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Convention against Torture
Agenda item 10(a)

REPORT OF THE WORKING GROUP ON A DRAFT CONVENTION
AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR
DEGRADING TREATMENT OR PUNISHMENT

Chairman-Rapporteur:

Mr. J.H. Burgers

(Netherlands)

Introduction

1. On the recommendation of the Commission on Human Rights in its resolution 25 (XXXVII), the Economic and Social Council, by its resolution 1981/37 of 8 May 1981 authorized the meeting of an open-ended Working Group for a period of one week prior to the thirty-eighth session of the Commission in order to complete the work on a Draft Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, with a view to the submission of the draft, together with provisions for the effective implementation of the future Convention, to the thirty-seventh session of the General Assembly.
2. As authorized by the Commission at its meeting on 10 March 1981, the Group continued its work during the session. The Group held 17 meetings on 25-29 January, 1, 5, 17-19 February and 1, 2 and 4 March 1982. It provisionally adopted three articles of the Draft Convention. In this connection, it should be recalled that the open-ended Working Group established prior to the thirty-sixth and thirty-seventh sessions of the Commission, had adopted a number of articles. The text of the articles adopted so far may be found in Annex I of the present report.
3. At the first meeting on 25 January 1982, Mr. Jan Herman Burgers (Netherlands) was elected Chairman-Rapporteur by acclamation.

Documents

4. The Working Group had before it the following documents:

E/CN.4/1285	Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Sweden.
E/CN.4/WG.1/WP.1	The revised Draft Convention submitted by Sweden.
E/CN.4/NGO/213	Draft Convention for the Prevention and Suppression of Torture submitted by the International Association of Penal Law.
E/1980/13, paras. 201-209	Report of the 1980 Working Group.
E/1981/25, paras. 180-189	Report of the 1981 Working Group.
E/CN.4/1427	Draft preamble and proposed final provisions submitted by Sweden.
E/CN.4/1409	Draft provisional protocol submitted by Costa Rica.
E/CN.4/1493	Revised Draft relating to implementation clauses submitted by Sweden.

Consideration of substantive articles

5. The Working Group established at the present session considered Article 1, paragraph 2; Article 3, paragraph 2; Article 5, paragraph 2; Article 6, paragraphs 4 and 5; Article 7; Article 8, paragraph 2; Article 9; Article 14; Article 16.

Article 1

6. Article 1 of the Draft, as it emerged from debates at previous sessions of the Working Group, read as follows:

"1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him or an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering only from, inherent in or incidental to lawful sanctions.

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

3. This article is without prejudice to any international instrument or national law which does or may contain provisions of wider application."

7. With regard to paragraph 2, some representatives considered it essential to affirm from the outset that the prohibition of "cruel, inhuman or degrading treatment or punishment" was included within the scope of the Convention, and to make it clear that torture was, in their view, at the highest end of the scale of such treatment or punishment. Such a clarification was, in their view, necessary in order that the crime of torture be defined with sufficient precision for purposes of their domestic criminal law. Some other representatives, pointing out that there was no universally accepted concept of "cruel, inhuman or degrading treatment or punishment", felt that the reference in paragraph 2 as presently worded would be far too vague for inclusion in a treaty, and that it would tend to bring imprecision to the concept of "torture" which had been agreed upon in paragraph 1. They proposed deletion of paragraph 2.

8. The discussion on this matter was then shifted to Article 16, paragraph 1 (see below under this article). As a result of the discussion and the incorporation of new language in Article 16, paragraph 1, the Group decided to delete Article 1, paragraph 2.

Article 3

9. Article 3 of the Draft, as it emerged from debates at previous sessions of the Working Group, read as follows:

"1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. [For the purpose of determining whether there are such grounds all relevant considerations shall be taken into account, including, where applicable, the existence in the State concerned of a consistent pattern of gross violations of human rights, such as those resulting from a State policy of apartheid, racial discrimination or genocide, colonialism or neo-colonialism, the suppression of national liberation movements or the occupation of foreign territory.]"
10. With regard to paragraph 1, some delegations indicated that their States might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves bound by Article 3 of the Convention, in so far as that article might not be compatible with obligations towards States not parties to the Convention under extradition treaties concluded before the date of the signature of the Convention.
11. Referring to paragraph 2, some representatives felt that it was very important to include in the Convention the proposed illustrative list of gross violations of human rights, which had several precedents in United Nations resolutions. In the view of some other delegations, this paragraph should be deleted as superfluous. It was also stated that many of the items in the proposed illustrative list did not, either legally or logically, constitute a basis for believing that an extradited person would be subjected to torture. One view was that, if the provisions were kept, references to other types of gross violations should be added. An alternative proposal was to keep the paragraph but to delete all words after "gross violations of human rights".
12. The Group decided to retain provisionally paragraph 3 between square brackets and to return to the question at a later stage.

