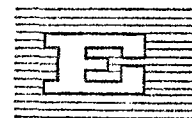


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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF  
DETENTION OR IMPRISONMENT, IN PARTICULAR: (a) DRAFT CONVENTION ON  
TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Summary prepared by the Secretary-General in accordance with  
resolution 13 (XXXIV) of the Commission on Human Rights

Addendum

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## INTRODUCTION

1. In its resolution 32/62 of 8 December 1977, the General Assembly requested the Commission on Human Rights to draw up a draft convention against torture and other cruel, inhuman or degrading treatment or punishment, in the light of the principles embodied in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
2. The Commission examined this question at its thirty-fourth session. In accordance with Commission resolution 18 (XXXIV), the Secretary-General transmitted all relevant documents of the thirty-fourth session of the Commission concerning the draft convention to the Governments of States Members of the United Nations or members of specialized agencies for their comments and prepared this summary of comments received for submission to the Commission at its thirty-fifth session (E/CN.4/1314 and Add. 1-3).
3. After the meeting of the Working Group of the Commission given the task in accordance with Economic and Social Council Decision 1978/24, of preparing concrete drafting proposals for a draft convention for submission to the Commission at its thirty-fifth session, and following completion of the thirty-fifth session, the Secretary-General received further comments relating to the documentation for the thirty-fourth session from Morocco, dated 4 April 1979, and Barbados, dated 27 June 1979. The Secretary-General also received comments from Italy, dated 26 October 1979, on working paper E/CN.4/WG.1/WP.1, submitted by Sweden to the Working Group of the Commission, which contained a revised version of the substantive articles.
4. In accordance with Economic and Social Council resolution 1979/35 which authorizes an open-ended working group of the Commission on Human Rights to meet for a period of one week prior to the thirty-sixth session of the Commission to complete the work on a draft convention on torture and other cruel, inhuman or degrading treatment or punishment, and requests the Secretary-General to transmit to the Commission on Human Rights at its thirty-sixth session all relevant materials relating to the draft convention, the Secretary-General has summarized the information referred to in paragraph 3 above, with the exception of the comments of Barbados on a draft optional protocol prepared by the International Commission of Jurists, since that document was not submitted to the Commission on Human Rights nor to its Working Group.

### I. GENERAL REMARKS (continued)

5. In its reply, Morocco supported the initiative for a draft convention on torture which is akin to and strengthens, through appropriate international co-operation, measures which have already proved successful in Moroccan internal law.
6. The Italian Government expressed its appreciation of the promising results of the work of the Commission on Human Rights at its thirty-fourth and thirty-fifth sessions.
7. The articles already approved by the Commission on Human Rights and the revised articles submitted by the Swedish delegation constitute, in Italy's view, an excellent basis for negotiation from both the political and the strictly legal standpoints.

8. The Swedish draft clearly indicates that torture must be banned from our civilization. Furthermore, the Constitution of the Italian Republic, article 27 of which specifies that penalties may not involve treatment that is contrary to humanitarian feeling but must rather help to rehabilitate the detainee, fully reflects this fundamental spirit and makes it a specific legal commitment. The fact that torture still exists today and that it is used in so many countries calls for a reaffirmation at the legal level of specific international commitments among States designed to ensure that their nationals will in no case, under any pretext, have recourse, or be accessories, to such practices.

II. COMMENTS ON THE ORIGINAL DRAFT ARTICLES SUBMITTED  
BY SWEDEN (E/CN.4/1285) (continued)

Article 1

9. Barbados would have liked the definition of torture to be extended to cover the acts of private individuals, in the light of the provisions of articles 7 and 8 of the original draft. Article 7 extends the concept of torture to cover the offences of complicity, participation, incitement and attempt. These offences are committed by private citizens. Hence this article is inconsistent with article 1 which limits the definition of torture to acts of public officials. In the same way, article 8, which deals with offences committed on board ships and aircraft, necessarily refers to acts of individuals and therefore amounts to an extension of article 1. Therefore, torture in article 1 should be redefined to apply to the offences in articles 7 and 8 as well as other acts of private individuals. 1/

Article 4

10. Morocco would have preferred the formula "to a State where there are reasonable grounds to believe" to be replaced by a formula such as "to a State known (or reputed) throughout the world to be practising torture". 2/

Article 8

11. Morocco considered that article 8, paragraph 1 (c), was unclear, that it could give rise to tendentious applications and that it opened the question of the principle of the territoriality of penal legislation. It proposed the following wording for paragraph 1 (c): "When the victim is a national of that State and has been tortured (by a national of another State) on the territory of that State ..." (see also Morocco's comments on article 14).

