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THE DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

Developing an Effective Tool to Prevent Torture

"(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."[1]

Torture and ill-treatment of persons deprived of their liberty are a reality today throughout the world. Each year Amnesty International receives reports of torture and cruel, inhuman or degrading treatment in over 100 countries in **all** regions of the world. In addition to those survivors of torture who live to give testimony of the brutality to which they have been subjected, thousands every year are unable to provide such accounts because they have died in detention or after release due to torture and ill-treatment. The international community has tried to develop mechanisms to combat these particular human rights violations and has created a range of such mechanisms at the international level such as the United Nations (UN) Committee against Torture and the UN Special Rapporteur on torture. Increasingly, an emphasis has been placed on prevention in the battle against torture. It is no longer sufficient to react to serious violations which have already occurred; it is time to develop more pro-active strategies to protect individuals at risk. The draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) represents one of the key efforts in this vein at the international level.

This document provides an overview of the draft Optional Protocol: its history, some of its key components, and Amnesty International's position on a number of contested issues in the text. It also suggests ways in which non-governmental organizations (NGOs) and others might wish to work towards a strong Protocol.

1. What is the Draft Optional Protocol to the Convention against Torture?

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 (the Protocol) is the draft text of an additional protocol to this Convention. It is the draft text of an instrument that would set up a Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Sub-Committee) made up of independent experts serving in their individual capacities. This body would be mandated to carry out a system of periodic visits to places of detention in any country which ratifies the Protocol, with a view to preventing torture and ill-treatment. The members of the Sub-Committee would make confidential

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

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 criminal justice 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.

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 fulfill 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 - information which 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.

1.1. How Does the Protocol Fit Into the Existing Machinery to Combat Torture?

The emphasis of this mechanism would be on prevention, making it unique within the human rights machinery of the UN. Most of the UN mechanisms related to torture do not fully come into play until after acts of torture have been committed. The Convention against Torture does

require states to take a wide range of preventive measures including training of law enforcement personnel and others, reviewing interrogation and custody instructions and rules and enacting legislation banning torture. However, other than the review of states' reports every four years by the Committee against Torture, there is no way of implementing this preventive aspect. The Sub-Committee would be able to recommend specific ways that the provisions of the Convention against Torture and other relevant standards should be implemented in places of detention, based on investigation of actual practice during missions.

Under the Convention against Torture, investigations can only be carried out by the Committee against Torture under Article 20 when it receives reliable information which indicates that "torture is being systematically practised" in a state, i.e. torture has already occurred and has been documented. The inter-state and individual complaints procedures under Articles 21 and 22 are similar, requiring either that "a State Party is not fulfilling its obligations under this Convention" (Article 21(1)) or that individuals are "victims of a violation..of the provisions of the Convention."(Article 22(1)) In other words, torture must have already been committed and discovered for these investigation and complaints mechanisms to be triggered into action.

Thus, the optional Protocol is both truly necessary and innovative. Former UN Special Rapporteur on torture, Peter Kooijmans stated in 1991 that the protocol's aim of setting up a system of international preventive visits "would to a certain extent be the final stone in the edifice which the United Nations has built in their campaign against torture."[2] It would build on the system which started with the UN General Assembly confirming the formal prohibition of torture and the elaboration of more detailed standards in the Convention against Torture.

The system of periodic visits envisaged in the Protocol would complement visits undertaken in many parts of the world at both the regional and national levels. In Europe, visits are carried out at the regional level by a mechanism very similar to that envisaged in the Protocol: the European Committee for the Prevention of Torture set up by the Council of Europe. In the inter-American system the Inter-American Commission of Human Rights carries out *ad hoc* country visits, recently including visits focusing on conditions of detention in the context of a new working group on prisons and conditions of detention. These visits are different to those envisaged in the Protocol because they are not periodic and only a few are carried out per year on an *ad hoc* basis. They do, however, spring from the same international trend towards setting up oversight mechanisms to scrutinize detention conditions. In the African system, a decision in principle has been taken by the African Commission on Human and Peoples' Rights to appoint in October 1996 a Special Rapporteur on prisons who is intended to undertake prison visits.

In many countries visits are also carried out at the national level by ombudspersons, members of the judiciary, NGOs, and others. In fact such visits are called for by the United Nations Standard Minimum Rules for the Treatment of Prisoners in Rule 55: "There shall be a

[2]Report of the Special Rapporteur on torture, P. Kooijmans, E/CN.4/1991/17; 10 January 1991; page 92, paragraph 300.

regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority."

The mechanism to be created by the Protocol will play many important roles in relation to other systems of visits. The work of the Sub-Committee will bring international attention and pressure to bear on detention issues and will offer both expertise in relevant fields and international comparative perspective. Most importantly, the Protocol will aim to implement the prevention of torture at the international level, contributing towards universal implementation of universal standards. Since there are 96 States Parties to the Convention against Torture as of 8 May 1996, the possible impact of the Protocol is far-reaching. Thus, the system created by the Protocol should be seen as complementary, rather than overlapping. Torture is a global problem demanding a global response.

Finally, it is important to stress, that as the Protocol's title clearly implies, it is an optional Protocol. The States Parties to the Convention against Torture may choose whether or not to ratify the protocol. States which ratify the Convention against Torture in future may or may not ratify the Protocol and thereby undertake the related obligations.

