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

Chairman-Rapporteur: Mrs. Nina Sibal (India)

A. ORGANIZATION OF THE SESSION

Introduction

1. On the recommendation of the Commission on Human Rights, contained in its resolution 18 (XXXIV), paragraph 2, the Economic and Social Council, by its resolution 1978/24, authorized the holding of a meeting of a working group open to all members of the Commission for one week immediately before the thirty-fifth session of the Commission. One of the tasks of this working group was to prepare concrete drafting proposals for the Commission on the basis of the relevant documents of the thirty-fourth session of the Commission and any comments received from Governments.
2. The pre-sessional working group was also concerned with matters relating to "Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms".
3. At its 1479th meeting the Commission on Human Rights by decision 1 (XXXV) decided that an informal open-ended working group should be established for the consideration of item 10 (a) on its agenda concerning the drafting of a convention against torture and other cruel, inhuman or degrading treatment or punishment.

Election of officers

4. At the first meeting of the pre-sessional working group, on 5 February 1979, Mrs. Mina Sibal (India) and Mr. Alioune Sene (Senegal) were elected by acclamation as co-Chairmen-Rapporteurs. Mrs. Sibal continued as Chairman-Rapporteur of the working group established by the Commission on Human Rights at its thirty-fifth session to continue the work of the pre-sessional working group.
5. The pre-sessional working group held three meetings at which it discussed proposals concerning a draft convention against torture and other cruel, inhuman or degrading treatment or punishment. Meetings were held in the afternoons on 5, 6 and 7 February 1979. The sessional working group held four meetings. These were on the afternoons of 23 and 27 February and 7 and 12 March 1979.
6. The draft report of the pre-sessional working group was issued in document CHR/XXXV/Items 10 and 11/WP.5 and Add.1 (Rev.1 in French only) of 8 February 1979. The draft report of the sessional working group was issued in document E/CN.4/WG.1/WP.3. At its meeting on 12 March 1979 the sessional working group adopted these reports and authorized the Chairman to amalgamate the three into a single report for presentation to the Commission. The present report is the result of that amalgamation.

Participation

7. The working group was open to all members of the Commission on Human Rights, the composition of which for 1979 was as follows: Australia, Austria, Benin, Brazil, Bulgaria, Burundi, Canada, Colombia, Cuba, Cyprus, Egypt, France, Germany, Federal Republic of, India, Iran, Iraq, Ivory Coast, Morocco, Nigeria, Pakistan, Panama, Peru, Poland, Portugal, Senegal, Sweden, Syrian Arab Republic, Uganda, Union of Soviet Socialist Republics, United States of America, Uruguay and Yugoslavia.

8. The following States were represented at the working group as observers: Belgium, Denmark, Finland, Germany, Democratic Republic of, Greece, Ireland, Italy, Jordan, Netherlands, Norway, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland and Yemen.

9. The United Nations High Commissioner for Refugees was represented at the working group.

10. Amnesty International and the International Commission of Jurists were represented at the working group.

Working documents

11. As the Commission requested in its resolution 18 (XXXIV) the working group had before it the report of the Secretary-General requested in paragraph 1 of the same resolution, summarizing the observations received from Governments (E/CN.4/1314 and Add.1 and 2), as well as relevant documents from its thirty-fourth session.

12. The point of departure for the working group's discussions was the "Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" which had been submitted by Sweden to the thirty-fourth session of the Commission on Human Rights (E/CN.4/1285).

13. At its meeting on 23 February 1979 the group accepted as the basis for its work a working paper submitted by the delegation of Sweden (E/CN.4/WG.1/WP.1) which contained a revised draft and accompanying comments based on the views submitted by certain Governments and summarized in document E/CN.4/1314 and on informal consultations. The numbering of articles in the present report is that of the revised Swedish draft. The numbers of the corresponding provisions of the original Swedish draft (E/CN.4/1285) are indicated in parentheses.

14. At its meeting on 5 February 1979 the Working Group discussed the possibility of consultations whereby interested participants could continue their discussions on the draft convention outside the Working Group.