Article 5

13. Article 5 as adopted by the Working Group established at the thirty-seventh session of the Commission reads as follows:

"1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction 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 if that State considers it appropriate.

[2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 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."

14. In the course of the debate on paragraph 2, reference was made to an informal proposal submitted in 1981 (E/CN.4/1981/WG.2/WP.8) to add to the above text of paragraph 2 a sub-paragraph reading as follows:

"Without prejudice to the foregoing paragraphs, an alleged offender should normally be tried by the State in whose territory the offence is committed."

Some delegates stated that they agreed with the tenor of this proposal, but felt that such a clause should not be included in the operative part of the Convention but in the preamble.

15. The Working Group felt that article 5 should not be considered separately from article 7. At the conclusion of the discussion regarding the article 7 (see paras. 19 to 36 inclusive below), it was noted that those delegations which could support the provisions contained in article 7 could accept paragraph 2 of article 5 (see para. 13 above). However, one representative expressed the view that the establishment of jurisdiction as envisaged in article 5(2) should be made dependent upon the refusal of a request for extradition. If such a clause could not be included in the text of the Convention itself, this delegation would consider making a declaration or reservation to that effect when adhering to the Convention.

Article 6

16. Article 6, as adopted by the Working Group in 1980, read as follows:

"Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in Article 4 is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the fact.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.

[4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in Article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.]

5. Any person regarding whom proceedings are being carried out in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings."

17. The Working Group felt that paragraph 4 of article 6 should not be considered separately from article 7. At the conclusion of the discussion on article 7, it was noted that those delegations which could support the provisions of article 7 could accept paragraph 4 of article 6.
18. The Working Group confirmed last year's decision that paragraph 5 of article 6 should be included in article 7 after adoption of that article as a whole.

Article 7

19. The Working Group continued the consideration of article 7 of the Swedish draft, which read as follows:

"The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in any territory under its jurisdiction, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State."

20. As indicated above, the Group felt that article 7 should be examined together with article 5 (as well as article 6, paragraph 4) in view of the close link between these provisions.
21. The delegate of the Netherlands informed the Group that his government had decided to withdraw the amendment it had submitted in 1981 with regard to article 7 (1981/WG.2/WP.2).
22. Several speakers considered that a system of universal or quasi-universal jurisdiction as envisaged in the articles 5 and 7 of the Swedish draft was indispensable in a convention against torture in order to ensure that there would be no "safe havens" for torturers. Corresponding provisions had already been included in many other treaties for the suppression of evils which the international community deemed unacceptable, such as the Convention for the Suppression of Unlawful Seizure of Aircrafts, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the Convention against the Taking of Hostages. Reference was also made to the Geneva Conventions of 1949 on humanitarian law applicable in armed conflicts.
23. Some delegates indicated that, although their governments had previously expressed reservations concerning the inclusion of a system of universal jurisdiction in the proposed convention against torture, they were now prepared to accept it in order to facilitate agreement on the convention.
24. Several other delegations maintained their opposition to or reservations concerning the inclusion of a system of universal jurisdiction in the draft convention. Difficulties of a practical kind were mentioned as regards the transfer of evidence from the country where the crime had been committed towards the State of arrest and trial under the universal jurisdiction clause. If the latter State would not extradite the alleged offender to the former State, this might lead to frictions which would turn illusory the holding of a fair trial against the defendant, since

it would be impossible to obtain the necessary evidence. Misgivings were also expressed that the system of universal jurisdiction could be exploited for political reasons and that it could result in trials on the basis of spurious accusations and fabricated evidence.

25. One delegation expressed the view that the system of universal jurisdiction was not the appropriate one to deal with a crime that is not international in its nature, like those dealt with in the Conventions cited as precedents in the Working Group. This delegation stated that the primary objective of the Convention should be to ensure the compliance with its norms by any State which does not punish acts of torture carried out by its public officials. According to this delegation, the establishment of universal jurisdiction would not contribute to this end, since such a system would only apply to the improbable case in which a torturer would leave his own State where he enjoyed impunity for his crimes, in order to travel to another State which, being a party to the Convention, might arrest and prosecute him. The system that was proposed to face this highly hypothetical case could be a source of controversies between States. The intention of a State to prosecute a case of torture on the basis of universal jurisdiction could be interpreted by the State where the crime had been committed as a demonstration of lack of trust in its own judicial system, a violation of its sovereignty and even as an interference in its internal affairs.

