

TABLE OF CONTENTS

INTRODUCTION:THE AIMS AND HISTORY OF THE OPTIONAL PROTOCOL.....	1
1. Prevention of torture - a matter of international concern.....	1
2. What is the Optional Protocol to the Convention against Torture?	2
3. The current stage of negotiations to prepare the text of the Optional Protocol..	5
RECOMMENDATIONS BY AMNESTY INTERNATIONAL ON THE DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT	7
1. A standing invitation should be extended to the international Sub-Committee to visit the territory of any state party to the Protocol.	8
(a) The importance of monitoring by an international Sub-Committee to make national monitoring effective.	9
(b) A need for guidelines for national mechanisms.....	11
(c)The universal prohibition of torture requires equal and universal application standards of prevention.	12
(d)The Sub-Committee should be free to plan their work and undertake visits according to their own assessment of need for their expertise.....	13
2. Scope of missions	14
(a) Modalities of visits must not undermine existing standards in international law.	15
3. Publication of the Sub-Committee's reports	16
4. No reservations article	17
5. National legislation	18
CONCLUSION.....	18

OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

Time to take a stand on the prevention of torture.

INTRODUCTION: THE AIMS AND HISTORY OF THE OPTIONAL PROTOCOL.

1. Prevention of torture – a matter of international concern.

Amnesty International supports a strong Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture), which establishes a strong international committee of experts to visit places of detention in order to make recommendations on the prevention of torture.

Amnesty International's campaign against torture this year has shown the world that the practice of torture and cruel, inhuman and degrading treatment continues in many countries. Victims of torture come from all ages, many countries of the world, and all sections of society – although most frequently, they are criminal suspects, or victims of discrimination on the grounds of race, sex, and sexual identity.¹ The variety and severity of the methods of torture and cruel, inhuman and degrading treatment and punishment defy belief. Even children are victims.² Frequently torture and

¹See “Crimes of hate, conspiracy of silence” (AI Index ACT 40/016/2001) for reports of torture used against sexual minorities; “Broken Bodies, Shattered Minds” (AI Index: ACT 40/001/2001) for reports of torture used against women; “Racism and the administration of justice” (AI Index: ACT 40/020/2001) for reports of torture and racial discrimination.

²See “Hidden Scandal, Secret Shame” (AI Index ACT 40/38/00) for reports of torture used against

cruel, inhuman and degrading treatment and punishment take place in state detention centres such as police stations, prisons and other places where persons deprived of their liberty are held.³

children.

³“Take a Step to Stamp Out Torture” (AI Index ACT 40/13/00).

Torture and cruel, inhuman and degrading treatment have long been recognized as matters of legitimate international concern. The international community, through intermediary bodies mandated by international human rights law - for example, the Special Rapporteur on torture, the Committee against Torture, and the Human Rights Committee - are entitled to scrutinise the practices of states, and make recommendations to address the practice of torture and cruel, inhuman and degrading treatment. The international prohibition against torture is so strong that, as the case regarding Augusto Pinochet's extradition from the UK to Spain showed, no person is immune from extradition and criminal prosecution if they are suspected to have committed torture, or caused torture to be committed.⁴ Indeed, the prohibition of torture is widely considered to constitute a peremptory norm or rule of *jus cogens* under international law:⁵ this means that the law against torture is unequivocal - torture is absolutely prohibited in all circumstances.

The prevention of torture is therefore a question of prevention of crime and a matter of international concern. It is a key obligation in the Convention against Torture.⁶ It is also a matter of humanitarian concern and compassion to take all possible steps to avoid torture happening to anyone.

2. What is the Optional Protocol to the Convention against Torture?

⁴R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)(House of Lords) 2 All England Law Reports 1999 at page 97.

⁵ See *The Prosecutor v Furundzija* (IT-95-17/1-T) Judgement, 10 December 1998 at para. 153-157; *Siderman de Blake v Republic of Argentina* (9th Circ. 1992) 965 F.2d 699 at 717.

⁶ Article 2(1) of the Convention against Torture states " Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

Article 11 states: "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 16 states: "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 I, 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."

“(T)he Special Rapporteur has emphasized the importance of a system of periodic visits by independent experts to places of detention and has called it one of the best preventive measures against torture.”⁷

The Convention against Torture is the international treaty which bans torture and cruel, inhuman or degrading treatment or punishment and sets the standards for methods by which states are to implement that ban at the national and international levels such as by carrying out investigations and bringing perpetrators to justice.

