each State Party shall ensure that an alleged offender is subject to criminal, disciplinary or other appropriate proceedings, when an allegation of other forms of cruel, inhuman or degrading treatment or punishment within its jurisdiction is considered to be well founded.

#### *Article 12*

Each State Party shall guarantee an enforceable right to compensation to the victim of an act of torture or other cruel, inhuman or degrading treatment or punishment committed by or at the instigation of its public officials. In the event of the death of the victim, his relatives or other successors shall be entitled to enforce this right to compensation.

*Article 13*

Each State Party shall ensure that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment shall not be invoked as evidence against the person concerned or against any other person in any proceedings.

*Article 14*

Instead of instituting criminal proceedings in accordance with paragraph 1 of article 11, a State Party may, if requested, extradite the alleged offender to another State Party which has jurisdiction over the offence in accordance with article 8.

*Article 15*

1. States Parties shall afford one another the greatest measure of assistance in connection with proceedings referred to in article 11, including the supply of all evidence at their disposal necessary for the proceedings.

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

*Article 16*

States Parties undertake to submit to the Secretary-General of the United Nations, when so requested by the Human Rights Committee established in accordance with article 28 of the International Covenant on Civil and Political Rights (hereafter referred to in the present Convention as the Human Rights Committee), reports or other information on measures taken to suppress and punish torture and other cruel, inhuman or degrading treatment or punishment. Such reports or information shall be considered by the Human Rights Committee in accordance with the procedures set out in the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

*Article 17*

If the Human Rights Committee receives information that torture is being systematically practised in a certain State Party, the Committee may designate one or more of its members to carry out an inquiry and to report to the Committee urgently. The inquiry may include a visit to the State concerned, provided that the Government of that State gives its consent.

*Article 18*

1. A State Party may at any time declare under this article that it recognizes the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention.

Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Human Rights Committee. No communication shall be received by the Human Rights Committee if it concerns a State Party which has not made such a declaration.

2. Communications received under this article shall be dealt with in accordance with the procedure provided for in article 41 of the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

#### *Article 19*

If a matter referred to the Human Rights Committee in accordance with article 18 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission. The procedures governing this Commission shall be the same as those provided for in article 42 of the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

#### *Article 20*

1. A State Party may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to have been subjected to torture or other cruel, inhuman or degrading treatment or punishment in contravention of the obligations of that State Party under the present Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Communications received under this article shall be dealt with in accordance with the procedure provided for in the Optional Protocol to the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

#### *Article 21*

The Human Rights Committee shall include in its annual report to the General Assembly a summary of its activities under articles 16, 17, 18, 19 and 20 of the present Convention.

[Final Clauses to be elaborated]

## Appendix 2

# International Association of Penal Law

## Draft Convention for the Prevention and Suppression of Torture

The Parties to this Convention hereby agree as hereinafter provided:

### Article 1

*(Torture as an international crime)*

Torture is a crime under international law.

### Article 2

*(Definition of torture)*

For the purposes of this Convention, torture is any conduct by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation of a public official or for which a public official is responsible under Article 3, in order:

- a) to obtain from that person or another person information or a statement or confession; or
- b) to intimidate, discredit or humiliate that person or another person; or
- c) to inflict punishment on that person or another person, save where such conduct is in a proper execution of a lawful sanction not constituting cruel, inhuman or degrading treatment or punishment.

### Article 3

*(Responsibility)*

A person is responsible for committing or instigating torture when that person:

- a) personally engages in or participates in such conduct; or
- b) assists, incites, solicits, commands or conspires with others to commit torture; or
- c) being a public official, fails to take appropriate measures to prevent or suppress torture when such person has knowledge or reasonable belief that torture has been or is being committed and has the authority or is in a position to take such measures.

#### Article 4

##### *(National measures for the prevention and suppression of torture)*

The Contracting Parties undertake to adopt legislative, judicial, administrative and other measures necessary to give effect to this convention to prevent and suppress torture, and to ensure that:

- a) any act of torture is punishable under its laws as a grave crime;
- b) their public officials do not practice or permit any form of torture;
- c) all complaints of torture or any circumstances which give reasonable grounds to believe that torture has been committed shall be investigated speedily and effectively and that complainants shall not be exposed to any sanction by reason of their complaints, unless they have been shown to have been made falsely and maliciously;
- d) persons believed to be responsible for acts of torture are prosecuted and when found guilty punished and disciplined in accordance with their laws;
- e) any victim of torture is afforded adequate and proper redress and compensation;
- f) no person is expelled or extradited to a State where there are reasonable grounds to believe that that person may be in danger of being tortured; and
- g) the text of this convention is widely disseminated and its contents made known to all persons arrested and detained.

#### Article 5

##### *(Superior orders)*

The fact that a person was acting in obedience to superior orders shall not be a defence to a charge of torture.

#### Article 6

##### *(Non-derogation)*

Torture can in no circumstances be justified or excused by a state or threat of war or armed conflict, a state of siege, emergency or other exceptional circumstances, or by any other reason.



Article 7  
*(Evidentiary effect)*

Any oral or written statement or confession obtained by means of torture or any other evidence derived therefrom shall have no legal effect whatever and shall not be invoked in any legal or administrative proceedings, except against a person accused of obtaining it by torture.