Article 1 (Article 1 of the original draft)

15. Article 1 of the draft convention (E/CN.4/1285) was as follows:

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

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

16. During the course of the pre-sessional working group's discussions, three revised versions of article 1 were considered: the Chairman's summary of the Group's discussions (CHR/XXXV/Items 10 and 11/WP.1); a proposal of the delegation of Sweden (CHR/XXXV/Items 10 and 11/WP.2); and that of the International Commission of Jurists (CHR/XXXV/Items 10 and 11/WP.3 and WP.4). Various other proposals and suggestions were made orally. The version proposed by the delegation of Sweden was as follows:

- "1. For the purpose of the present Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation or with the consent or the acquiescence of a public official or other person acting in an official capacity for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, intimidating or coercing him or other persons, or for any reason based on discrimination of any kind. 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 establish wider prohibitions."

The version proposed by the International Commission of Jurists and orally amended was as follows:

- "1. The present Convention applies only to torture 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.
- "2. For the purposes of this Convention, torture means any act by which a person intentionally inflicts severe pain or suffering, whether physical or mental, on another person for such purposes as obtaining from the person tortured or a third person information or a confession; punishing the person tortured for an act he has committed or is suspected of having committed; or intimidating or coercing the person tortured or a third person; or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
- "3. This Article is without prejudice to any international instrument or national legislation which does or may establish prohibitions of wide application or definition."

17. Some delegates pointed out that the draft convention was the first attempt at the international level to define torture. They considered that the application of the Convention, and the definition of torture in Article 1 should not be restricted to "public officials". It was proposed that the Convention should be made applicable to all individuals under the jurisdiction of a contracting State. It was said that such an approach was preferable because of the possible incidence of acts of torture committed by those other than public officials. By contrast, the view was expressed that such acts should be covered by existing or future national law, and that international action was primarily designed to cover situations where national action was otherwise least likely.

18. It was generally agreed that the definition of acts committed by public officials should be expanded to cover acts committed by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity.

19. There was considerable discussion as to whether the article should specify the purposes for which acts of torture might be perpetrated. Some delegates suggested that it would be unduly restrictive to specify any purposes at all; others indicated that the list of purposes was not an exhaustive one. Several proposals were made for extending this list, and general agreement was reached to include as torture such acts as inflict severe pain and suffering for any reason based on discrimination of any kind.

20. It was also agreed that coercion should be included amongst the purposes listed in order to broaden their scope.

21. The view was expressed by some representatives that the reference in the original Swedish draft (E/CN.4/1235) to the Standard Minimum Rules for the Treatment of Prisoners should have been retained in the revised draft. Alternatively the limitation clause relating to "pain or suffering arising only from, inherent in or incidental to lawful sanctions" should have been deleted as too broadly worded. A number of other delegates proposed the deletion of the reference to the Standard Minimum Rules. It was stated that the Rules are limited in scope in that they dealt only with punishment relating to matters of prison discipline, and that they lacked legally enforceable status in international law. One delegation also pointed out that the Standard Minimum Rules did not cover treatment during the period preceding actual trial and sentencing after which the detained person was designated a "prisoner". Several delegates stated that it was desirable to refer to "existing international standards" or to use some other formulation in order to ensure that certain existing or future "lawful sanctions" did not frustrate the spirit of the Convention. However, it was widely agreed that, in the absence of specific existing international standards, it was not advisable to refer to universally acceptable principles.

22. Many delegates considered that paragraph 2 of article 1 of the original draft risked unduly restricting the definition of torture and should be deleted. Several delegates were of another opinion but stated that in any case such deletion should not prejudice the broader issue of whether subsequent articles of the Convention should apply only to torture or also to other forms of cruel, inhuman or degrading treatment or punishment.

23. The proposed revision of article 1 contained in CHR/XXXV/Items 10 and 11/WP.4 was designed to satisfy those delegates who sought a broad definition of torture, which covered both public and private individuals, as well as to clearly restrict the coverage of the Convention to acts of torture falling within the scope of paragraph 1 of the revision. It was suggested by some delegates that the order of paragraphs 1 and 2 of the revision should logically be reversed, but this was said to be unacceptable to other delegates.

24. At the first meeting of the sessional working group article 1 of a revised draft by Sweden (E/CN.4/WG.1/WP.1) was submitted. It was 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 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. 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 legislation which does or may contain provisions of wider application relating to the subject matter of this Convention.

25. It was stated that the revised draft of article 1 sought to achieve a compromise between the two alternative versions considered previously.