The draft Optional Protocol to the Convention against Torture (the Optional Protocol) is the draft text of an addition to the Convention against Torture which would assist the implementation of an existing obligation in the Convention against Torture - the requirements under Articles 2, 11 and 16 to take steps to prevent torture. The Optional Protocol is the legal agreement that would set up a Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Sub-Committee). This would comprise of independent experts serving in their individual professional capacities, and not representing their governments in any way. As the quotation above shows, international experts on torture have promoted the practice of such visits as a powerfully effective method of ensuring the prevention of torture.

The Sub-Committee would be mandated to carry out a system of regular visits to places of detention in any country which ratifies the Protocol, with a view to making practical recommendations to prevent torture and ill-treatment. The members of the Sub-Committee would make confidential recommendations to governments based on the visits as to how to improve the situation of detained persons so as to prevent torture. States Parties would be expected to implement these recommendations.

The Sub-Committee would be a body made up of experts in a range of fields, including penal management, criminal justice, medical and psychiatric expertise, and human rights, serving in their individual capacities. They would carry out missions to States Parties, having the power to visit any place in any country which ratified the Protocol where persons are deprived of their liberty. The missions would be of two kinds: periodic (regular, recurring and preventive) and *ad hoc*. Delegations consisting of at least two members of the Sub-Committee assisted by experts in necessary fields such as psychiatry and criminology, as well as translators, would carry out the missions to a country. They should be able to inspect any part of any place of detention they visit, interview any detainee without witnesses and receive the full cooperation of the relevant authorities. When a delegation completed its mission, it would prepare a report to be transmitted to the government of the country visited containing recommendations about making improvements in the situation of persons deprived of their liberty with a view to preventing torture.

⁷Report of the Special Rapporteur on torture, P. Kooijmans; E/CN.4/1989/15; 23 January 1989; page 3, paragraph 10.

A preventive approach can be particularly effective if it combines two techniques: fact-finding - to identify practices which facilitate human rights violations; and the initiation of dialogue with governments to discuss remedial measures. The principles governing relations between the Sub-Committee and governments would be cooperation and confidentiality. The favoured method for advancing the prevention of torture would be constructive and confidential dialogue between the Sub-Committee and governments. However, in the event that a government fails to cooperate with the Sub-Committee or refuses to implement the recommendations made in the report, a public statement on this matter or publication of the report may be made, as a last resort.

There is no shortage of international standards against torture and ill-treatment and, indeed, the draft Optional Protocol does not attempt to create new substantive rights. Yet governments - including many of the states parties to the Convention against Torture - too often do not fulfil their international obligations in this area. The Sub-Committee envisaged in the Protocol would seek to secure the implementation of these standards. However, it would not act as a quasi-judicial body investigating alleged violations of treaty obligations. Rather, the members of the Sub-Committee would go and see for themselves the conditions in places of detention and particular practices which may be instrumental in the occurrence of torture and ill-treatment - acquiring information governments sometimes lack even if they have the political will to institute reform. The Sub-Committee would enter into a dialogue with governments and make practical, confidential recommendations about ways to prevent torture and ill-treatment.

The Optional Protocol posits a radically different type of international mechanism from those already existing - the Special Rapporteur on torture, the Committee against Torture, the Human Rights Committee - in that it seeks to prevent torture, rather than respond to incidences of torture. Although the three bodies referred to make useful recommendations on the prevention of torture in the course of their activities, they cannot, as of right, go into a country to assess conditions in places of detention and make specific recommendations tailored to prevailing conditions. This is the key contribution that the Optional Protocol could make to the international struggle against torture, and the reason that Amnesty International strongly supports the successful conclusion of the negotiating process. As the former Special Rapporteur on torture, Mr Kooijmans, pointed out, the Optional Protocol "would to a certain extent be the final stone in the edifice which the United Nations has built in their campaign against torture."⁸

⁸ Report of the Special Rapporteur on torture, Mr. P.Kooijmans; UN Doc E/CN.4/1988/17; 12 January 1988, page 21, paragraph 65.

Support for an effective Optional Protocol and acknowledgement of the key role it could play has further been expressed during the Vienna World Conference on Human Rights.⁹ The principle that places of detention should be visited by experts is stated in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.¹⁰ The present Special Rapporteur on torture has also expressed his support for the practice of inspection of places of detention.¹¹

Non-governmental organizations (NGOs), including Amnesty International, have stressed that a weak Optional Protocol could be worse than none at all. A weak Optional Protocol would provide no effective prevention of torture, but might be used by states as an excuse to refuse to allow other visits to places of detention, such as those carried out by NGOs and the International Committee of the Red Cross, or as an excuse not to allow domestic NGOs to set up systems of visits at the national level. Such an outcome would defeat the goals of the Optional Protocol.