Article 8  
*(Period of limitation)*

No prosecution or punishment of torture shall be barred by the application of a period of limitation of lesser duration than that applicable to the most serious offence in the laws of the Contracting Parties.

Article 9  
*(Jurisdiction)*

1. Jurisdiction for the prosecution and punishment of the international crime of torture shall vest in the following order in:

- a) the Contracting Party in whose territory the act occurred;
- b) any Contracting Party of which the accused is a national;
- c) any Contracting Party of which the victim is a national;
- d) any other Contracting Party within whose territory the accused may be found.

2. Nothing in this Article shall be construed as affecting the jurisdiction of any competent international criminal court.

Article 10  
*(Extradition)*

1. Where a Contracting Party receives a request for extradition from a Contracting Party having prior or concurrent jurisdiction, it shall grant extradition of persons accused of torture in accordance with its laws and treaties in force and subject to the provisions of this Convention.

2. In the absence of a treaty of extradition with a requesting Contracting Party, the Contracting Parties undertake to extradite on the basis of this Convention.

3. Contracting Parties which do not make extradition conditional on the existence of a treaty shall recognize torture as an extraditable offence.

Article 11  
*(Cooperation)*

The Contracting Parties shall afford one another the greatest measure of judicial and other cooperation in connection with criminal proceedings brought in implementation of this Convention.

#### Article 12

*(Torture not a political offence)*

For the purposes of this Convention, torture shall not be deemed a political offence.

#### Article 13

*(International measures of implementation)*

1. The Contracting Parties undertake to submit to the Human Rights Committee established under the International Covenant on Civil and Political Rights periodic reports on the legislative, judicial, administrative and other measures they have adopted to implement this Convention.

2. The first report of a Contracting Party shall be submitted within one (1) year of the date of entry into force of the Convention and thereafter a report shall be submitted every two (2) years.

3. The Chairman of the Human Rights Committee shall, after consulting the other members of the Committee, appoint a Special Committee on the Prevention of Torture, consisting of five (5) members of the Human Rights Committee who are also nationals of the Contracting Parties to this Convention to consider reports submitted by Contracting Parties in accordance with this Article.

4. If, among the members of the Human Rights Committee, there are no nationals of Contracting Parties to this Convention or if there are fewer than five such nationals, the Secretary General of the United Nations shall, after consulting all Contracting Parties of this Convention, designate a national of the Contracting Party or nationals of the Contracting Parties which are not members of the Human Rights Committee to take part in the work of the Special Committee established in accordance with paragraph 3 of this Article, until such time as sufficient nationals of the Contracting Parties to this Convention are elected to the Human Rights Committee.

5. The Special Committee on the Prevention of Torture shall meet not less than once a year for a period of not more than five days, either before the opening or after the closing of sessions of the Human Rights Committee and shall issue an annual report of its findings.

#### Article 14

*(Settlement of Disputes)*

Any dispute by Contracting Parties arising out of the interpretation, application or implementation of this Convention which has not been settled by negotiation, arbitration or referral to an independent and impartial body shall, at the request of any party to the dispute, be brought before the International Court of Justice.

Article 15  
*(Signature and Accessions)*

1. This Convention is open for signature by all States.
2. Any State which does not sign this Convention before its entry into force may accede to it thereafter.

Article 16  
*(Reservations)*

No reservations may be made to Article 6 of this Convention. The pertinent provisions of the Vienna Convention on the Law of Treaties shall apply with respect to any other reservations.

Article 17  
*(Depositing Instruments of Ratification)*

This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18  
*(Accession)*

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

Article 19  
*(Entry into Force)*

1. This Convention shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the tenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 20  
*(Revision)*

1. A request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps if any to be taken in respect to such a request.

Article 21  
*(Notification)*

The Secretary-General of the United Nations shall inform all States of the following particulars:

1. Signatures, ratifications, accessions and reservations under Articles 15-18 of this Convention;
2. The date of entry into force of the present Convention;
3. Notifications under Article 20 of the present Convention.

Article 22  
*(Official Languages)*

This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

Article 23  
*(Transmittal)*

The Secretary-General of the United Nations shall transmit certified copies of this Convention to all Contracting Parties.

Since the proclamation in 1948 of the Universal Declaration of Human Rights, the international instruments condemning torture have multiplied. Nevertheless, far from receding, this scourge has spread like a cancer in a large number of States of all political tendencies in all continents.

At present, an international Convention against torture is in process of elaboration within the United Nations. There is no indication that it will be accompanied by the necessary provisions to ensure its implementation.

An original and realistic proposal was launched four years ago by a Geneva lawyer, Jean-Jacques Gautier, who obtained the support of a number of Swiss and international experts. In 1978 the International Commission of Jurists adopted this idea and turned it into a Draft Optional Protocol, which is published in this booklet. In March 1980, the Government of Costa Rica submitted it formally to the UN Commission.

In short, it proposes that, in order to ensure that the Convention Against Torture is really enforced, the States Parties undertake to authorize a Committee established under the Protocol to visit freely all places of detention within their territory. It is thus a procedure for prevention rather than for condemnation.

This idea, inspired by the experience of the International Committee of the Red Cross, is making gradual progress. The creation of this new weapon in the campaign against torture is supported, in this booklet, by some personalities of world-wide renown.