26. One delegation expressed some doubts concerning the term "mental torture" which it considered not precise enough for use in criminal law.

27. As regards the words "or for any reason based on discrimination of any kind" in the revised draft, it was requested that the following statement be included in the group's report:

"The United Kingdom shares the concern to eliminate all forms of torture, including any motivated by discrimination. The United Kingdom is doubtful of the need to isolate this particular motivation and in practical terms the United Kingdom thinks that there will in any case be difficulties in doing so with the necessary degree of precision for a criminal offence."

28. It was agreed that consideration of paragraph 2 of article 1 of the revised Swedish draft, which characterized torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment" should be postponed.

29. Article 1, paragraphs 1 and 3 of the revised Swedish draft was adopted by consensus.

Article 2 (Article 2 of original draft)

30. Article 2 of the draft convention (E/CN.4/1285) was as follows:

1. Each State Party undertakes to ensure that torture or other cruel, inhuman or degrading treatment or punishment does not take place within its jurisdiction. Under no circumstances shall any State Party permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

31. One delegate stated that while a State could undertake to adopt measures to prevent torture, it could not undertake to ensure that torture would never occur. Other delegates also questioned whether article 2 (1) was not too broad, or was juridically sound. It was also proposed that the obligations of States in article 2 (1) and article 3 could be consolidated.

32. It was stated that the phrase "within its jurisdiction" might be interpreted too widely so as to cover citizens of one State who are resident within the territory of another State. It was proposed to change the phrase to refer to "any territory under its jurisdiction". It was emphasized that such wording would cover torture inflicted aboard ships or aircraft registered in the State concerned as well as occupied territories.

33. Thereafter, a new text of article 2 (1) was proposed by the delegation of Sweden and adopted by the Working Group (see paragraph 37 below).

34. Several delegates considered that references to other forms of cruel, inhuman or degrading treatment or punishment should be deleted from article 2 because of the difficulty of defining in this context what was meant by that phrase. Other delegates reiterated the view reflected in the second sentence of paragraph 23 above.

35. One delegate proposed the addition to paragraph 3 of a provision indicating that superior orders may be considered in mitigation of punishment if justice so requires. It was agreed to include the addition in brackets for consideration by the Commission on Human Rights.

36. Article 2, as adopted by the Working Group, is therefore as follows:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

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.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture [However, this may be considered in mitigation of punishment if justice so requires].

One delegation indicated that it had some reservations regarding article 2 (3).

Article 3 of the original draft

37. Article 3 of the draft convention (E/CN.4/1285) was as follows:

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

38. It was agreed to delete article 3 on the basis that its objective had been achieved by the revised article 2 (1).

Article 3 (Article 4 of original draft)

39. The equivalent article in the original draft (E/CN.4/1285) was article 4 which was as follows:

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

Article 3 of the revised draft (E/CN.4/WG.1/WP.1) was as follows:

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

40. Questions were raised regarding the compatibility of the proposed article with previous extradition agreements concluded between States Parties and States not parties to the Convention against Torture. It was felt preferable not to include an exception for such cases in the text of the article lest such a limitation be interpreted as encouraging extradition to countries where the persons concerned would be subjected to torture. It was proposed, rather, that the following remark be included in the report of the Commission:

"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 signature of the Convention."

41. It was agreed that the words "to a State" should be added after the word "person" in the revised draft. These words were already present in the French and Russian translations of the draft.

42. The advisability of including the word "return" ("refouler") in the revised draft of article 3 gave rise to considerable discussion. In favour of the proposal it was said that there were strong humanitarian considerations for the inclusion of the word "return" which broadened the protection of the persons concerned. The concept was found also in Article 33 (1) of the 1951 Convention relating to the status of refugees. On the other hand the view was expressed that the 1951 Convention on Refugees was on a quite different subject and, in addition, was not broadly accepted. The question was also raised whether the inclusion of the concept of "return" in Article 3 might not require a State to accept a mass influx of persons when it was not in a position to do so. It was also pointed out that disagreement about the concept of return or refoulement had led to failure in the drafting of the Convention on Territorial Asylum. Consequently, it was proposed either that the term be deleted or that specific provision be made in the Convention for States to attach a reservation to their acceptance of the article.