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1/ The Working Group adopted by consensus paragraphs 1 and 3 of revised draft article 1 submitted by Sweden. See Commission on Human Rights, report on the thirty-fifth session, E/1979/36, para. 173, paras. 15-29 of the report of the Working Group.

2/ The Working Group decided to suspend discussion of this article to allow further consideration and consultation. See E/1979/36, para. 173, paras. 39-50 of the report of the Working Group.

Article 11

12. For Barbados, paragraph 2 is a repetition of paragraph 1 and, considering also article 8 (3), ought to be deleted. (See also Morocco's comments on article 14.)

Article 12

13. Concerning article 12, which recognizes the right to compensation to the victim of an act of torture, Barbados thought that it should be specified whether the State, public official or individual is liable to pay compensation.

Article 14

14. The extradition measure recommended would be possible only where a Member State had received in its territory a national of another Member State who had previously committed an offence in his State of origin. Except in that case, the principle of the territoriality of penal legislation applies fully and the act of agreeing to extradite a national to another Member State, on the ground that the victim is a national of that State, would be equivalent to reversion to the humiliating practice of "capitulations", linked to the worst memories of the colonial era. For these reasons, Morocco urges that articles 8, 11 and 14 should be revised and, since they are based on a single concept, it should be possible to envisage a new wording which would be limited to two articles and would bring out the desired ideas in a more condensed form.

Articles 16 and 17

15. According to Barbados, provisions could be inserted in either of these articles to allow States to submit reports to and collaborate with voluntary organizations in the field of human rights.

Article 20

16. In Morocco's view, the idea that an individual could, after having exhausted all domestic remedies, apply to the Human Rights Committee, was extremely laudable. However, no Arab State and very few States of the African, American and Asian continents had recognized the competence of the Human Rights Committee, in accordance with the Optional Protocol to the International Covenant on Civil and Political Rights. Recognition of its competence could be unanimous only if the approach to and scope of human rights values were viewed in the same way by everyone, and if membership of the Committee was such that its impartiality was guaranteed. The fact that each Member State could take the initiative with regard to recognition of the Committee's competence may be considered, from the legal point of view, as a positive element, in view of the fundamental principles of international law and particularly the principle of sovereign equality of States.

III. COMMENTS ON THE DRAFT ARTICLES SUBMITTED BY THE  
INTERNATIONAL ASSOCIATION OF PENAL LAW (E/CN.4/NGO/213)

Article II

17. Barbados suggested that the definition should be extended to cover acts of individual citizens. This would harmonize with article III which treats the offences of incitement, participation, attempt and complicity as acts of torture.

Article III

18. For Barbados, the phrase "such conduct" in paragraph (a) should be changed to "acts of torture".

19. Morocco considered that it was not always easy for a public official to have "reasonable belief" that torture had been committed by one of his subordinates. It would also be difficult to prove that such a "senior public official" had "reasonable belief" or even knowledge that torture had been committed since, as far as the police, for example, were concerned, an interrogation frequently took place in private between the police officer and the suspect or accused, without witnesses. Furthermore, the legal repercussions of the article seemed to imply a kind of immediate collective responsibility of public officials, whereas law always decreed the individuality of offences and therefore of penalties.

20. According to Morocco, article III of this draft could give rise to a broad interpretation and lead to a general responsibility of officials, or even of the State, without even requiring that an investigation be carried out and before a decision on such responsibility is taken.

21. State responsibility could not be involved in such a situation, because a crime involving torture committed by the official of a State could not be attributed to that State except within the strict framework of the rules of international law governing State responsibility. None of the bilateral or multilateral international legal assistance agreements made such a hasty judgement concerning State responsibility, and it was therefore extremely desirable that the terms of the article be carefully amended. The article should not, as it appeared to do, endorse a procedure which was as clearly contrary to legal practice as trial by hearsay, on the contrary it should insist that a preliminary legal investigation be carried out. It should also set out clearly the criteria for defining principal guilt and complicity, including (in view of the spirit of the article) passive complicity.

Article VII

22. This article corroborates Moroccan penal legislation: a confession is obviously only one of the many elements of conviction. It is a matter to be evaluated freely by the judge and it may fail to convince him (article 288 of the Moroccan Code of Criminal Procedure.) Furthermore, a confession obtained lawfully merely supports scientific or material evidence or proof by witnesses. However, if a confession is obtained by torture, it should be rejected and will be without effect. Moreover, a police officer who uses torture during an interrogation will incur administrative and penal sanctions.