2. The History of the Draft Optional Protocol to the Convention against Torture

2.1. The Origin of the Draft Text

While the Convention against Torture was being considered by the Commission on Human Rights (Commission) in 1980, the Government of Costa Rica submitted a text of the draft Optional Protocol. This text had been conceived by the Swiss Committee against Torture (which later became the Association for the Prevention of Torture) and the International Commission of Jurists in 1978.

At the time, the Commission decided to defer discussion of the draft Protocol until 1989 for several reasons. The first was that the Convention against Torture, itself, had not yet been adopted and would not be until 1984. Secondly, regional human rights machineries were in the process of being developed. However, the only regional system which developed a comprehensive system of preventive visits was the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) which entered into force on 1 February 1989 and created the European Committee for the Prevention of Torture (CPT).

Given these developments, the draft Protocol was revisited by international experts to take into consideration the development of the Convention against Torture and the ECPT, culminating in an expert meeting in Geneva in November 1990. The updated draft text was then submitted to the Commission in 1991 by Costa Rica. In 1992, the Commission in Resolution No. 43/92, created an open-ended inter-sessional working group to elaborate a draft

Optional Protocol which would use the 1991 Costa Rica draft text as the basis for its discussions.

2.2 The Progress of the Working Group

Since 1992 this working group has been meeting for two weeks a year to consider the draft text. The first session was devoted to a general discussion of the text and underlying principles. A first reading of the entire draft text, article by article, was carried out during the 1993 and 1994 sessions and completed during the 1995 meeting. At these meetings, participants debated key provisions in the text, proposed alternative articles and negotiated wording. Agreement on wording has been reached by the often labourious process of consensus. The outcome of this reading is a draft text with many of the key passages in square brackets, meaning that there is not yet a consensus in the working group about their contents. Some articles have several alternative formulations. The second reading of the draft text is set to begin at the next working group meeting currently scheduled for 14 - 25 October 1996. This reading will try to finalize the text. The portions of the text in square brackets will be the main focus of argument. The struggle for the soul of the protocol: the process that will determine whether or not an effective international mechanism to prevent torture is created in the foreseeable future - will be set in motion.

The working group has been open to all states, both members and non-members of the Commission, as well as to inter-governmental organizations and NGOs, many of which have taken a very active role.

States which have attended include Algeria, Argentina, Australia, Austria, Brazil, Canada, Chile, China, Costa Rica, Cuba, Denmark, Egypt, El Salvador, Ethiopia, Finland, France, Germany, India, Iraq, Israel, Japan, Mexico, Netherlands, Nigeria, Norway, Russian Federation, Senegal, South Africa, Sweden, Switzerland, Syria, United Kingdom, United States and Uruguay.

NGOs have participated very actively in the working group sessions; sharing their expertise in working against torture with government delegations. In recent years the NGOs which have attended include the Association for the Prevention of Torture, the International Commission of Jurists, Human Rights Watch, the International Federation of Christians Against Torture, the Service for Peace and Justice in Latin America, as well as Amnesty International. The International Committee of the Red Cross (ICRC) has also attended some sessions. Amnesty International has actively participated in all working group sessions.

2.3 Support for a Strong Protocol

The idea of the Protocol has gained tremendous support at the international level from some governments, while other governments have raised considerable objections to fundamental aspects of the text. The Protocol has also gained the support of many NGOs active in the prevention of torture and other human rights violations, including Amnesty International, who

see it as integral to their work. Successive Special Rapporteurs on torture have also declared their support in principle for the ideas underlying the protocol. In the words of the former Special Rapporteur on torture, "(t)he importance of a system of visits as a preventive measure against torture and similar practices can hardly be exaggerated..."[3] The current Special Rapporteur on torture Nigel Rodley stated that "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."[4]

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly in 1988, calls for regular visits to places of detention by independent experts as a means of supervising the treatment of prisoners in accordance with relevant laws in its Principle 29. The former Special Rapporteur on torture, Peter Kooijmans, commenting on the Body of Principles stated that "the significance of such a system of visits, preferably by international teams, as a preventive measure can hardly be overestimated."[5]

Recognizing the unique value of the protocol, the 1993 World Conference on Human Rights affirmed that :

"(E)fforts to eradicate torture should, first and foremost, be concentrated on prevention and, therefore, call(ed)for the early adoption of an optional protocol to the Convention against Torture and Other Cruel, Inhuman and (sic) Degrading Treatment or Punishment, which is intended to establish a preventive system of regular visits to places of detention."[6]

NGOs, the current Special Rapporteur on torture, and others have stressed that a weak Protocol could be worse than none at all. A weak Protocol would provide no protection 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 ICRC, or as an excuse not to set up systems of visits at the national level. Such an outcome would defeat the goals of the Protocol and must be opposed by those committed to the struggle against torture.

3. The Elements of an Effective Optional Protocol to the Convention against Torture

[3] Report of the Special Rapporteur on torture, P. Kooijmans; E/CN.4/1988/17; 12 January 1988; Page 21, Paragraph 65.

[4] Report of the Special Rapporteur on torture, N. Rodley; E/CN.4/1995/34; 12 January 1995; Page 172, Paragraph 926c.

[5] Report of the Special Rapporteur on torture, P. Kooijmans; E/CN.4/1990/17; 18 December 1989; Page 82, Paragraph 267.

[6] Vienna Declaration and Programme of Action, A/CONF.157/23; 12 July 1993; Page 22, Paragraph II B. 5 (61).