3. The current stage of negotiations to prepare the text of the Optional Protocol.

The presentation of the aims and key concerns regarding the content of the Optional Protocol has not changed substantially since the last major Amnesty International document on this subject was written in 1996,¹² and thus, the present document should be read in tandem with Amnesty International's previous paper. However, the dynamic of the negotiation has changed substantially since then and this has led to new matters of concern for Amnesty International and other human rights organizations. The recommendations in this

⁹ "The World Conference on Human Rights reaffirms that efforts to eradicate torture should, first and foremost, be concentrated on prevention and, therefore, calls for the early adoption of an optional protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which is intended to establish a preventive system of regular visits to places of detention." UN Doc A/CONF.157/23, of 12 July 1993, *paragraph 61*.

¹⁰ "In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment." UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 29.

¹¹ "Regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture." *Report of the Special Rapporteur on torture, N. Rodley E/CN.4/1995/34, 12 January 1995, paragraph 926 (c)*.

¹² "The Draft Optional Protocol to the Convention against Torture: Developing an Effective Tool to Prevent Torture" July 1996, AI Index IOR 51/01/96.

present document are based on a joint submission prepared by Amnesty International, Human Rights Watch and the International Commission of Jurists, which was sent to the Chairperson of the Working Group in July 2001.

The original draft of the Optional Protocol was proposed by Costa Rica in 1991. It anticipated the establishment of an international body of experts, drawn from many different countries. Until the session of the Working Group in February 2001, there had been several years of stalemate in the negotiations.

Some states raised concerns about national sovereignty: they were concerned that they would lose control over who could visit their country, as once the Optional Protocol is ratified, the Sub-Committee would have a right to enter freely. Also they were concerned that their criminal justice policies should not be dictated by foreigners who might have a political motivation for criticising their states. In particular it was feared that developed countries would criticise developing states for failing to implement conditions of detention that they could simply not afford. Other states were concerned that giving a Sub-Committee wide powers of access to “any place” where detainees might be held would lead to a state security risk, as Sub-Commissioners might wish to go to military installations etc, to see if detainees were held there.

As a response to this stalemate, the representatives of Mexico, broadly supported by other Latin American states, proposed a new draft of the Optional Protocol on 13 February 2001, based on the radically different premise that *national* mechanisms internal to the countries which ratify the Optional Protocol, will undertake visits to places of detention and make recommendations to prevent torture. It was hoped that substituting a national body for the international body envisaged in the original draft would satisfy the concerns of objecting states, outlined above.

Amnesty International, Human Rights Watch, and the International Committee of Jurists immediately expressed concerns that the use of national mechanisms, rather than an international body, might lead to ineffective visits being made.¹³

For several days in the negotiation the Working Group considered the new ideas brought forward in the Mexican draft, alongside the ideas in the original Costa Rican proposal, but without looking at the detail in the draft. Instead, they undertook a general debate on the concept of prevention of torture and the role of national and international mechanisms in the framework of the Optional Protocol, and the relationship between them.

On the 22 February 2001, the day before the end of the negotiation, the European Union, represented by Sweden, proposed a third text, broadly based on the original ideas in the Costa

¹³ Statement of Amnesty International, Human Rights Watch and the International Commission of Jurists, 14 February 2001.

Rican proposal, but including references to the important role that national mechanisms can play in the prevention of torture, and allowing for the international body to act alongside national mechanisms. A group of states expressed their preference to return to consideration of the original Costa Rican draft.¹⁴ Therefore, the Working Group closed with three drafts proposed for consultation: from Costa Rica (1991) Mexico (2001) and the European Union (2001).

The Chairperson of the Working Group is consulting widely with governments and non-governmental organizations, in order to prepare the next stage of the negotiation, which will take place in 14-25 January 2002.

¹⁴Switzerland, Georgia, Japan, New Zealand, and Canada made their statement to the Working Group on 22 February 2001.

The need to bring the Working Group's work to a successful conclusion is now urgent as already, this Working Group has been meeting regularly since 1991. Mrs Robinson, the High Commissioner for Human Rights, expressed concern at the last session of the Working Group that the process of negotiation should not continue indefinitely.¹⁵

Amnesty International is concerned that, without a strong political will on behalf of states, non-governmental organizations and civil society to take seriously and address penal conditions and practices in an effective way, the process to draft an Optional Protocol to the Convention against Torture will end in failure. Every day, Amnesty International receives and takes action on reports of torture and cruel, inhuman and degrading treatment in prisons, police stations and other places of detention. Once established, a Sub-Committee of international experts mandated by an effective Optional Protocol could do a great deal to create conditions where torture is used less and less, and could be a true asset in the world-wide fight against torture. It would be a great loss if the process of drafting an Optional Protocol ended in failure - and a tragedy for those at risk of torture in places of detention, all around the world.

