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International Commission  
of Jurists

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Swiss Committee  
Against Torture

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# The Draft European Convention Against Torture

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## Introduction

On September 28, 1983, the Parliamentary Assembly of the Council of Europe unanimously voted Recommendation 971 (1983) inviting the Committee of Ministers to adopt the draft **European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment**<sup>1</sup>. The text is annexed to the recommendation. The Recommendation of September 28 is an important step forward in a campaign which began several years ago, and which is still far from completion. We would like to recall its main phases.

### 1. The progress of an idea

In 1975 a Swiss lawyer in Geneva, Jean-Jacques Gautier, increasingly concerned that torture was continuously on the increase and was becoming more and more sophisticated, and being greatly impressed by the positive results achieved by the International Committee of the Red Cross with their visits to prisoners of war, launched the idea of a system of visits to all places of detention. He proposed that it should begin with a convention between a limited number of States determined to ensure that the prohibition against torture was respected in their own countries. He was convinced that in time other states would follow suit.

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1) See p. 11.

A first draft of a **Convention** was prepared in May 1977 by about 20 experts from various countries working together privately.

A few months later, the United Nations General Assembly requested the Commission on Human Rights to draw up a Draft Convention against Torture. Sweden and the International Association of Penal Law each submitted drafts to the Commission and in March 1978 the Commission on Human Rights decided to use these as a starting point for its work. The authors of the 1977 draft had at that time neither the means nor the desire to submit their project to the Commission. In these circumstances however, there was a danger that their proposal would lose its momentum in the short-term, and that the opponents of torture would be split into two different camps.

Consequently, in June 1978, at the suggestion of Niall MacDermot, Secretary-General of the International Commission of Jurists, his organisation and the Swiss Committee Against Torture, founded by Jean-Jacques Gautier, redrafted the 1977 text as a draft **Optional Protocol** to the Draft United Nations Convention against Torture<sup>2</sup>. In March 1980, this was submitted officially to the Commission on Human Rights by the government of Costa-Rica. It was also supported by the governments of Nicaragua, Barbados and Panama. With the agreement of its authors and in order not to hold up the discussions on the Convention itself, the government of Costa Rica proposed that the Draft Protocol should not be discussed until the drafting of the Convention had been completed.

Unfortunately the drafting of the United Nations Convention encountered a number of fundamental differences of opinion and it is accordingly making slow progress. Consequently the debate about the Optional Protocol has been considerably delayed, if not jeopardized.

For this reason, when in the summer of 1982 the Legal Commission of the Parliamentary Assembly of the Council of Europe asked the International Commission of Jurists and the Swiss Committee Against Torture to present their proposal in the form

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2) See *Torture: How to Make Effective the International Convention. A Draft Optional Protocol* (International Commission of Jurists, Swiss Committee Against Torture, Geneva 1980, 60 pages).

of a Draft **European Convention**, they accepted willingly. It is this text — which has benefitted greatly from the valuable advice of the Human Rights Division of the Council of Europe and of experts from the Swiss Department of Foreign Affairs — that has been recommended unanimously by the Parliamentary Assembly.

## 2. An outline of the project

As the Draft Convention of 1977, the Draft Optional Protocol of 1978 and the Draft European Convention of 1983 are almost identical in their main features, they can be summarized together.

A commission composed of nationals of the State Parties elected in their personal capacities is to be responsible for organising periodic visits to places of detention in order to make sure that detainees are not being subjected to torture or to other cruel, inhuman or degrading treatment. The State Parties are to assist the Commission's delegates by permitting them to visit **without prior notice** any place where people are deprived of their liberty (such as police stations, interrogation centres, prisons, hospitals, etc). They are to be allowed to speak with the detainees and their relatives and lawyers, **without witnesses** and to obtain **full information about the places** where persons are being detained. In addition to these periodical and routine visits, which obviously can cover only a fraction of the places of detention, the Commission can organise any other visit which appears to it to be called for in the circumstances.

After each mission, the Commission will inform the State concerned of its findings and, if necessary, make recommendations. All these proceedings remain strictly **confidential**. However, if a State refuses either to cooperate with the Commission or to implement its recommendations, the Commission is entitled to make a **public statement**.