The key elements for an effective Protocol fall into four categories: Basic Principles of Missions; Modalities of Missions, including Relation to Other Mechanisms; Organization and Structure and Fundamental Principles. This discussion will refer to two drafts of the Protocol: the draft text submitted by Costa Rica to the Commission in 1991 (1991 Costa Rica draft text)[7] and the text which is the outcome of the first reading (current text).[8] These two texts constitute the basis on which the working group will carry out the second reading.

3.1. Basic Principles of Missions

This section focuses on how the Sub-Committee will approach missions and the principles that will govern how missions to a state are to be decided upon and planned.

3.1.1 Consent to Missions by the Sub-Committee

The most fundamental issue is that of state consent to missions[9] by the Sub-Committee. The Sub-Committee should be able to send a delegation to any state which has ratified the Protocol without having to seek further permission for each individual mission. Ratification should constitute prior consent to missions. Otherwise, ratification of the Protocol would count for little. States would not take on any new obligations by ratifying the Protocol beyond those already imposed by the Convention against Torture. The ECPT provides simply in Article 2 that "Each Party shall permit visits in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority." That is the basic obligation of the Convention and no further consent is required.

Article 1 of the current draft text makes this point clear by stating simply: "A State Party to the present Protocol shall permit visits in accordance with this Protocol to any place in any territory under its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held...." This is the fundamental obligation of the protocol. Without missions and visits, the Sub-Committee would not be able to make recommendations, there would be no dialogue with the government, no functioning of the Protocol and hence, no prevention of torture.

Still, some states have challenged this basic article, believing that each mission by the Sub-Committee should require the prior consent of the state to be visited. This position is included in a footnote to the Article in the current text. Furthermore, an alternative formulation

[7] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations Office at Geneva addressed to the Under-Secretary-General for Human Rights; E/CN.4/1991/66; 22 January 1991.

[8] This text is attached as Annex I to Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; E/CN.4/1996/28; 25 January 1996.

[9] In the draft text, "mission" means a trip to a country. A "visit" is a trip to a place of detention within that country within the context of a mission. Thus, one mission will contain many visits.

of Article 8 proposes that missions "be undertaken by the express consent of the State Party concerned." The struggle over this point is likely to dominate the beginning of the second reading of the text and will be a crucial issue in determining whether or not the Protocol will be effective.

The current Special Rapporteur on torture has underlined that this principle is a *sine qua non* of an effective Protocol, without which he believes "a serious question would arise regarding the value of the exercise." In his words, the Sub-Committee "must have a clear right to visit any State Party, both periodically and on an ad hoc basis, and the State Party must have a corresponding obligation to grant such access."[10] As the Special Rapporteur's statement indicates, it is not merely that missions must be consented to by ratification, but also that the missions must be able to occur periodically, ie. with a certain frequency. Otherwise, they will be ineffective and could even put detainees at greater risk because of the lack of follow up.

Amnesty International strongly believes that if the Protocol is to provide a useful tool in the struggle to prevent torture, the Sub-Committee must have the right to visit any State which has ratified the Protocol without having to seek further permission for each individual mission.

3.1.2 Programs of Missions

Article 8 of the 1991 Costa Rica draft stated simply that "(t)he Sub-Committee shall establish a programme of regular missions to each of the State Parties." In addition to these missions, exceptional missions to a State Party which are necessary under particular circumstances could be carried out. The need for missions to be periodic has been emphasized both by the Special Rapporteur on torture and the ICRC. This allows for follow up to assess the outcome of earlier missions and is more suitable to the concept of prevention. Combined with ongoing dialogue between the Sub-Committee and the government, periodic visits will provide greater protection for detainees.

During the first reading, this article was reformulated with states raising concerns about timing of missions and placing conditions on the planning of missions. These proposed conditions include state consent to missions, consultation on the modalities of missions, notification of the State Party about the mission and possibly even submission of the Sub-Committee's detailed plan for the mission, including places to be visited, to the State Party.

[10] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Working Paper Submitted by the Secretariat pursuant to Commission on Human Rights resolution 1994/40: Comments of the Special Rapporteur of the Commission on Human Rights on the question of torture (hereinafter Working Paper); E/CN.4/1994/WG.11/WP.2; Page 3, Paragraph 1.

The Protocol requires the Sub-Committee to carry out missions and visits (Article 8). The text sets out the extent of its powers during these missions and visits (Article 12 - see section 3.2.2 below), such as the right of access to all places of detention and any detained person and the right to interview such persons confidentially. Clearly, the government and the Sub-Committee will have to be in regular communication before and during a mission so the government can supply the necessary logistical support and ensure its prison and other authorities fully cooperate. This type of consultation on the modalities of missions is a well-established practice in the UN system. A similar provision is found in the ECPT.

However, such consultations must not limit the clear power of the Sub-Committee to decide how it will carry out a mission, where it will visit and who it will interview, including the possibility of carrying out unannounced visits. Information sent to the government about a planned mission should not prevent the Sub-Committee changing and adapting its mission according to circumstances it meets in the particular country. Without this flexibility the ability of the Sub-Committee to identify practices which facilitate torture would be undermined.

Additionally, it is crucial that the Sub-Committee have the ability to undertake both periodic and *ad hoc* missions. Periodic missions would constitute the core of the Sub-Committee's work; this consists of regular repeated programmatic missions to all States Parties. All of the language referring to the ability to undertake both of these types of missions is in square brackets in the current draft text of Article 8 meaning that consensus has not yet been reached on the subject.