26. Another delegation replied that universal jurisdiction was intended primarily to deal with situations where torture is a State policy and, therefore, the State in question does not, by definition, prosecute its officials who conduct torture. For the international community to leave enforcement of the Convention to such a State would be essentially a formula to do nothing. Therefore, in such cases, universal jurisdiction would be the most effective weapon against torture which can be brought to bear. It could be utilized against official torturers who travel to other States, a situation which is not at all hypothetical. It could also be used against torturers fleeing from a change in government in their States if, for legal or other reasons, extradition to that State would not be possible.

27. Regarding due process and the adequacy of evidence, it was stated that the text of the draft Convention as a whole, including the Chair's proposed article 7, made it clear that criminal prosecution would take place only when adequate evidence exists and it is possible to ensure fair treatment at all stages of the proceedings. In particular cases, such as when a torture victim is present in a State Party, it would be quite possible to meet these requirements.

28. During the discussion of article 7, reference was also made to a revised version that had been submitted in 1981 by Brazil and Sweden but that subsequently had been withdrawn, as well as to a text proposed in 1981 during informal consultations which the Group had not been able to discuss owing to lack of time. The possibility was mentioned of redrafting article 7, taking into account those alternative proposals and qualifying the exercise of universal jurisdiction in a manner which could alleviate some of the concerns expressed by delegations, in particular regarding the risk of discrepancies as to the standards of evidence.

29. In the light of these discussions the Chairman-Rapporteur suggested the following new text for article 7 (WP.5):

"1. A State Party which has established its jurisdiction over an offence according to article 5 shall, when the alleged offender is present in a territory under its jurisdiction, submit the case to its competent authorities for the purpose of prosecution, if it does not extradite him.

2. These authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any offence set forth in article 4 shall enjoy all guarantees of a fair and equitable trial."

30. A number of delegates supported this suggestion in general terms, considering that it was a constructive synthesis, which retained the substance of the original Swedish draft while making clear certain protections accorded to an accused. Some other delegates observed that the new proposal did not reduce significantly their difficulties concerning acceptance of the principle of universal jurisdiction. During the debate arguments were reiterated that had been put forward in earlier discussions.

31. In the course of the discussions concerning the proposal of the Chairman-Rapporteur, most speakers indicated that their governments were prepared to support the inclusion of a system of universal jurisdiction in the draft convention. In particular one delegation announced that its government, although retaining its reservations concerning the advisability of including universal jurisdiction in the convention against torture, had now decided to accept this in the interests of facilitating progress towards agreement on a final text.

32. One other delegation stated that it could accept the proposed text for article 7, depending on its understanding of article 5, since it preferred to make the establishment of universal jurisdiction as envisaged in article 5, paragraph 2, dependent on the refusal of a request for extradition. The view was also expressed that paragraph 2 of article 5 would be more acceptable if the provision mentioned in paragraph 14 of this report would be added to it.

33. On the other hand, some delegations made it clear that they could not accept the inclusion of a system of universal jurisdiction in the Convention.

34. Several speakers who supported the proposal of the Chairman-Rapporteur in general terms stated that in their view some drafting changes would be desirable. In particular the text should be harmonized with the formulations already appearing in comparable treaties such as the Convention for the Suppression of Unlawful Seizure of Aircrafts. After consultations with these delegates the Chairman-Rapporteur submitted a revised version of his proposal (WP.5/Rev.1), which was again discussed in the Working Group. This discussion led to further amendments of the text. Article 7, as it emerged finally from the discussion, reads as follows:

"1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings."

35. It was noted that all delegations who could accept the inclusion of universal jurisdiction in the draft convention against torture, could support this text. The same delegations could also support the text of article 5, paragraph 2, and of article 6, paragraph 4. For the position of one delegation with regard to article 5, paragraph 2, reference is made to paragraphs 15 and 32 above.

36. Some delegations stated that, since document WP.5/Rev.1 had been submitted to the Group at its last meeting dealing with the substance of the draft convention, and only in English and French, they had not had enough time to study its contents.