**RECOMMENDATIONS BY AMNESTY INTERNATIONAL ON THE DRAFT
OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND
OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT.**

Amnesty International supports a strong Optional Protocol which establishes a strong international mechanism, the Sub-Committee of the Committee against Torture ("the Sub-Committee"), to visit places of detention in order to make recommendations on the prevention of torture.

¹⁵ The High Commissioner on Human Rights addressed the Working Group on 16 February 2001.

To be truly effective, the Optional Protocol should contain the following key points:

1. A standing invitation must be extended to the international Sub-Committee within the text;
2. The Sub-Committee must be guaranteed unlimited access to all places of detention and to all detainees and have the right to interview detainees without witnesses;
3. The Sub-Committee should have the option to publicize reports;
4. The Optional Protocol should not permit reservations;
5. The Optional Protocol should not permit any reference to national law which could be used to inhibit the work of the Sub-Committee.

1. A standing invitation should be extended to the international Sub-Committee to visit the territory of any state party to the Protocol.

This is central to the Optional Protocol and needs to be clearly stated in the text. The Sub-Committee must have the power to carry out missions to any state which has ratified the Optional Protocol without having to seek further permission for each individual mission.

The clandestine nature of the use of torture means that this possibility of scrutiny at any time is important. It is a useful reminder to national authorities responsible for law enforcement, and particularly law enforcement personnel themselves, that their actions may be scrutinised at any time, and that taking all possible steps to prevent torture is a continuous and on-going duty.¹⁶ Indeed, such visits - which allow the practice of the law enforcement personnel to be assessed at first hand - may greatly assist the national authorities in implementing their obligation to prevent torture: especially in cases where torture is committed by officials who deliberately use torture in contravention of the rules handed down by national authorities, and without the knowledge of the authorities.

If missions or visits take place only with express prior permission, there is a risk that only “model” installations, which have been specially prepared for a visit, will be seen. Visits to such model installations cannot give an assurance that long-term, securely entrenched procedures to prevent torture are being implemented throughout the jurisdiction of the state party. The Sub-Committee must see the true conditions within places of detention if it is to make effective recommendations to prevent torture.

¹⁶ See Articles 2(1), 11 and 16 of the Convention against Torture, set out above at footnote 6.

Similarly, unannounced follow-up visits are important to ensure that cooperation between the Sub-Committee and the state party develops, and that results are monitored and assessed to make sure that effective progress is made. Some states have raised concerns that allowing the Sub-Committee to make *ad hoc* visits may lead to certain countries being visited frequently, which would imply strongly that the country in question was practising torture - clearly such an implication would reflect very badly on the country in question. It was also said that visits might be made frequently on political grounds, in order to criticise or embarrass particular states. Amnesty International believes strongly that such criticisms are unfounded, as the members of the Sub-Committee would be international experts acting as independent professionals, not representatives of their government.

(a) The importance of monitoring by an international Sub-Committee to make national monitoring effective.

If the Optional Protocol establishes a strong international visiting mechanism, with a mandate to work with national mechanisms, then the abilities of both to prevent torture will be strongly enhanced in an effective circle of mutual co-operation and support.¹⁷

Some delegations at the Working Group in February 2001 supported the idea of establishing a treaty which creates only *national* visiting mechanisms, with no international monitoring input at all. Amnesty International believes that without an international element, the Optional Protocol would add nothing to existing international legal mechanisms regarding the prevention of torture. Already the Office of the High Commissioner for Human Rights offers confidential technical services to states which require advice on how to implement their obligations under the Convention against Torture. Articles 2, 11 and 16 of the Convention against Torture require states parties to take effective measures to prevent torture. Setting up a national mechanism - or encouraging the activities of civil society - to visit places of detention and advise on improvements appears to be a very basic and obvious step towards the effective prevention of torture, one which applies to all states parties to the Convention against Torture. The Human Rights Committee,¹⁸ the Committee against Torture¹⁹ and the

¹⁷In their book "Preventing Torture" Professors Evans and Morgan note that the recommendations of the European Committee for the Prevention of Torture are most frequently and effectively implemented where civil society groups within the state take them up and carry out on-going work with the authorities to publicize and implement them.

¹⁸ See for example the Human Rights Committee's recommendations to Sri Lanka published on 3 October 1995 (UN Doc: CCPR/C/79/Add.56); to Uzbekistan published on 26 April 2001 (UN Doc: CCPR/CO/71/UZB); and to the Democratic People's Republic of Korea (North Korea) on 26 July 2001 (UN Doc: CCPR/CO/72/PRK).

¹⁹ See for example, the Committee against Torture's recommendations to Armenia of published on 17 November 2000, UN Doc CAT/C/XXV/Concl/1.

Special Rapporteur on torture²⁰ have all encouraged the establishment of national mechanisms to visit places of detention for some time.