For Amnesty International, consultation on modalities and logistics within the framework the Protocol establishes for missions is appropriate; requiring consent for each mission or the submission of a detailed plan which cannot be changed or would limit the flexibility of the Sub-Committee are not appropriate as such procedures would undermine the Protocol's effectiveness in preventing torture.

3.1.3 Objections to Visits

Article 13 of the current text provides for states, in exceptional circumstances, to "make representations to the Sub-Committee or its delegation against a particular visit." The possible grounds on which such representations can be made include national defence, public safety, medical condition of a person or urgent interrogation relating to a serious crime. It is made clear that the formal declaration of a state of emergency cannot be the grounds for such an objection. Furthermore, the objection is to a particular visit to a particular location at a particular time. When such an objection is made, the Sub-Committee and the State Party are to enter into consultations as to how to proceed. This could include the transfer to another location of a person the Sub-Committee plans to interview, with the state providing information on any such person to the Sub-Committee until the visit takes place.

The vague terminology used in the current draft allowing for objections based on "national defence" or "public safety" could allow states to prevent visits in routine situations

which are neither urgent nor exceptional. As for the medical condition of a person, such a condition could be the product of torture or cruel, inhuman or degrading treatment or punishment which is precisely what the Sub-Committee should be aware of in order to make recommendations about preventing torture in the future. It also makes no sense to prohibit the Sub-Committee from visiting an entire facility due to one person's medical condition. As for urgent interrogation, this again can be handled by transferring a prisoner without preventing a visit to a place of detention. It is questionable whether any provision is needed allowing for states to object to particular visits.

If states are to retain the express power to object to particular visits, Amnesty International believes that this must be strictly limited to exceptional situations which are urgent and compelling -perhaps related to a riot or other violent disturbance in a place of detention. Clear and detailed reasons should be immediately provided by the government. In such rare situations the immediate consultations between the government and the Sub-Committee should lead to agreement on when the visit would be able to take place.

In summary, the basic principles governing missions under the Protocol must be that they are the primary obligation of the treaty and thus expressly accepted by ratification and that the Sub-Committee should have authority to plan and implement the most effective program of missions within the parameters of the Protocol. Consultation with the State Party to be visited is a key component in this process.

3.2. Modalities of Missions

This section examines some technical aspects of how missions and visits will be carried out and what follow up will be undertaken by the Sub-Committee. The issue of the relationship with the Committee against Torture and other bodies which carry out missions and visits is also considered.

3.2.1 Composition of Delegations: Experts to Assist the Sub-Committee Members on Missions

Members of the Sub-Committee will carry out missions to countries on the basis of which reports will be written and recommendations made. In order for these missions to be fully effective, the Sub-Committee will need the assistance of experts in a variety of fields, such as psychiatry and criminology, as well as translators. It would not be possible for the Sub-Committee within its ranks to have available all the knowledge and skills required for such missions to a range of places of detention in a wide variety of countries. The current text envisages delegations consisting of at least two members of the Sub-Committee and experts. The experts would be subordinate to the Sub-Committee members and act under their authority. No expert would undertake a mission without Sub-Committee members.

Furthermore, none of the members of the delegation, with the exception of translators, are to be nationals of the state visited. Amnesty International believes that no member of the

delegation - including translators - should be a national of the state visited. This would avoid any appearance of partiality and maintain objectivity and confidentiality. If any members of the delegation were nationals of a state visited there is a risk that they could be subject to inappropriate pressure during and after the mission.

A pool of experts with the relevant skills would be established to which each State Party could propose a list of candidates, both nationals and non-nationals of that state. The UN Centre for Human Rights and the UN Crime Prevention Branch would also be able to nominate experts.

Some states have fought to maintain the right to object to particular experts, including translators, participating in the mission to that country. Some states have objected entirely to the idea that non-members of the Sub-Committee could take part in missions at all.

The CPT has found the assistance of experts vital given the amount of work involved in carrying out missions and preparing reports and the scope of expertise required. Amnesty International believes that the Protocol must allow experts to assist the members of the Sub-Committee to make their work as effective as possible.

3.2.2 State Cooperation with the Sub-Committee

For the visits to be effective, certain provisions have been made in Article 12 of the current text providing ground rules for visits. States Parties must provide the delegation of the Sub-Committee with all the necessary facilities and promote the full cooperation of the competent authorities. In particular they must grant: access to territory and the right to travel without restriction; relevant information on the places to be visited; unlimited access to the places to be visited (including the right to move around inside without any restriction); assistance in gaining access to places where persons are reasonably believed to be deprived of their liberty; access to any person the delegation wishes to interview; and any other necessary information. Furthermore, Article 12 states that the delegation may interview detainees in private and without witnesses. They may do so for as long as necessary. They may also interview relatives, friends, lawyers and doctors of detainees or former detainees, or any other person they believe may be able to provide them with necessary information.

It is important to note that many of the key passages in Article 12 are in square brackets because no consensus has yet been reached about them. This includes the right to travel without restriction; unlimited access to places of detention visited; the ability to interview detainees in private; and the ability to interview persons other than the detainees.