Article 8

37. At the present session, the Working Group in examining article 8 was mainly concerned with the alternatives "may" and "shall" between brackets in paragraph 2 of article 8.

38. After some discussion, the Group adopted the text with the deletion of the word "shall" and the removal of the brackets around the word "may".

39. Article 8 as adopted by the Working Group in 1982 reads as follows:

"Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1."

Article 9

40. One delegation sought clarification of the extent of the obligation under article 9 that requires States Parties to assist one another in criminal procedures under the Convention. In particular, that delegation asked whether the provisions might require the supplying of evidence that might be inadmissible as evidence in the requested State. There was no dissent from the opinion expressed by some delegations that the law of the requested State would apply to determine such matters.

Article 14

41. The Working Group considered article 14 provisionally agreed to last year and decided to retain it as it is:

"1. Each State Party shall ensure in its legal system that the victim of an act of torture committed in any territory under its jurisdiction be redressed and have an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

42. One delegation asked that reference be made in the report to the reservation concerning article 14 which it had entered at the two previous sessions. 1/

Article 16

43. The text of article 16 as it had emerged from the 1981 session read as follows:

"1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not constitute torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12, 13 and [14] shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion."

The debate on article 16, paragraph 1, was carried over from the earlier discussion on article 1, paragraph 2 (see paragraph 7 above).

1/ E/CN.4/L.576, para. 44; E/1980/13, para. 206.

44. As regards paragraph 1 of article 16, the delegation of the United States introduced an amendment (WP.2) to include either the following phrases, "which are not sufficient to constitute torture" or "which do not amount to torture", after the words "inhuman or degrading treatment or punishment".

45. In support of the amendment, several speakers considered it important to indicate clearly in the Convention that torture was the gravest form of "cruel, inhuman or degrading treatment or punishment", and that the whole range of such treatment or punishment should be covered by some articles at least of the Convention. Some other delegations felt, however, that the proposal introduced an undesirable element of vagueness into the text. One opinion was that the difference between torture, as defined or referred to in national laws and in some international decisions, and "cruel, inhuman or degrading treatment or punishment" was one of substance and not of degrees. After some debate, it was agreed to adopt the second alternative in WP.2 on the understanding that one delegation maintained its objection against this formulation.

46. The Group then considered whether to refer to article 14 regarding compensation, in paragraph 1 of article 16.

47. Some speakers, referring to article 11 of the United Nations Declaration against Torture favoured a reference to article 14, on the grounds that victims of cruel, inhuman or degrading treatment or punishment may have a legitimate claim to compensation. Other representatives did not feel that extension of the scope of their compensation laws to an ill-defined field to include all such treatments would be warranted. Since no consensus could be reached, the Group decided to revert to this question at a later stage.

48. Article 16 paragraph 1 reads therefore as follows:

"1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12, 13 and [14] shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

PROVISIONS RELATING TO IMPLEMENTATION

49. In 1981, the Working Group had engaged in a general debate on measures of international implementation, mainly on the basis of the Swedish draft in document E/CN.4/1285. 2/

50. At the present session, Sweden presented a revised draft on implementation (E/CN.4/1493). 3/

2/ E/CN.4/L.1576, paras. 50-54, reproduced in E/1981/25, para. 185.

3/ See Annex 2 to this report.

51. A preliminary discussion took place on whether to consider first the nature and composition of the proposed implementation organ, or its functions. At the request of some representatives, the Group started with a debate on the latter, as a decision on the type of organ required would, in their view, depend largely upon the kind of functions assigned to it. At a later stage, both the organizational and the functional aspects were discussed at considerable length.

52. After the completion of the meetings of the pre-sessional Working Group, during which several amendments were made, the Chairman-Rapporteur, in an effort to reconcile the divergent views expressed by members of the Working Group on the problems of implementation, submitted a new set of implementation provisions as a possible alternative to the Swedish draft articles 17 to 34, contained in document E/CN.4/1493. This new set of implementation provisions was reproduced in document E/CN.4/1982/WG.2/WP.6. 4/

53. In the framework of the general discussion which took place on measures of implementation, some speakers reiterated the view that, basically, implementation should be assured by each State Party within the context of its legal system, and expressed doubts regarding the advisability of establishing international bodies with extensive jurisdiction. It was suggested that the provisions concerning international supervision should be made optional. Other delegates stated that self-policing by States has not been entirely successful and, therefore, effective implementation provisions were an indispensable part of the treaty. In the view of yet other delegates, the inclusion in the treaty of the principle of universal jurisdiction was even more important than implementation provisions because such a principle could be invoked even in regard to alleged torturers from non-States Parties. On the other hand, implementation provisions were totally ineffective vis-à-vis non-States Parties.