43. The revised draft of article 3 provided that expulsion, return or extradition should not occur where there are "substantial grounds for believing" that a person would be in danger of being subjected to torture. The original draft had used the words "reasonable grounds, to believe" and other alternatives suggested were "substantial evidence indicating" and "substantial indications". The view was expressed that some of the formulations proposed - such as the word "grounds" - were too vague. The term "evidence" was also criticized as possibly too technical and lending itself to different interpretations in the various legal systems. The view was expressed that such problems were difficult to avoid and that the effective application of the provision would, in any event, depend upon the good faith of those concerned.

44. It was said that the purpose of the provision was to afford the greatest possible protection against torture and that the evidentiary requirement should not be too rigorous and should be kept to a minimum. It was further said that the burden of proof should not fall solely upon the person concerned.

45. It was proposed that the word "where" should be replaced by "as long as" or "when" so as to allow for extradition or expulsion in cases where new developments after a lapse of time had removed the danger of the person concerned being subjected to torture. On the other hand, it was felt that the word "where" was adequate to cover such situations.

46. At the meeting of the working group on 7 March 1979 the representative of the USSR proposed the following text for article 3 (E/CN.4/WG.1/WP.2):

"1. No State Party shall expel or extradite a person to another State where substantial evidence indicates that he may be in danger of being subjected to torture.

2. The evidence referred to in the preceding paragraph of this article includes above all situations characterized by flagrant and massive violations of human rights brought about when apartheid, racial discrimination or genocide, the suppression of national liberation movements, aggression or the occupation of foreign territory are made State policy.

3. The provisions of this article shall not be invoked as grounds for refusing to institute proceedings against persons who have committed crimes against peace or mankind, or war crimes as defined in the relevant international instruments".

47. It was said by the author that in paragraph 2 an attempt had been made to develop and illustrate the concept of "substantial evidence" by citing certain types of situations which arose as a result of State policy and which, in his view, were most conducive to torture practices. The situations referred to were based broadly on those mentioned in General Assembly resolution 32/130, although the lists were not identical. It was not possible to make an exhaustive list of relevant situations. The term "colonialism" was not included because it was encompassed in the broader reference to "the suppression of national liberation movements".

48. The view was expressed, on the other hand, that the listing of specific types of situations might be misinterpreted to imply that there were other situations in which torture could be tolerated. It was also said that the main purpose of the article was to ensure a separate evaluation of the case of each individual, and that it was thus not helpful to refer to general situations.

49. It was said by the sponsor that paragraph 3 of the USSR proposal, which took into account comments made by other delegations, aimed at ensuring that the article could not be invoked as a pretext for refusing to institute proceedings against persons who have committed the crimes specified. The paragraph would secure punishment for such criminals, but did not oblige States to extradite them to countries where they could be in danger of being subjected to torture.

50. One delegation proposed that Article 3 be deleted. It was agreed that discussion of article 3 should be suspended to allow further consideration and consultation.

Article 10 (Article 5 of the original draft)

51. Article 10 of the revised draft (E/CN.4/WG.1/WP.1) was as follows:

"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."

52. It was proposed that, in paragraph 2, the words "give effect to" should be used in place of "include" in order to make the requirement more substantial. However, the view was expressed that the existing wording was more effective.

53. Article 10 of the revised draft was adopted by consensus without amendment.

Article 11 (Article 6 of original draft)

54. Article 11 of the revised draft (E/CN.4/WG.1/WP.1) was as follows:

"Each State Party shall keep under systematic review interrogation 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."

55. The issue was raised as to whether the phrase "territory under its jurisdiction" included occupied territories. It was agreed that the phrase had the same meaning as had earlier been agreed upon in connexion with article 2 (1) of the revised draft.

56. An opinion was expressed that there were certain discrepancies between articles 10 and 11 which would require in the future some additional work of a drafting nature with regard to these texts.

57. It was agreed that article 11 should be amended to harmonize it with article 10 by referring to "interrogation rules, instructions, methods and practices".

58. Article 11 was then adopted as follows:

"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."

59. Following the adoption of the rest of the report of the working group it was suggested that the group should make a recommendation to the Commission that the drafting of the convention against torture and other cruel, inhuman or degrading treatment or punishment should be continued by an inter-sessional working group established for the purpose before the thirty-sixth session of the Commission. However, no agreement was reached on the matter.