In the view of Amnesty International, missions will be ineffective unless the Sub-Committee is able to visit all and any part of any detention facility and speak privately with detainees. It is for the Sub-Committee to decide what it needs to see and who it should speak to in order to understand fully conditions of detention in a country. Without such freedom, governments could simply offer up "model" detention facilities to be visited which do not reflect the real situation in other parts of the detention centre or in other detention centres.

Furthermore, if detainees are interviewed in the presence of guards or other officials this greatly decreases the utility of the interviews, making it less likely detainees would speak truthfully with the delegation about the conditions of detention. It would also increase the risk that detainees might face retribution for speaking frankly with the Sub-Committee. It is vital that these aspects of the Sub-Committee's working methods are guaranteed in the final text of the Protocol for it to be an effective instrument in the battle against torture.

The current Special Rapporteur on torture underlined the crucial importance of these aspects in his written statement to the working group in 1994: "A...right and obligation is required in respect of access to any place of detention identified or suspected as such by the Sub-Committee.(...)Meetings of the Sub-Committee with persons deprived of liberty must be held in absolute confidentiality, with the possibility of follow-up to ensure the subsequent protection of such persons."[11] These same criteria were stressed by the ICRC in an oral statement at the Commission in 1992 under agenda item 10 (Detention): "The ICRC wants to underline that visits to detainees, whether prisoners of war, "political" or "security" prisoners...must meet certain precise criteria...such as interviews without witnesses, repetition of visits and access to all places of detention where these detainees are found."[12]

During the first reading, some states introduced into the text of Article 12 a paragraph calling on delegates to respect national laws and regulations while conducting visits in a country. This paragraph is widely seen as an attempt to unjustifiably constrain the work of the Sub-Committee. Other states responded by introducing a sentence to the effect that such national laws and regulations should not be used for purposes which hinder the program and purpose of the visits. The mandate of the Sub-Committee is to uphold international standards on torture and cruel, inhuman or degrading treatment or punishment and to prevent these acts from occurring. Amnesty International believes that the attempt to subordinate the work of the Sub-Committee in a general or abstract way to the provisions of national law is inappropriate and should be deleted. If this proposal were adopted, states whose laws violate international human rights standards, particularly related to torture and cruel, inhuman or degrading treatment or punishment, would be able to hinder the work of the Sub-Committee simply by invoking such laws or administrative regulations.

3.2.3 Ability of the Sub-Committee to Make a Public Statement or Publish the Report

The operating principles of the Sub-Committee which will allow it to work closely with and have the confidence of states are confidentiality and cooperation. However, confidentiality and cooperation are means to the end of having an effective mechanism for preventing torture and

[11] Working Paper; Page 3, Paragraphs 2 and 3.

[12] International Committee of the Red Cross, Statement to the 48th Session of the Commission on Human Rights under Point 10 (detention); delivered 12 February 1992; translated from French by Amnesty International.

not ends in themselves and thus, in exceptional circumstances, the Sub-Committee might need to go public if confidentiality and cooperation fail.

Article 14 of the draft text calls for the Sub-Committee to write a report after each mission to be submitted to the State visited including recommendations on how to improve the protection of persons deprived of their liberty. The government and the Sub-Committee then enter into a confidential dialogue to discuss openly and frankly how to implement the recommendations. This should particularly assist states that have the will to implement recommendations but need technical advice about which precise measures to take to prevent the occurrence of torture and ill-treatment. However, if after this long process the State Party refuses to co-operate or to make the necessary improvements, or if it refuses to receive a mission or otherwise refuses to cooperate during the process, the draft text provides that the Sub-Committee could request that the Committee against Torture make a public statement on the matter or publish the Sub-Committee's report. This would be a measure of last resort if no agreement could be reached on these issues. A similar provision is included in the ECPT whose Article 10 allows for a public statement to be made in response to the failure of a state to cooperate or to implement the recommendations of the CPT.

The Committee against Torture has power under Article 20 of the Convention against Torture to carry out a "confidential inquiry" into the possible systematic practice of torture in a country, after which it submits a confidential report to the state with recommendations. The Committee against Torture is obliged to seek the cooperation of the state at every stage of the inquiry. This power to investigate allegations after the fact is clearly very different to the preventive work of the Sub-Committee. Nevertheless, when drafting the Convention against Torture, states recognized that confidential dialogue must be accompanied - as a last resort - by the power of the expert UN body to make a public statement. This is considered to be an exceptional measure and has only been done twice under the Convention against Torture: with regard to Turkey (November 1993) and Egypt (May 1996). Confidentiality is balanced by the ultimate power to bring public attention to the problem should constructive dialogue not lead to improvements in the situation. This principle is a useful precedent for the drafters of the Protocol to consider. Without an analogous provision in the Protocol, there would be no way in which the Sub-Committee could ensure the cooperation of States Parties or could react to non-cooperation.

This point has been quite controversial, with some states arguing strongly in favour of confidentiality being absolute with no exceptions unless a State Party asks for the report to be published. The entire paragraph which refers to this topic is therefore in square brackets and several proposed alternatives are included in Annex II. Retaining the ability to make findings public is another of the aspects listed by the current Special Rapporteur on torture without which he feels the Protocol may be ineffective.

In the current text of Article 14, the Sub-Committee is also empowered to make a public statement or publish its report if a State Party makes public part of the report. This provision is designed to ensure a balanced representation of the contents of the report. Bracketed text

makes this contingent upon the consent of the State Party. Amnesty International supports giving the Sub-Committee the right to make such a publication without state consent, given the need to ensure accurate reflection of the Sub-Committee's report.