It might be useful for the Optional Protocol to set out the requisite needs that must be fulfilled by national mechanisms, as these are an important way to prevent torture. But for a treaty to present only these requirements would undermine the obligations that already exist under Articles 2, 11 and 16 of the Convention against Torture; because those states who have ratified the Convention against Torture, but not the Optional Protocol, might say that because they have not ratified the Optional Protocol, they are under no obligation to set up national visiting mechanisms or allow non-governmental organizations to do so.

In addition, Amnesty International believes that the obligation to take effective measures to prevent torture - including establishing national mechanisms to visit places of detention - already exists within the Convention against Torture, and it would be needless repetition to draft a new treaty simply to establish national mechanisms. Amnesty International believes that new international human rights treaties must develop human rights protection.

In order to prevent torture effectively, national mechanisms should assist the international body by supplying detailed reports on conditions within specific places of detention. They should promote the recommendations of the international mechanism between its visits to the state party, by making the recommendations known to the wider society and liaising with civil society groups also concerned with prison conditions. They should also visit places of detention more frequently than the international mechanism, and keep the Sub-Committee informed of their findings and recommendations. National mechanisms may not be able to work effectively on their own. The Sub-Committee can assist even the most effective and independent national mechanisms when they require support at the international level, for example in cases where a national government seeks to limit their activities or fails to act on their recommendations.

During the recent session of the Working Group in February 2001, certain states suggested that the Committee against Torture could fulfil the role of supporting national mechanisms, and that there was therefore no need to set up a new Sub-Committee. Amnesty International, with colleague non-governmental organizations, carefully reviewed the strengths and weaknesses of this alternative before reaching its own current position. Based on that extensive review, Amnesty International strongly disagrees that the Committee against Torture could fulfil such a role. Conditions in places of detention which may give rise to torture and cruel, inhuman and degrading treatment require urgent international attention and action. The Committee against Torture meets only three times a year, and as Dr Mavromatis of the Committee against Torture pointed out when he addressed the Working Group on 20 February 2001, it is already over-charged with work. Indeed, he suggested that the Committee against Torture would welcome a strong Sub-Committee to carry some of its workload.

²⁰See above, footnotes 7, 8 and 11.

Therefore, a new international body, with sufficient financial, personal, and other resources, is essential.

Amnesty International believes that the proposed international Sub-Committee should be strong and independent, with full powers to make effective visits. As the Special Rapporteur on torture, Sir Nigel Rodley, pointed out in the Working Group on 15 February 2001, it is important to visit - in person - a place in order to assess conditions of detention. If the international body does not have the power to undertake visits at its own discretion, then it cannot adequately assess conditions of detention, or the work of a national institution and the appropriateness of its actions *vis-à-vis* the actual conditions of detention. Amnesty International is particularly concerned that Article 22 of the Mexican draft could easily lead to ineffective, purely cosmetic visits taking place, following which the Sub-Committee would not be empowered to visit, even though no effective assessment of conditions in places of detention had taken place. This would defeat the entire purpose of the Optional Protocol.

The key obligation of any state party to the Optional Protocol must be an acceptance that *effective* visits be made to places of detention in order for experts to make recommendations to prevent torture - the international mechanism should have full powers to undertake such visits, and be given adequate resources, both human and financial, to do so.

(b) A need for guidelines for national mechanisms

Amnesty International is also concerned that discussions within the Working Group continue to address the possible role of national mechanisms without firm guidelines being proposed regarding the independent and effective functioning, and appropriate working conditions or practices of the national mechanisms. Such mechanisms should be required to use the most up to date standards in carrying out their work, including the UN Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights²¹ (“the Paris Principles”), and handbooks such as “Making Standards Work” by Penal Reform International (Second Edition, 2001) the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known as “The Istanbul Protocol” published by Physicians for Human Rights, 1999). *The Sub-Committee, in consultation with national mechanisms, states, non-governmental organizations and independent experts should be asked to prepare as a matter of priority, a new and detailed set of guidelines regarding the independence and effective functioning of national mechanisms, informed by most recent practices with national*

²¹ UN Doc A/RES/48/134 of 20 December 1993.

human rights institutions, and existing mechanisms for visiting places of detention.

The negotiations during the Working Group session in February 2001 showed that there are already a great variety of national visiting mechanisms. For example, the Attorney General or head of the prosecutor's office, committees of judges, and so on, may be mandated by national law to carry out visits to places of detention to assess conditions. Amnesty International believes that while there is no single model for all national mechanisms, all must be able to work effectively and independently of any undue influence by the state, consistently and with the most stringent possible safeguards.