Nature and composition of the implementation organ

54. It may be recalled that the initial Swedish draft (E/CN.4/1285) had proposed to entrust the task of implementation to the Human Rights Committee established under the International Covenant on Civil and Political Rights. A Netherlands amendment (1981/WP.3) had provided for the establishment of a committee composed of the members of the Human Rights Committee. The Working Group had taken note of a telegram from the Legal Counsel of the United Nations (1981/WP.6) explaining the legal difficulties that he believed would arise if the Human Rights Committee were designated as the international implementation body under the Convention.

55. At the present session, the representative of Sweden submitted a revised draft (E/CN.4/1493). The revised Swedish draft provided for the election by the States Parties of a committee composed of persons, serving in an individual capacity, who "shall, so far as possible, be chosen among members of the Human Rights Committee" (article 17).

56. A number of delegates felt that the revised Swedish text was a constructive proposal. In their view, the new draft, based on the concept of a committee of individual experts, had the advantages of attempting to ensure the independence of the committee from governmental instructions or pressures while avoiding the difficulties pointed out in the cable of the Legal Counsel.

4/ See Annex 3 to this report.

57. It was explained by the author that the clause under which the members should "so far as possible" be also members of the Human Rights Committee was designed to facilitate harmonization between the decisions of the two organs on similar matters, and to reduce the cost of the new scheme. As regards financial implications, attention was also drawn to articles of the revised Swedish draft which provided, as in the Convention against Racial Discrimination, that States Parties would be responsible for the expenses of the members of the Committee while they were performing their duties.

58. In the view of other delegates who had reservations concerning the multiplication of international organs, the revised Swedish draft would raise difficulties. They felt that it would create a new body with sizeable financial implications and no strong safeguards against duplication with the Human Rights Committee. In this regard, those speakers felt that the phrase "so far as possible", in paragraph 2 of article 1 of the draft, was too vague and inappropriate in a binding legal instrument. Some delegates considered the proposed provisions too lengthy and complicated in proportion to the material provisions.

59. In this context, some restated their preference for entrusting the supervisory functions to the Human Rights Committee established under the Covenant. It was observed, however, that it would be difficult to pursue this option in view of the problems raised by the Legal Counsel of the United Nations.

60. Some delegates, without necessarily endorsing the very concept of a permanent international machinery, felt that, if this concept were accepted, it should rather be expressed in terms of an inter-governmental body or of a body organically linked with inter-governmental organs of the United Nations. One speaker observed that the Group of Three Members of the Commission on Human Rights established under article IX of the International Convention on the Suppression and Punishment of the Crime of Apartheid was performing valuable work and might constitute a useful precedent.

61. In his alternative text (1982/WG.2/WP.6), submitted after consultations with several delegates, the Chairman-Rapporteur suggested the creation of "a group of five persons ..." whom the Chairman of the Commission on Human Rights would "appoint from among representatives to the Commission on Human Rights who are nationals of States Parties to the Convention" (art. 17, para.2). It was provided in paragraph 3 that the members of that group "shall serve in their personal capacity".

62. The Chairman-Rapporteur explained that he had tried to suggest a possible solution for the composition of the implementation organ which would avoid the creation of an entirely new body outside the already existing structures for the promotion and protection of human rights, and which would avoid the need for spelling out election procedures etc. in considerable detail, taking as his starting point the machinery provided for in the International Convention on the Suppression and Punishment of the Crime of Apartheid.

63. A number of speakers felt that the Chairman-Rapporteur's text was a constructive compromise which was likely to promote effective implementation with a minimum of financial and administrative implications.