Amnesty International believes that the ability to make a public statement or publish the report in response to state non-cooperation or refusal to implement recommendations as well as in response to a partial publication by the State Party must be given either to the Committee against Torture or the Sub-Committee. Without such a provision for publication of the report or public statement, the Protocol may be ineffective.

3.2.4 The Relationship Between the Committee against Torture and the Sub-Committee

There needs to be close coordination and cooperation between the Committee against Torture and the Sub-Committee. Under Article 15, the Sub-Committee will report to the Committee against Torture every year on the progress of its work. According to the current text of Article 14 in square brackets, it is the Committee against Torture that will be empowered to make a public statement in the event of state non-cooperation. Furthermore, it may be the Committee against Torture which will prepare the list of candidates for the Sub-Committee, choosing from among those nominated by States Parties, and according to one formulation currently in brackets even elect the members of the Sub-Committee.

With a view to avoiding duplication and minimizing disruption in the work of the Committee against Torture, Article 9 in the current draft text envisages that the Sub-Committee either "may" or "shall" decide to put off a mission to a state if a visit to that state under Article 20 of the Convention against Torture has been scheduled and agreed to by that state.

3.2.5 Relation to Other Bodies

One of the key concerns within the international regime for the prevention of violations of human rights and torture in particular, is the issue of duplication and lack of coordination. The Protocol addresses this concern by stipulating in Article 9(2) that the Sub-Committee will cooperate with other relevant UN organs and mechanisms as well as with regional mechanisms.

To ensure that the Protocol applies universally, the Sub-Committee can indeed undertake visits to countries also visited under a regional Convention. However, cooperation or consultation are to be encouraged between the Sub-Committee and any such regional body to avoid unnecessary duplication.

Finally, Article 9(4) states that the provisions of the Protocol do not affect the right of the ICRC to visit detainees under the 1949 Geneva Conventions and the 1977 Additional Protocols nor should they affect the possibility for states to give the ICRC the right to visit detainees in situations not covered by international humanitarian law. Given the importance of

the work done by the ICRC in the detention area, and its expertise, this provision is essential. The Protocol must not serve as an excuse for blocking any mechanism or body; both governmental and non-governmental; regional, national or international; from carrying out visits to places of detention. This would be counter to the motivating spirit of the Protocol which is the prevention of torture and cruel, inhuman or degrading treatment or punishment.

3.3. Organization and Structure of the Sub-Committee

The section outlines how the Sub-Committee would be organized, conducted and funded. A strong and fully resourced Sub-Committee is a prerequisite for a strong mechanism.

3.3.1 Composition of the Sub-Committee

The 1991 Costa Rica draft proposed that the Sub-Committee be comprised of a maximum of 25 members. In the current formulation, the number of members has not been specified as there is not yet consensus on this point.

The members of the Sub-Committee must have "high moral character" and experience in the administration of justice, in prison or police administration, the medical profession or the field of human rights. They are to serve in their individual capacities, not as representatives of states. They must be "independent" and "impartial" (Article 4). According to other organizing principles, the aim is for the Sub-Committee to be geographically representative and to contain a balanced representation of women and men.

Amnesty International urges that the Sub-Committee should include members with expertise in all the relevant professions: police and prison administration, law, medicine, and particularly the protection of human rights. It will also be essential for the Sub-Committee to include those with expertise in issues related to women detainees and prisoners, including conditions which facilitate rape and other forms of torture and ill-treatment as they specifically impact women.

3.3.2 Election of the Sub-Committee

The 1991 Costa Rica draft proposed that the members of the Sub-Committee are to be elected by the Committee against Torture for four year terms by an absolute majority from a list of qualified persons nominated by States Parties to the Protocol. As has proven to be the case with many human rights mechanisms and treaty bodies, the competence of the mechanism or body is determined largely by the quality and independence of the members.

The current text proposes two alternatives. The first is election by States Parties of candidates nominated by States Parties to the Convention against Torture and submitted to the Committee against Torture which would prepare a list of candidates found to possess the necessary qualities under Article 4. The second possibility is election by the Committee against Torture from a similar list of candidates. In either case a secret ballot would be used.

Amnesty International believes that a strong Sub-Committee is necessary for a strong Protocol. States Parties will clearly want to have significant input into the selection of experts. However, there is clearly a contradiction between the need to have a balanced range of expertise and practical experience for this type of active fieldwork and the vagaries of political considerations which would dominate if State Parties both nominated and elected the Sub-Committee. Therefore, Amnesty International considers that the Committee against Torture should play a major role in the selection of members of the Sub-Committee. Alternatives which could provide the needed calibre and variety of independent experts should be explored.

3.3.3 Procedures of the Sub-Committee

The provisions of Article 7 pertain to the procedures of the Sub-Committee. Most rules of procedure are to be determined by the Sub-Committee itself. However, some working principles are set out in the article. The Sub-Committee is to elect its own officers for two year terms. The Sub-Committee shall meet in camera. Decisions are to be made by a majority vote of members present. The program of meetings is to be set by the Sub-Committee itself but text in brackets suggests that such meetings should be held at least twice a year. Amnesty International urges that the Sub-Committee should be able to hold a sufficient number of meetings every year to carry out the very substantial and time-consuming work within its mandate.