Article VIII

23. Article VIII puts forward a new idea: the application of periods of limitation for acts and penalties classified as crimes to all prosecution or punishment of torture even if an offence is involved. Moroccan law has adopted an interesting solution which consists in doubling the penalties applicable to all acts committed by a public official that are classified as torture (article 231 of the Penal Code); at the same time article 690 of the Code of Criminal Procedure states that "when a prison sentence of over five years is handed down, the period of limitation shall be equal to that of the sentence", thus the period of limitation provided for under Moroccan law for offences involving torture is longer than the normal limitation period.

Article X

24. For Barbados, the definite article "a" in paragraph 1 should be changed to "one Contracting Party" in the first instance, and "another Contracting Party" in the second instance. The word "shall" should be inserted before the word "undertake" in paragraph 2.

Article XII

25. This article states that torture is not a political offence. For Barbados this is inconsistent with the definition in article II where acts of public officials are stressed.

Article XIV

26. Barbados suggested that additional provisions should be made with reference to the arbitration of disputes on the interpretation, application or implementation of the Convention as a necessary step before the institution of proceedings in the International Court of Justice. This article could also be amplified to include clauses relating to the appointment to an independent arbitration committee of persons mutually agreed to by Contracting Parties.

IV. COMMENTS ON A REVISED TEXT OF THE SUBSTANTIVE ARTICLES  
SUBMITTED BY SWEDEN (E/CN.4/WG.1/WP.1)

Article 3

27. Italy considers that the basic idea underlying the draft Convention should be the prevention of the practice of torture in all countries and by every means. However, it points out that some of the provisions of the draft could conflict with bilateral undertakings which are already binding upon certain States parties to the Convention, particularly with regard to extradition, expulsion and return. The Convention would in fact be applicable only between States parties and could not have a direct effect on agreements it made between those States and "third" States which might conflict with it. In such a case, a State party could find itself in the position of being unable to observe the Convention against torture without violating bilateral undertakings previously subscribed to.

28. Italy therefore suggests a new wording for article 3 which, while providing for a number of specific undertakings by States acceding to the Convention, would make it possible to ensure the following:

- (a) that undertakings arising from this Convention should be considered to take precedence, between member States, over those arising from existing agreements that conflict with it;
- (b) that States parties should not subscribe to new agreements conflicting with the Convention;
- (c) that States parties should proceed to modify any agreements to which they subscribed before the Convention on Torture, if implementation of those agreements could entail a violation of the principles embodied in the Convention.

#### Article 5

29. In order to prevent disputes between the States concerned on the question of jurisdiction over the punishment of an offence involving torture, Italy suggests that the wording of article 5 should be amended and expanded as follows, so as to establish an order of priority for the various jurisdictions: "Each Member State shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 above in the following cases and according to the order of priority indicated below: (paragraphs (a), (b) and (c) unchanged); (d) when the accused is on its territory".

#### Article 7, paragraph 2

30. Italy considers that the phrase "Each State Party shall ensure that..." does not appropriately express the idea of the automatic legal link which should exist between the criminal act of torture (considered as an offence per se or in connexion with another offence) and the initiation of criminal proceedings against those responsible. Italy would therefore prefer a more binding formula which, in view of the criteria establishing a State's competence to judge the case (article 5), would be as follows: "Each State shall provide that..."

#### Article 12

31. Italy proposes that the text following the words "by its competent Authorities" should be deleted, since it is not only pleonastic in view of the contents of articles 2, 3 and 7, but might also give rise to the doubt that other forms of treatment could be acceptable.

#### Article 14

32. In view of the need to assess any damage that may have been suffered and to ensure settlement through the legal channel, Italy suggests the following amendment: "Each State Party shall ensure that any one who considers himself to be the victim of an act of torture, as defined in article 1, has the right to institute legal proceedings to prove that damage has in fact been suffered and to have that damage assessed, with a view to possible compensation".

Articles 17 and 18

33. Italy agrees that, on the basis of this Convention, the States parties should entrust to the Commission on Human Rights the task of ensuring that it is observed in practice. There is nothing in either internal or international law to prevent an international legal instrument from entrusting such a task to an already existing intergovernmental body. Such a solution would prevent the subsequent proliferation of procedures and bodies, particularly if it was accompanied by an appropriate statement recognizing the Commission's right to investigate, although that would mean increasing the Commission's workload - a situation which could be alleviated by strengthening its structure.

Final clauses

34. Italy would like to see drafted as soon as possible the clauses of the Convention, not yet provided for in the Swedish draft, on the settlement of any disputes that may arise between States concerning the interpretation and application of the Convention.