64. While not disagreeing that the text could form the basis of a constructive compromise, one delegation suggested the following amendment to it: "The Chairman of the Commission on Human Rights should appoint the members of the Group from among nationals of Member States of the Commission on Human Rights which are parties to the Convention." Other representatives expressed objections or reservations concerning the proposed appointment of members by the Chairman of the Commission from among the representatives on that body: such a procedure would, in their view, introduce strong political factors which were especially undesirable as regards implementation of a Convention designed to prohibit torture by public officials. Those delegates considered that the clause of paragraph 2 regarding membership "in personal capacity" would leave matters ambiguous and would not suffice to guard against the risk of politicization. Queries were also voiced on the absence of provisions concerning the terms of office of members, criteria for selection of members and the frequency and duration of meetings.
65. One speaker observed that he found himself in a particular position since he was on the one hand a representative of his Government to the Commission on Human Rights while he was on the other hand a member of one of the Commission's Working Groups, serving as an expert in his personal capacity. He was therefore fully aware of the dilemmas which might arise for a Government representative to the Commission if such a representative would have at the same time to perform the delicate functions envisaged in the draft proposals under discussion. In this context, it was suggested that it might be better to have the members of the supervisory body appointed by the Chairman of the Human Rights Committee from among the members of that Committee who would be nationals of States Parties to the Convention. If the members of the Committee were to serve in this capacity, it would be totally different and apart from their functions under the Covenant. This would seem to some delegations to avoid the legal problem raised by the United Nations legal expert.
66. In the course of the ensuing debate, a number of delegates expressed their preference, with varying emphasis, for the following basic elements: election of the implementation organ by the States Parties; requirement that all or part of the members should also belong to the Human Rights Committee; and term of office to be carried out in a personal capacity. Other delegations spoke in favour of the establishment of an entirely new organ.
67. Some delegations maintained their preference for a body organically linked to the Commission on Human Rights.
68. The International Commission of Jurists put forward a compromise proposal (WP.7), according to which the members of the implementation organ would be appointed for a period of three years at a meeting of representatives of the States Parties to the Convention, after consultation by their Chairman with the Chairman of the Commission on Human Rights and the Chairman of the Human Rights Committee. They would be appointed from among representatives to the Commission and members of the Committee, who were nationals of States Parties to the Convention and willing to serve on the implementation organ under the Convention. The organ would report both to the Commission on Human Rights and to the Human Rights Committee.

69. One delegate suggested a two-phase procedure for the composition of the implementation organ. Initially, as long as only a limited number of States had become parties to the Convention, the members of the organ would be appointed; in a later stage, after a certain number of ratifications or accessions had been reached, the members would be elected by the States Parties.

Measures of international implementation

70. Several delegations expressed their support for the proposal contained in article 29 of the new Swedish draft, providing for the submission of reports and other information by the States Parties and the consideration thereof by the implementation organ to be set up under the Convention. On the other hand, some delegations objected to the inclusion of "other information" in this procedure. The delegation of Brazil submitted amendments to draft article 29, which were reproduced in document E/CN.4/1982/WG.2/WP.3, and which related both to paragraph 1 and paragraph 2 of this draft article. According to the first proposed amendment, paragraph 1 would be replaced by the following text:

"1. The States Parties to the present Convention undertake to submit to the Secretary-General of the United Nations reports on the measures they have adopted to give effect to their undertakings under the Convention:

(a) within one year of the entry into force of the Convention for the States Parties concerned;

(b) whenever there is any change in those measures;

(c) when the Committee so requests."

During the discussion of this proposed amendment, some changes were suggested which were accepted by the delegation of Brazil. The revised version, as reproduced in document E/CN.4/1982/WG.2/WP.3/Rev.1, which was also acceptable to the Swedish delegation, reads as follows:

"1. The States Parties to the present Convention undertake to submit to the Secretary-General of the United Nations reports on the measures they have taken to give effect to their undertakings under the Convention:

(a) within one year of the entry into force of the Convention for the States Parties concerned; and

(b) whenever any new measures have been taken; and

(c) when the Committee so requests."

According to the second amendment proposed by the delegation of Brazil, the first sentence of paragraph 2 of article 29 would read as follows:

"Such reports shall be considered by the Committee, which shall transmit them with such comments or suggestions as it may consider appropriate to the States Parties."