3.3.4 Funding of the Sub-Committee

The current Special Rapporteur on torture has stated that in order for the Protocol to be effective, it must "be guaranteed the material and financial means to carry out its work effectively."[13] The Costa Rican draft proposed two funding alternatives: a) funding through the regular budget of the United Nations or b) by contributions from States Parties supplemented by a Special Fund based on voluntary contributions from governments, inter-governmental organizations, NGOs and individuals.

Amnesty International believes that the Sub-Committee's work should be funded out of the regular budget of the UN since human rights work is clearly part and parcel of the mainstream activities of the UN. Reliance on separate contributions from States Parties could seriously hamper the functioning of the mechanism. This reality is reflected in the amendment

[13] Working Paper; Page 3, Paragraph 5.

of the Convention against Torture to change the funding for the Committee against Torture from funding directly by States Parties to funding through the regular UN budget, an amendment endorsed by the General Assembly in December 1992.

Some countries including those which have not paid their full assessments have raised the issue of the budget crisis of the UN as a way of opposing such funding and have flagged their concerns about putting further stress on the budget of the UN Centre for Human Rights. While it is true that the work of the Sub-Committee will cost money, it will cost a mere fraction of the amount being spent to cope with victims of torture after the fact. If states take seriously the exhortation of the Vienna World Conference on Human Rights to focus on preventing torture and adopt the Protocol, they need to make a political and financial commitment to create a system which will be effective.

At the 1995 session of the working group, a delegation proposed the creation of a special voluntary fund which would provide assistance to countries in implementing the recommendations of the Sub-Committee. While there was widespread support for this idea among states, some concern was expressed about how the fund should be administered and about the proliferation of such special funds. Amnesty International believes that this proposal is worth exploring further, though it should not affect the method by which the Sub-Committee itself is to be funded.

3.4 Treaty Issues

This section covers issues related to the Protocol as a treaty: requirements for entry into force and reservations.

3.4.1 Number of Ratifications for Entry Into Force

The Protocol will be open for ratification to all States Parties to the Convention against Torture. The Costa Rican draft text provided that the Protocol will enter into force after the deposit of the tenth instrument of ratification or accession. This means that ten countries would have to ratify the Protocol before it would begin operating.

Amnesty International considers that the Protocol should enter into force with a small number of ratifications, such as the ten proposed in the Costa Rica draft text, to ensure that the system being created begins operating as soon as possible and is built on a firm foundation. Working with a small group of States Parties at first would give the Sub-Committee space to carry out the time-consuming work of developing its working methods, drawing up rules of procedure and developing its list of supporting experts, without having to cope at the same time with an unmanageable workload of missions. The members of the Sub-Committee and experts would gain in experience and efficiency as the number of States Parties and their program of work increased. This would help to avoid delays in carrying out the work, delays which would only weaken the credibility and effectiveness of the system.

Both the first and second Optional Protocols to the International Covenant on Civil and Political Rights (ICCPR) required only 10 ratifications before entry into force. The ECPT required seven member States of the Council of Europe to have expressed their consent to be bound by the convention before entry into force (Article 19).

One state suggested at the 1995 working group session, that the number of ratifications required should be substantially increased on the grounds that a higher number was required to guarantee effectiveness and fairness in the functioning of the Protocol. Amnesty International opposes such a move which could greatly delay the Protocol's entry into force and thereby unnecessarily delay the creation of this system of inspection, which could threaten its effectiveness and which is inconsistent with the precedent of the Optional Protocols to the ICCPR and the very similar ECPT.

3.4.2 Reservations

Article 18(3) of the 1991 Costa Rica draft text stated clearly that "no reservations may be made in respect of the provisions of this Protocol." Since this is a procedural mechanism which does not create new substantive standards related to the prohibition of torture, only a new mechanism to better implement pre-existing standards, reservations would be highly detrimental and could potentially greatly reduce the value of ratification. Amnesty International has consistently opposed limiting reservations to human rights treaties.

Some states have argued strongly in favour of maintaining the possibility of making reservations. One state has proposed incorporating the language of the Vienna Convention on the Law of Treaties into the text to the effect that "No reservations [incompatible with the object and purpose of the Convention and Protocol] may be made in respect of the provisions of this Protocol." This language is now present in the current text of Article 18(3), bracketed as shown. Such language is unnecessary because international law already does not permit such reservations. Also, Amnesty International believes that any limiting reservations to human rights treaties tend to defeat their object and purpose. As the Special Rapporteur on torture had previously stated, "It is so hard to conceive of a reservation to an instrument of this nature that would not have such an adverse effect that a general exclusion of reservations would appear appropriate."[14]

The Protocol presents ways in which States Parties should cooperate with the Sub-Committee and the ways in which the Sub-Committee should function. It creates a coherent package of powers and procedures all of which will be essential to have an effective, impartial and consistent system of inspection for places of detention. If States Parties could make reservations, they could remove an element of this coherent package, thereby crippling the system.

[14] Working Paper; Page 3, Paragraph 6.

In support of the argument in favour of permitting reservations, states have argued that allowing the possibility of reservations will increase the number of ratifications. However, widespread adherence to a potentially enfeebled instrument would do little to prevent torture. Amnesty International opposes the possibility of making reservations in such a Protocol.