## 3. A rapid, non-judicial and preventive system

Far from competing with other conventions against torture, the proposal seeks on the contrary, to ensure their application in a new way. The existing implementation procedures in the Inter-

national Covenant on Civil and Political Rights and its Optional Protocol and the European Human Rights Convention are of a quasi-judicial nature. Based on complaints made either by States or by individuals, they envisage an enquiry which generally results in a decision which either condemns or exonerates the State concerned. The State is placed in the situation of a defendant with its honour and prestige at stake. It is therefore tempted to use every possible means at its disposal to delay and drag out the enquiry. Even the European procedure, useful as it is for the protection of human rights in general, is not always effective when it comes to the question of the struggle against torture. By its very nature it can neither prevent torture nor help its victims.

The difference between the proposed system of visits and the existing procedures is evident:

- Instead of an inquisitorial enquiry, the Commission organises regular visits to all States parties so that no one can take offence.
- Instead of accusing the government, the Commission makes them confidential recommendations; they have every interest to take account of them and cooperate with the Commission, if only to avoid publicity.
- Instead of an extremely slow procedure, full of pitfalls, the system of visits makes an almost immediate intervention possible whenever the circumstances require.
- Instead of an enquiry after the event, the accent is on prevention. As those in charge of places of detention will not know when they may be visited, they will think twice before having recourse to dubious or degrading practices. The delegates will contribute to the promotion of respect for human dignity within the security forces and prison systems by reporting such practices and giving encouragement to those officials who are conscious of their duties towards detainees. This is the best way to restrain the temptation to resort to torture.

It must be emphasized that the proposals in the Draft European Convention constitute an integral whole. It is certainly not only legitimate but also useful and necessary that the Committee of Ministers and their appointed experts examine the Draft Convention with the utmost care in order to improve it and correct possible errors. Nevertheless, the authors are convinced that

should this examination result in the elimination of one or other of the obligations indicated in heavy types in section 2 above, or even of article 14 which prohibits reservations by the States parties, the Convention would lose a large part of its efficacy and would no longer meet the hopes which it has raised within the Parliamentary Assembly of the Council of Europe.

#### 4. Why a European Convention?

At first sight it seems pointless to propose a remedy against torture in a part of the world where it hardly exists. In reply it must first be said that Western Europe is not immune from this scourge. At the beginning of this century Europeans were convinced that torture had for them become a thing of the past. Since then most European countries have experienced it again. Even during the last fifteen years, there have been serious allegations of torture in several countries of the Council of Europe. To have the same illusions as our predecessors would be a great mistake. The violence which prevails in the world at present creates the conditions for a return to these revolting practices. All the technical refinements invented since then, that cause a total disintegration of the personality, can only make them worse. Europeans must, therefore, use this present lull to eliminate torture where it still exists within the continent and above all to protect their descendants from a return in strength of this canker.

None the less the Draft European Convention should be seen in a much larger perspective, namely in the framework of a worldwide strategy, in which its usefulness may now be examined.

In principle there are in international law two different and complementary ways of establishing respect for human rights and, in particular, the prohibition of torture. The first, which is currently in use, consists of drawing up, preferably within the United Nations, a **universal convention** in the hope that it will eventually command the support even of the most recalcitrant States. To achieve this, a convention is proposed which has firm principles but is not very restrictive in its implementation procedures. Nevertheless, modest as they are, the proposals for implementation are liable to be fought line by line by governments

which practice torture and by those which, on principle, do not accept any international control over matters which they consider to be exclusively within their domestic jurisdiction. These governments have at hand a powerful means of obstruction, namely the system of consensus. Nobody will deny that, in matters concerning sovereign States, consensus corresponds to obvious political necessities, but its development over the years, as has been recognised within the United Nations<sup>3</sup>, certainly acts as a brake. It enables a small minority of States to oppose every restrictive article when a convention is being discussed, thus delaying its conclusion and often weakening its content. In the end the system of consensus plays into the hands of cynical states which for obvious reasons of prestige much prefer to adhere to an ineffectual convention rather than see a more restrictive convention drawn up without them. Thus, the International Covenant on Civil and Political Rights was not accompanied by implementation measures which could bring about an effective reduction of torture, notwithstanding its indisputable merit of making the prohibition of torture, as well as many other principles in the Universal Declaration on Human Rights, binding obligations under positive international law. Some 15 years later, a specific convention against torture is being prepared. It will certainly be an important advance, as it will contain provisions relating to criminal law, the nullity of confessions extracted by torture, universal jurisdiction, international judicial cooperation, etc. Nevertheless, in the field of implementation, it is encountering the same obstacles as the Covenant, so that there are serious doubts whether it will carry matters any further.