71. This second amendment met with no objections in the Working Group.

72. The Working Group discussed at some length the proposed procedure for enquiries as contained in article 30 of the new Swedish draft.
73. The Netherlands delegation also recalled the fact-finding proposal set out in the amendments submitted by the Netherlands in 1981. There was some support for this proposal. Some delegations, however, remarked that, while their governments might be prepared to accept for themselves a fact-finding system as provided for in the Netherlands proposal, they felt such a system was too stringent for the purpose of a convention which was intended to obtain worldwide support.
74. With regard to the Swedish proposal several points of criticism were raised. It was observed that draft article 30 did not make it clear that a step-by-step approach would be required: first the implementation organ should consider whether there were sufficient reasons for addressing itself to a State Party, in a second stage the organ should consider, taking into account all relevant information at its disposal, whether it would be warranted to initiate an enquiry, and finally the organ should consider, in the light of the results of the enquiry, whether to transmit any comments or suggestions to the State Party concerned. It was also recommended to specify in the text that all the proceedings under this article should be confidential.
75. One delegation submitted that torture is an evil of such a grave nature that publicity would be justified if a government would clearly fail to take the necessary measures to suppress this evil. This delegation suggested to include in the Convention a provision along the following lines: If the implementation organ would consider that compelling grounds existed for believing that repeated violations of the Convention had occurred on the territory of a State Party and that the State Party had not taken satisfactory action in respect of these violations, the organ should advise the State Party confidentially that in its opinion prosecution of alleged offenders would be required in accordance with article 7 of the Convention. If after a period of one year after the communication of such advice no action to prosecute had been taken by the State Party concerned, the implementation organ in its discretion might include an account, which might be a summary account, of the situation in its public report to the Economic and Social Council.
76. Some delegations expressed hesitations with respect to this suggestion. It was pointed out that the draft Convention does not entail an obligation to prosecute but only an obligation to submit cases to the competent authorities who have to decide about prosecution. Moreover, it was observed that adequate measures to suppress the evil of torture may often be of a different character than measures in the field of penal law.
77. In the light of the discussion with regard to article 30, the delegation of Sweden submitted a revised text of this draft article. The revised text, which was reproduced in document E/CN.4/1982/WG.2/WP.4, reads as follows:

"Article 30

1. If the Committee receives information from any source which appears to indicate that torture is being systematically practised in the territory of a State Party, the Committee shall give that State Party the opportunity to state its views on the situation.

2. On the basis of all relevant information available to the Committee, including any explanations which may have been given by the State Party concerned, the Committee may, when the circumstances so warrant, designate one or more of its members to make a confidential enquiry and to report to the Committee urgently.

3. An enquiry made in accordance with paragraph 2 of this article may include a visit to the territory of the State Party concerned, unless the Government of that State Party refuses to give its consent.

4. After examining the report of its member or members submitted in accordance with paragraph 2 of this article, the Committee may transmit to the State Party concerned any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee under this article shall be confidential."

78. The revised text of draft article 30, presented by Sweden, evoked several comments from members of the Working Group. It was said that the implementation organ should form its own judgement as to whether any information received appeared to indicate the occurrence of systematic practices of torture. Therefore, in paragraph 1 the words "in its view" should be inserted before "appears to indicate". Again, the organ should make its own judgement as to whether the initiation of an enquiry according to paragraph 2 would be warranted. Therefore, in paragraph 2 the words "when the circumstances so warrant" should be replaced by "if it decides that this is warranted". The formula "to state its views on the situation" at the end of paragraph 1 was criticized because the word "situation" might seem to imply that the practice of torture did indeed occur; therefore this formula should be replaced by a more neutral expression. A similar observation was made with regard to the term "explanations" in paragraph 2. As to paragraph 3, it was suggested to read the last part of it as follows: "unless the Government of that State Party, when informed of the intended visit, does not give its consent". All these suggestions were accepted by the Swedish delegation.

79. Several delegations expressed their support for the complaint procedures contained in the Swedish draft articles 31 and 32. Other delegations had misgivings with regard to the inclusion of such procedures in the Convention. In particular since the implementation organ could not be the Human Rights Committee as envisaged in the original Swedish proposal, there might be a risk of duplication and even conflict between these procedures and the corresponding procedures under the International Covenant on Civil and Political Rights and the Optional Protocol of 1966. Taking into account also that the proposed procedures would be optional, some delegations wondered whether it would not be preferable to omit these procedures from the Convention.

80. In connection with the optional procedure for State complaints contained in article 31 of the new Swedish draft, the delegate of the Netherlands invited comments with regard to the proposal for a mandatory State complaint procedure as contained in the amendments submitted by his Government in 1981. One delegation stated its preference for a mandatory procedure as envisaged in the Netherlands proposal; most other delegations who expressed themselves on this question stated that they preferred an optional procedure in the Convention under discussion.