3.5. Operating Principles of the Protocol

The draft text stresses that the operating principles of the mechanism are cooperation, confidentiality and impartiality. These principles are laid out in Article 3 and reiterated in bracketed text in Article 8; draft consolidated Articles 10 and 11; Article 14 and Article 15. Such principles are important for the mechanism to work properly. The nature of preventive work requires the development of trust between States Parties and the Sub-Committee and their close cooperation in order that the best missions may be carried out, the most appropriate recommendations made and most importantly, implemented. It also requires a level of frankness and openness which warrants confidentiality.

During the first reading of the text, a delegation introduced a clause requiring full respect for the principles of non-intervention and sovereignty of states in the operation of the Protocol. This provision should be deleted. The Protocol is not a threat to sovereignty of states. It defines the powers of the Sub-Committee. States exercise their sovereign power by choosing to ratify the Protocol. That sovereignty is never lost as States Parties are always free to denounce any treaty they have ratified, thereby avoiding future obligation, and this is included in the Protocol in Article 19. Non-intervention is not a relevant issue either, since the acceptable powers given to the Sub-Committee will be set out in clear language in the text. Such language regarding sovereignty and non-intervention is broad and therefore readily misused and would set a dangerous precedent if included in such a human rights treaty.

Finally, in the draft text of Article 1, the issue is raised as to the relevant standards to which the Sub-Committee may refer in the context of examining the condition of detained persons and making recommendations about improving their situation in relation to torture and ill-treatment. The three terms "standards", "instruments" and "law" are all present in square brackets. Amnesty International believes that the Protocol should enable the Sub-Committee to be guided by the detailed UN standards on conditions of detention and related matters, found in UN human rights treaties and non-treaty standards; and in relevant regional treaties and standards. The UN standards have already been discussed and negotiated by states at the UN and embodied in texts which represent the consensus of the General Assembly and other UN bodies.[15]

[15] Such standards include the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by Economic and Social Council resolutions 663 c (XXIV) and 2076 (LXII); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly in Resolution 43/173; the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1990; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), adopted by the UN General Assembly in resolution 40/33; the Basic Principles on the Independence of the

4. The Road Ahead

At its fifty-second session in April 1996, the Commission welcomed the conclusion of the first reading of the draft text of the Protocol by the working group. It renewed the mandate of the working group and requested it to meet for another two week period prior to the next session of the Commission to begin the second reading on the basis of the 1991 text, and the text produced by the first reading. The meeting is scheduled for 14-25 October 1996.

It is difficult to estimate how long the second reading of the draft text of the Protocol will take. Following the second reading, the text will be presented to the Commission on Human Rights for approval and then, if approved, would be transmitted first to the Economic and Social Council and then to the General Assembly for final adoption.

5. Recommendations

Amnesty International believes this Protocol can, and should be, adopted and enter into force at the latest by the year 2000. It would be a sad commentary on humanity if the twentieth century - with its history of torture on a scale unparalleled in preceding centuries - were to end without an effective mechanism to help prevent this grave crime.

The efforts of those supporting the idea of the Protocol must be martialled during the second reading of the draft text, not only to push ahead with drafting and adoption, but to ensure that the text which is drafted and adopted creates a mechanism effectively able to make a contribution to the prevention of torture.

Such a text must:

Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by the UN General Assembly in resolutions 40/32 of 29 November 1985 and 40/146; the Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly in resolution 47/133; the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, annexed to Economic and Social Council Resolution 1989/65; the Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly in resolution 34/169; the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1990; the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly in resolution 37/194; the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 3452 (XXX); and others which represent the consensus of the international community and contain detailed standards on the treatment of detained and imprisoned persons.

*ensure that the Sub-Committee has the power to carry out missions to any state which has ratified the Protocol without having to seek further permission for each individual mission (Article 1(1));

*create a strong Sub-Committee which is chosen from among qualified persons in the fields of prison administration, medicine, law and especially human rights (Articles 5 & 6);

*give the Sub-Committee the power to plan and implement the most effective missions (Article 8);

*guarantee that the Sub-Committee has the right to undertake both periodic and *ad hoc* missions (Article 8);

*guarantee the Sub-Committee unlimited access to all places of detention and to all detainees; the right to interview detainees in private; and the right to interview other persons who may provide useful information (Article 12);

*ensure that the Sub-Committee may effectively undertake its work by providing for experts to participate in missions and assist Sub-Committee members (Draft Consolidated Articles 10 and 11);

*allow for publication of the Sub-Committee's report or for a public statement to be made in the event that a state refuses to cooperate or partially releases the Sub-Committee's report (Article 14(4));

*be funded out of the regular United Nations budget (Article 16(1) and in practice be provided with sufficient resources for the Sub-Committee fully to carry out the functions mandated to it in the Protocol;

*provide for the Protocol to enter into force with the lowest possible number of ratifications consistent with effectiveness so that the important work of preventing torture is not unnecessarily delayed (Article 18(1));

*prohibit reservations since this is a procedural mechanism the consistent and efficient functioning of which would be impeded by reservations (Article 18(3)).

Amnesty International strongly supports the drafting of an effective Optional Protocol to the Convention against Torture and calls on all opponents of torture: governments, inter-governmental organizations, NGOs, individuals and others; to work for such a mechanism with the goal of preventing torture around the world.

Given the severity of the crime of torture and the irreparable harm, both physical and psychological, which it inflicts on its victims, as well as its widespread occurrence -

documented by Amnesty International each year in more than 100 countries in all regions of the world - clearly, the time to develop a preventive mechanism at the international level to stop torture before it happens is now.