Faced with this relative impotence of the universal texts which condemn torture, another approach is possible. It consists in bringing together States which are now exempt from torture to agree upon a more restrictive legal instrument. If, as is often said, torture spreads like a disease, the most urgent task is to protect the existing zones of immunity with the appropriate legal instruments that, like a *cordon sanitaire*, will prevent the disease from spreading. This strategy is all the more valid in that torture is not

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3) Cf. *Kritisch befragt: Die Vereinigten Nationen*, 1981, United Nations Department of Press and Information with the collaboration of the United Nations Association of the Federal Republic of Germany, p. 18.

a static phenomenon. Political unrest and the odious character of regimes that practise torture frequently result in the overthrow of these regimes and the suppression of their hideous practices.

Unfortunately these improvements are often counterbalanced by the appearance or aggravation of torture in other countries, and sometimes, a few years after torture has disappeared from a particular country, it reappears there again under another political regime. Consequently, if one can introduce a selective system which prevents torture appearing in States which for the time being are spared it, the result can only be positive in the long run, since torture would not be able to conquer fresh fields and would necessarily lose its hold in some of the other places where it now reigns. Moreover, there is a large number of States where torture still exists in a hidden way, even though the prevailing opinion, including that of the governments, is in principle opposed to it. It should be possible to rally a growing number of these States to adhere to an instrument already introduced by others.

If one accepts these premises, the problem is how to set up this selective system. One solution is to add a stronger optional protocol to a convention which has little restrictive force. This would be limited to those States prepared to assume effective obligations. During the negotiations for such a convention, States which do not want an optional protocol for themselves may be persuaded not to oppose it since this will enable them to ratify the Convention without submitting themselves to the procedures in the Protocol. In this way a number of optional articles and an Optional Protocol were added to the International Covenant on Civil and Political Rights, which increased its efficacy. For this reason the promoters of the system of visits in no way renounce on the Draft Optional Protocol to the Convention against Torture which Costa Rica has submitted for consideration by the Commission on Human Rights as soon as that is possible.

Another solution would be to choose a different framework, such as regional treaties. For this purpose the Council of Europe has many advantages, since the States parties have already accepted extensive obligations for the protection of human rights and fundamental freedoms. By establishing a system of visits without prior notice to places of detention, it would once again be a pioneer. The Draft European Convention may eventually serve as a model and an effective stimulus for any project which

is intended to reach a wider number of countries, either through the Optional Protocol or through the creation of other regional or sub-regional conventions. If these meet with insurmountable obstacles, the possibility remains of drawing up a convention outside the framework of existing institutions, as was proposed originally by Jean-Jacques Gautier in 1975. It must be recognized, however, that this manner of proceeding is unusual in the field of human rights and would probably encounter certain technical and diplomatic obstacles. An effective European Convention would certainly be a preferable solution.

Obviously, these are all long-term perspectives. Torture will not be abolished in one generation. In the immediate future, the setting up of a European Convention would represent a tremendous break-through towards an effective interstate system of control for the prevention of torture, and more generally, would be an important step towards a better respect for human rights at the international level.

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# **Draft European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment**

*Appendix to Recommendation 971 (1983)  
adopted unanimously by the Parliamentary Assembly  
of the Council of Europe on 28 September 1983*

## **PREAMBLE**

(to be drafted)

## **CHAPTER I**

### **Principles**

#### *Article 1*

In order better to ensure respect for and observe Article 3 of the European Convention on Human Rights, the Contracting Parties agree to supplement the procedure provided for in the European Convention on Human Rights by creating a procedure for the protection of detainees from torture and cruel, inhuman or degrading treatment or punishment.

#### *Article 2*

This convention shall apply in all circumstances and all places to all persons deprived of their liberty, whatever the reason, including persons detained for the purposes of inquiries by civil or military authorities responsible for the maintenance of law and order, persons held in provisional, administrative or re-educative detention, persons accused of, or sentenced for, any offence whatever and persons interned for medical reasons.

### *Article 3*

No provision of this convention may be interpreted as detracting from the enjoyment by detainees of any advantages applicable to them under domestic legislation or under other international instruments, such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Optional Protocol thereto, and the Geneva Conventions of 12 August 1949 on the protection of victims of armed conflicts and the Additional Protocols thereto of 10 June 1977.

## CHAPTER II

### Commission

#### *Article 4*

For the purpose of this convention, there shall be established a commission composed of five members, who shall serve in their individual capacities and be selected from among persons of high moral standing, known for their competence in the field of human rights or in the fields covered by the convention. The commission may not include two members of the same nationality.