81. One other delegation observed that, in so far as State complaints were in fact allegations by a State that another State was not fulfilling its obligations under the Convention, the question could be considered as involving a dispute between two States about the interpretation or the application of the Convention. Such a dispute should then be necessarily subject to the procedures for peaceful settlement set out in the Charter of the United Nations. It could therefore be specified in the Convention that, once a dispute thus arose, the parties to the dispute accepted the obligation to submit it to a procedure such as mandatory conciliation, unless they agreed to another procedure. This would have the advantage of establishing clearly a mandatory procedure to be applied to the settlement of the dispute. At the same time, conciliation was a method that States could more easily accept than other procedures, such as arbitration or judicial adjudication, in which States were bound to accept not only the method of settlement but also the award or sentence. In the view of this delegation, allegations by a State that another State was not taking effective measures to prevent acts of torture - an obligation assumed under the Convention - could thus be dealt with simply as a dispute concerning the interpretation or application of the Convention, without the need to give the allegation the character of a "complaint". In its view, that solution would be as effective as a system of "complaints" and States were more likely to accept it, since it would fall in the generally accepted treatment of inter-State disputes concerning a treaty that binds them.

82. In introducing his alternative proposal for the implementation provisions, the Chairman-Rapporteur explained that his proposed articles 18 and 19 contained no new elements but simply reflected the outcome of the discussions that had taken place concerning articles 29 and 30 of the Swedish draft. Article 20 and the accompanying annex had been inspired by the suggestion of one delegation to include in the Convention a mandatory conciliation procedure for disputes between States. The text of this article and the annex were a copy, with some necessary adaptations, of the corresponding provisions in the Vienna Convention on the Law of Treaties. The alternative set of implementation provisions, suggested by the Chairman-Rapporteur, did not provide for the inclusion of procedures for State complaints or individual complaints regarding non-fulfilment by a State Party of obligations under the Convention.

83. Some members expressed their hesitations with regard to the mandatory conciliation procedure as contained in article 20 and the annex of the proposal of the Chairman-Rapporteur. One speaker pointed out that the precedents mentioned by the Chairman-Rapporteur related to international treaties regarding subjects of an entirely different character than the envisaged Convention. Some delegations observed that there was a difference between disputes regarding the application of such provisions of the Convention as those in the field of jurisdiction and extradition, which would often lend themselves to judicial or quasi-judicial settlement, and disputes regarding the occurrence of the practice of torture, which would more naturally be the subject of complaint procedures. In this context it was considered an advantage of the complaint procedure contained in the Swedish proposals that the matter was not dealt with exclusively between the parties to the dispute but that the implementation organ had a certain role to play. Some delegations stated that, for their Governments, only an optional conciliation procedure would be acceptable. On the other hand one delegation recommended to include in the Convention a mandatory procedure for judicial settlement of disputes relating to the interpretation or application of the Convention by the International Court of Justice, as contained in article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination and numerous other treaties.

Annex IArticle 1 d/

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. a/
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. a/
3. An order from a superior officer or a public authority may not be invoked as a justification of torture. c/

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. a/
2. ["For the purpose of determining whether there are such grounds all relevant considerations shall be taken into account, including, where applicable, the existence in the State concerned of a consistent pattern of gross violations of human rights, such as those resulting from a State policy of apartheid, racial discrimination or genocide, colonialism or neo-colonialism, the suppression of national liberation movements or the occupation of foreign territory."] e/

"Remark: Some delegations indicated that their States might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves bound by article 3 of the Convention, in so far as that article might not be compatible with obligations towards States not Party to the Convention under extradition treaties concluded before the date of the signature of the Convention."

Article 4 b/

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. */
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; b/
 - (b) When the alleged offender is a national of that State; c/
 - (c) When the victim is a national of that State if that State considers it appropriate. c/
- [2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.] l/
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law. c/

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 if present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted. b/

*/ The term "complicity" includes "encubrimiento" in the Spanish text.

In the Spanish text

[Add at the end of para. 1: "o encubrimiento de la tortura".]

In the French text

[Add a foot-note reading: "le terme 'complicité' comprend 'encubrimiento' dans la texte espagnol".]

l/ See paragraphs 9 to 12 of the report.

2. Such State shall immediately make a preliminary inquiry into the facts. b/
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides. b/
- [4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.] 2/

Article 7 3/

1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8 d/

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

2/ See paras. 16 to 18 of the report.

3/ See paras. 19 to 36 of the report.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9 b/

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10 a/

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11 a/

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12 b/

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13 b/

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14 d/

1. Each State Party shall ensure in its legal system that the victim of an act of torture be redressed and have an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15 b/

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16 e/

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12, 13 and [14] shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion." e/

a/ Adopted in 1979.

b/ Adopted in 1980.

c/ Adopted in 1981.

d/ Adopted in 1982.

e/ Not yet adopted.