Amnesty International is also concerned that Article 23 of the Mexican draft would permit states parties to "opt-in" to allow visits by the Sub-Committee. Amnesty International believes strongly that any state which ratifies the Optional Protocol should make a definite commitment to full international scrutiny. At most, a limited provision to opt-out of international visits, for a short, specifically limited length of time – not longer than one or two years – could be acceptable, but only if linked to a commitment to develop, in cooperation with Sub-Committee, an effective program of action to bring prisons and other places of detention into compliance with international law and standards. Anything less specific would make the treaty obligations too vague and uncertain, and states parties could delay "opting-in" indefinitely – in which case, they would have added nothing to their existing obligations, while claiming credit for having ratified a human rights instrument.

(c)The universal prohibition of torture requires equal and universal application standards of prevention.

Amnesty International is concerned that a false opposition between the “European model” and a “world-wide model” has led to a compromising emphasis on national mechanisms at the expense of a strong international mechanism.

The prevention of torture is a universal value. The ideas inherent in the European Convention against Torture and Inhuman or Degrading Treatment or Punishment are the basis for the original Costa Rican text and the European Union text which was put forward at the last Working Group. However, it is of concern that the opposition has been made by some states between a “European” model (the European Union draft and the Costa Rican draft) and a “world-wide” or specifically “developing world” model. Amnesty International supports a properly resourced international model based on the Costa Rican draft and incorporating the five key principles set out in this paper because it allows for effective scrutiny and assessment of penal practices, in order to prevent torture.

Although some delegations in the Working Group referred to the requirement for flexibility according to regional differences, it is the experience of our organizations that the tools needed to assess conditions within places of detention and to make recommendations to prevent torture are the same world-wide. One of these tools is a

group of international experts with the power to go into places of detention, and make a full, frank and thorough investigation of actual conditions; through their experience of the many problems and challenges of penal management they can suggest solutions, based on the promotion of best practices from countries all over the world. Through visits, the experts share the benefit of their knowledge directly.

Even though there is a wide variation in prison conditions world-wide according to policies and resources available from country to country, there are some issues that are not susceptible to relative interpretation; these are the standards agreed by the international community, such as the UN Standard Minimum Rules for the Treatment of Prisoners.

Both poor prison conditions and torture are to be found in developed and developing countries. The failure to combat the practice of torture and the continuing impunity of those who have used torture results from the lack of political will rather than problems of development. Amnesty International has documented examples of prisons in the developing world where although conditions are basic, the detainees are treated with humanity; equally, Amnesty International has documented examples of prisons in the developed world where torture and cruel, inhuman and degrading treatment is practised frequently.

It should be borne in mind that states all around the world have ratified the Convention against Torture. An effective Optional Protocol would be a tool to complement obligations already adopted by states

parties and facilitate the proper implementation of the standards agreed to by all the states parties to the Convention against Torture. As of August 2001 there are 126 states parties, in all regions of the world. Therefore the Optional Protocol could potentially have a wide effect across the world: all the more reason why the effectiveness of this mechanism should be ensured.

(d) The Sub-Committee should be free to plan their work and undertake visits according to their own assessment of need for their expertise.

Amnesty International is also concerned that in the recent Working Group session, states continue to consider that if the Sub-Committee is given a wide discretion to make visits, particularly follow-up visits, this could lead to a politicization of the process, and provide a method of undermining or criticising developing states.

First and most importantly, the proposed Sub-Committee is not a political body, it is an expert body charged with providing professional expertise. The original Costa Rican draft allowed visits and recommendations to take place confidentially, with an exceptional option to publicise concerns if the Sub-Committee's recommendations met with an absolute failure to act by the state party. The original and true aim of this instrument is to prevent torture – for the Sub-Committee and the state party to work together to improve conditions.

Secondly, the fact that a follow-up visit is taking place need not automatically imply that conditions within the places of detention in that state are particularly bad. Transparency in these cases (for example, if a state and the Sub-Committee issued a statement promoting a fruitful exchange of views and experiences, and showing that the state is co-operating in a wide ranging and thorough assessment of its practices in a variety of places of detention within its territory) can work in a state's favour by showing a true commitment to preventing torture.

The experience of the European Committee on the Prevention of Torture shows that in all states, certain aspects of the regimes within places of detention are not as they should be, regardless of the level of development or political situation within the country, even though of course, the extent to which problems exist varies widely. Therefore, the fact that a state is visited by the Sub-Committee need not be seen as implying particular criticism of conditions of detention in that state.

The work of the Sub-Committee needs to be undertaken through a carefully considered program of visits, on the basis of need for international expertise to assess conditions of detention and promote best practice. Amnesty International therefore believes that the provision in Article 23(2) of the Mexican draft for visits to planned according to drawing of lots to be entirely inappropriate.