#### *Article 5*

1. The members of the commission shall be elected by the Parliamentary Assembly of the Council of Europe from a list of persons nominated by the Contracting Parties, each of which shall nominate three candidates who are nationals of Contracting Parties, of whom two at least shall be its own nationals.

2. The members of the commission shall be elected for a period of six years. They may be re-elected. However, among the members elected at the first election, the terms of three members chosen by lot shall expire at the end of three years.

#### *Article 6*

The commission shall meet in camera. Its decisions shall be taken by a majority of the members present and voting. A quorum of the commission shall be four members.

### *Article 7*

1. Without prejudice to Article 6 above, the commission shall draw up its own rules of procedure. It shall meet whenever circumstances require, but at least once a year.

2. The commission shall be provided with secretarial services by the Secretary General of the Council of Europe. Its secretary shall be appointed by the Secretary General in agreement with the commission.

## CHAPTER III

### Visits

#### *Article 8*

1. The commission may organise visits, by delegates chosen from among its members or other persons, to places of detention within the jurisdiction of the Contracting Parties.

2. Apart from periodic visits in the territory of each Contracting Party, the commission may organise such other visits as appear to it to be required in the circumstances.

#### *Article 9*

1. The commission shall notify the government of the Contracting Party concerned of its intention to carry out a visit. After such notification, its delegates may, without prior notice and at any time, visit any place within the Contracting Party's jurisdiction where they believe detainees as referred to in Article 2 above are being or may be held, including police stations and civil and military interrogation centres.

2. The delegates may not inspect places which representatives or delegates of Protecting Powers of the International Committee of the Red Cross are entitled to visit under the Geneva Conventions of 1949 and the Protocols of 1977 thereto and which they do in fact visit regularly.

3. A Contracting Party in whose territory a visit is being made shall provide the commission with every facility to carry out its task and may in no way hamper the visit. In particular, it shall give the commission full information on the places where detainees, including specified persons, are being held.

4. The delegates may interview detainees alone and at leisure.
5. The delegates may communicate freely with the families, the counsel and doctors of detainees.
6. During each visit, the delegates shall ascertain that detainees are being treated in conformity with Article 3 of the European Convention on Human Rights.
7. If necessary, the delegates shall immediately communicate their observations and recommendations to the appropriate authorities of the Contracting Party concerned.

#### *Article 10*

1. After each visit, the commission shall draw up a report, setting out its observations and recommendations. On the basis of this report, the commission shall inform the Contracting Party concerned of its findings and, if necessary, make recommendations. The commission may on its own initiative engage in consultations with the Contracting Party with a view to improving the treatment of detainees.

2. As a rule, the reports, findings, recommendations and consultations of the commission shall be confidential. By way of exception, however, if the government concerned fails to co-operate or refuses to apply the recommendations, the commission may decide to make a public statement on the matter, announcing its findings and recommendations. It must publish its findings and recommendations whenever requested to do so by the Contracting Party concerned.

3. The commission shall submit to the Committee of Ministers a general report which shall be transmitted to the Parliamentary Assembly and made public.

### CHAPTER IV

#### Final provisions

#### *Article 11*

The convention shall be open to signature by the member states of the Council of Europe. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

### *Article 12*

1. This convention shall come into force on the first day of the month following the expiry of a period of three months after the date on which five member states of the Council of Europe have expressed their consent to be bound by the convention in accordance with the provisions of Article 11 above.

2. In respect of any member state which subsequently expresses its consent to be bound by the convention, the convention shall come into force on the first day of the month following the expiry of a period of three months after the date of deposit of the instrument of ratification, acceptance or approval.

### *Article 13*

Any state may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this convention to all or some of the territories for whose international relations it is responsible. In respect of such territories, the convention shall come into force on the first day of the month following the expiry of a period of three months after the date on which such declaration is received by the Secretary General.

### *Article 14*

No reservations may be made in respect of the provisions of this convention.

### *Article 15*

1. Any party may, at any time, denounce this convention by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall take effect on the first day of the month following the expiry of a period of twelve months after the date on which the notification is received by the Secretary General.

### *Article 16*

The Secretary General of the Council of Europe shall notify the member states of the Council of Europe of:

- a.* any signature;
- b.* the deposit of any instrument of ratification, acceptance, approval or accession;
- c.* any date of entry into force of this convention in accordance with its Articles 12 and 13;
- d.* any other act, notification or communication relating to this convention, except for action taken in pursuance of Chapter III above.

In witness whereof, the undersigned, being duly authorised thereto, have signed this convention.

Done at . . . . ., this . . . . . day of . . . . . 19 . . . , in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member state of the Council of Europe.