2. Scope of missions

The Sub-Committee must be guaranteed unlimited access to all places of detention and to all detainees, at any time, without advance warning, and have the right to interview detainees in confidence.

The Optional Protocol aims to facilitate cooperation in the prevention of torture between the state and the Sub-Committee. In order to fulfil this role, full information must be made available to the Sub-Committee from those who have experienced torture, witnessed torture, or dealt with the results of torture (for example, medical staff who have treated injuries of torture victims, or the family of the tortured person). Such people should be able to report fully, frankly and without fear of repercussions. Without this guarantee, the Sub-Committee will not be able to prepare a full picture of the causes and circumstances of incidences of torture or cruel, inhuman and degrading treatment; for example, to make an assessment of whether torture is the action of certain individuals, or a failure of legitimate methods of investigation into allegations of crimes; or the result of discriminatory attitudes towards a certain sector of the population, whether in the prison population or in the wider community.

There has been much discussion in previous negotiations about the scope of visits – whether these should be confined to installations such as prisons and police stations, or anywhere where persons may be held. The experience in recent decades of the phenomenon of “disappearance” and the use of clandestine detention centres as places of torture means that it is essential that members of the

Sub-Committee should have the widest possible access to any place where persons are detained, without exception.

Amnesty International is particularly concerned that Article 1 of the European Union draft contains a serious problem – the requirement that “deprivation of liberty” is defined as pursuant to an “order” by a public authority. This may lead to uncertainty about what constitutes an “order” in various national jurisdictions. Subsequently, those detained without a specific written, judicial, or other type of order might not be deemed to be “deprived of liberty” for the purposes of this Protocol, and the Sub-Committee or national mechanism will therefore not be entitled to visit. Also, there are many cases where detention is not undertaken by public state officials, but is undertaken at the instigation of, or with the consent or acquiescence of, public state officials. The Sub-Committee must be empowered to visit such detainees.

(a) Modalities of visits must not undermine existing standards in international law.

The original draft of the Optional Protocol put forward in 1991, and indeed, the European Convention for the Prevention of Torture, was inspired by the work of the International Committee of the Red Cross (ICRC). The ICRC used the mandate set out in the Geneva Conventions to seek the agreement of governments to visit prisoners of war, and political prisoners held in connection with "internal tensions and troubles" to ensure that prisoners be treated humanely and to carry out immediate humanitarian aid such as medical treatment, and

provision of food and other necessities of life. The ICRC has been frequently granted access to prisoners to carry out their humanitarian work, mainly because the organization scrupulously abides by the condition that their findings remain confidential.

Both the European Convention for the Prevention of Torture and the Costa Rican draft of the Optional Protocol sought to improve the effectiveness of the ICRC's model by dispensing with the need to seek permission once the state concerned ratified the treaty, and by allowing publicity in certain circumstances (see below). However, despite this difference in the method and terms of granting access to prisoners, the modalities of how the visits take place are a key standard in the Geneva Conventions, the core of international humanitarian law, allowing prisoners safe access to those who can assist them, and the visitor appropriate freedom of action to fulfil his or her humanitarian role.

The modalities of visits provided for in the Geneva Conventions of 1949 should therefore be used by both national mechanisms and the international Sub-Committee in setting out the modalities for visits to places of detention; these modalities should be specifically included in the body of the Optional Protocol and should not be undermined in any way at any time.

It would be paradoxical and unacceptable if the standards set out in the Geneva Conventions, which are available during armed conflicts, were not available during peacetime or during states of emergency falling short of armed conflict.

These modalities are that:

- 1. the visiting mechanism shall have access to all places of detention, and have access to all premises in which detainees may be held;*
- 2. the visiting mechanism shall be able to interview detainees without witnesses, either personally or through the mechanism's own interpreter;*
- 3. the visiting mechanism shall have liberty to select the places they wish to visit;*
- 4. the duration and frequency of visits shall not be restricted.²²*

The only reason for denying access to a particular place of detention should be physical danger equal to the provision within the Geneva Conventions regarding compelling military necessity – which in practice means that a place of detention should only be out of bounds for visits if it is under weapon fire, and only during the period of danger. State security should not be an issue which would affect visits. The Sub-Committee itself should assess and take appropriate precautions regarding any other risks, such as risk to health through disease prevalent within a certain institution.²³

²² The Third Geneva Convention, Article 126; the Fourth Geneva Convention, Article 143.

²³ The European Union draft contains a serious fault in that it allows a variety of reasons to be given for refusing a visit to a particular institution: see Article 3.3.

3. Publication of the Sub-Committee's reports

In the event that a state refuses to cooperate or fails to take appropriate steps to implement its recommendations, or partially releases the Sub-Committee's report (with the aim or effect of giving a misleading impression about the level of torture or cruel, inhuman or degrading treatment or punishment taking place within its jurisdiction) the Sub-Committee must be able to make a public statement or publish its report.

Publication of reports with states' consent assists transparency, and promotes the prestige of states parties who cooperate with suggestions and implement appropriate changes in their penal conditions and practices on the advice of the Sub-Committee.

In those rare cases where a state refuses to cooperate with the Sub-Committee, acts obstructively or openly in bad faith, or fails to take steps to implement changes within its power and possibilities, such a state party can be deemed to be failing to respect obligations with regard to the Optional Protocol. In such cases there needs to be some effective response, otherwise there would be no reason for such a state to cooperate with the Sub-Committee - it could ignore its obligations under international law with impunity. In that case, the Optional Protocol would be an entirely ineffective mechanism.

Therefore, the preventive goal of the Optional Protocol must be reinforced by the sanction of publication as a last resort. The practice of the European Committee for the Prevention of Torture in this respect shows

that the publication of a report without the consent of a state party is a measure which is very rarely taken, and is only taken as a measure of last resort.

4. No reservations article

No reservations to the Optional Protocol should be permitted.

Reservations are explicit written limitations that a state makes to its obligations under a treaty: for example, a state may state that it does not consider itself bound by a particular provision of a treaty, or will only respect the treaty under certain circumstances or to a certain extent.

The Optional Protocol sets up a mechanism of inter-related functions by personnel who are experts in analysing the causes of torture and implementing methods to prevent torture. Reservations to any part of the Optional Protocol would inhibit the proper functioning of the Sub-Committee.

The activities of the Sub-Committee need to be maintained in a uniform manner applying to all states parties equally if full and impartial assessment of conditions in places of detention is to be ensured. If reservations to the Optional Protocol were to be permitted, then states which use reservations would be able to maintain a very different relationship with the Sub-Committee and a different level of scrutiny to those states who do not enter reservations. Such states could render their participation in the treaty entirely meaningless.

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women is an instrument which, like the

proposed Optional Protocol, supplements existing legal obligations with an instrument to enhance its implementation. It states categorically that no reservations shall be permitted. Similarly, the Rome Statute for the International Criminal Court also bars reservations. Therefore, there are clear precedents supporting the express exclusion of reservations in treaties which establish mechanisms to promote and enforce human rights.

5. National legislation

References to national legislation in the Optional Protocol must not be used to limit or restrict the work of the Sub-Committee.

The proposed article X in the Costa Rican draft may be used to inhibit the work of the Sub-Committee. Article 23 in the current Costa Rican confirms the Sub-Committee members' diplomatic status, ensures that they shall respect the laws and regulations of the visited state, and shall refrain from any action or activity incompatible with the impartial and international nature of their duties. It is not clear why any further limitations on the activity of the Sub-Committee are necessary.

Amnesty International's conclusion: the international visiting mechanism proposed for the Optional Protocol is a small but important step - international action to prevent torture must move forward, not stand still.

At the end of the Working Group session in February, it became clear that the Mexican proposal as it stands is unacceptable to many states and

will not gain consensus – the European Union have put forward their own, quite different, proposal.

The key point of contention is whether there should be a strong international mechanism to protect prisoners from torture, working either on its own or in conjunction with a national mechanisms and civil society groups. Both Mrs Robinson, the High Commissioner on Human Rights,²⁴ and Sir Nigel Rodley, the Special Rapporteur on torture, expressed their support for a strong international mechanism to prevent torture.²⁵ In a joint statements to the Working Group, Amnesty International, Human Rights Watch and the International Committee of Jurists emphasised the need for an international mechanism.²⁶ Dr Mavromatis of the Committee against Torture in his address to the Working Group emphasised that weak national mechanisms can act as “whitewash” to protect governments who carry out torture and can therefore help to perpetrate torture.

It is therefore clear that principled and expert opinion on human rights law is against a weak Optional Protocol which establishes an obligation to set up national mechanisms alone. Such an Optional Protocol adds nothing to international law and could even act as a shield to the practice of torture. Therefore, to be effective, the draft Optional Protocol must establish a strong *international* body.

Amnesty International urges all those taking part in the negotiations to work towards this aim.

²⁴ In her address on 16 February 2001, Mrs Robinson reminded the Working Group that the original aim of the Working Group was “to create a strong international mechanism for the prevention of torture, it is important not to lose sight of this.”

²⁵ In his address in the afternoon of 15 February 2001, Sir Nigel Rodley emphasized that he was in favour of an international system of prison visits, supported by political will, resources and personnel: and that he was in favour of strong national and international mechanisms.

²⁶ Joint statement of Amnesty International, Human Rights Watch and the International Commission of Jurists, 14 February 2001.

