# Efforts to eliminate torture through international law

**by Hans Haug**

## I

The idea of "respect for human rights and for fundamental freedoms for all" has been disseminated throughout the world since the Second World War and has influenced both international law and national legislation in many States. Nevertheless, *torture*, that most fundamental assault on the human person, has continued over the years to be practised, either systematically or occasionally, in many countries.[1] Torture, in which a person is intentionally subjected to extreme physical pain or emotional distress, is used mainly to elicit information, break the will to resist, intimidate, humiliate and degrade. It is also used to mete out (illegal) punishment for real or supposed wrongdoings.[2] Techniques of torture include withholding food and preventing sleep, abrupt alternation of extreme cold and heat or silence and noise, total isolation, causing mental confusion and distress through misinformation or other means, the use of brute force– sometimes resulting in permanent mutilation– rape, electric shocks, the application of chemicals and pharmaceuticals, finally death threats.

Torture often occurs where there are international or non-international armed conflicts and in cases of internal disturbances and tension. It is an instrument of State power in totalitarian systems which employ

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[1] Delegates of the International Committee of the Red Cross regularly visit places of detention. In 1976, the ICRC published a report in which it stated that "repeated and even systematic resort to torture, whether on orders from or with the tacit approval of the authorities, whether by violence or by psychological or chemical means, is a cancer which seems to be spreading, threatening the body of our civilisation. Of all weapons, torture is probably the most cruel and the most harmful". (See «International Committee of the Red Cross and torture», *IRRC*, no. 189, December 1976, p. 610).

[2] See Art. 1 of the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 10 December 1984.

all possible means to silence political opponents or bend them to the ruler's will. This sometimes leads to outright physical elimination. Nevertheless, torture itself and other cruel, inhuman or degrading treatment can also occur in democratic countries in which the rule of law is largely respected, particularly when measures are taken to maintain public order, protect national security or fight terrorism. Wherever the rule of law and consciousness of the rights of the individual have been weakened and people are at the mercy of those in power and those who do their bidding, torture and other forms of inhuman treatment can result. It is also possible for a government's own security forces to get out of hand and such violations of human rights can take place without that government's knowledge or connivance. This can be the consequence of overzealousness or simply a manifestation of the hate and cruelty which reside in so many people's hearts.[3]

## II

In contrast to earleir times, torture is now almost universally condemned. This condemnation takes the form of *anti-torture provisions* in the legislation of many countries and in international treaties. Article 7 of the 1966 International Covenant on Civil and Political Rights states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". There are similar provisions in Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 5 of the 1969 American Convention on Human Rights. All three of the above-mentioned treaties require that this prohibition be respected *under all circumstances*, that is, even "in time of public emergency which threatens the life of the nation" (Art. 4 of the 1966 Covenant). These provisions are thus emergency-proof and can be considered as part of *ius cogens*. Finally, the 1984 African Charter on Human and Peoples' Rights prohibits "all forms of exploitation... torture (and) cruel (and) inhuman... treatment" (Art. 5). The Charter does not mention states of emergency but it is safe to assume that it must be fully implemented in exceptional circumstances.

[3] Prof. M. P. Kooijmans, appointed "Special Rapporteur for matters relating to torture by the UN Commission on Human Rights", states in his 1987 report that "torture is still a widespread phenomenon in today's world. From the information he has received the Special Rapporteur has been confirmed in his conviction that no society, whatever its political system or ideological colour, is totally immune to torture.", Doc. E/CN.4/1987/13, p. 23.

In the realm of the *law of war*, the four *Geneva Conventions* of 1949 for the protection of wounded, sick and shipwrecked members of land and sea forces, prisoners of war and civilians in time of armed conflict also *prohibit torture*—whether physical or mental. These provisions apply both to international and internal armed conflict. The aim is to provide *absolute protection* to which exceptions may not be made on the grounds of national security or the need to take reprisals. Moreover, the torture of protected persons is a grave violation of the Geneva Conventions and the States party to the Conventions are obliged to take action in cases of torture through adequate penal legislation and prosecution by their own authorities or extradition to another State for trial and punishment. The 1977 *Protocols* additional to the Conventions of 1949 strengthen and broaden the scope of the existing prohibition on torture in connection with international and internal armed conflict.

As already noted, considerable *disparity* exists in many countries between the absolute prohibitions in force against torture and other cruel, inhuman or degrading treatment or punishment and the reality to be found in prisons, barracks and police stations. The various bans on torture are repeatedly and often gravely flouted. Many States obviously lack the internal controls necessary to prevent and punish acts of torture. This can be because the State lacks the means it requires to enforce the law but it can also be due to a lack of political will. *Supranational mechanisms* for the supervision and enforcement of international law, on the other hand, are insufficiently developed and therefore have little effect, an example being the system for submitting reports and "communications" concerning violation of civil and political rights outlined in the International Covenant on Civil and Political Rights and its optional Protocol. Relatively effective procedures such as that contained in the 1950 European Human Rights Convention have the disadvantage of taking a long time. They can drag on for years and therefore fail to meet the acute need created by torture and other cruel treatment. In any case, torture is such a grave violation of human rights, such a vicious assault on human dignity, that *extraordinary measures* are required at the national and international level to eradicate and prevent it.[4] Such measures are set out in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punish-

[4] M. P. Kooijmans ends his 1987 report as follows: "Torture should be viewed objectively and seen by everyone, Governments and individuals alike, for what it is: the criminal obliteration of the human personality, which can never be justified by any ideology or overriding interest, as it destroys the very basis of human society.", *op. cit.*, p. 27.

ment[5] and the European Convention for the prevention of torture and inhuman or degrading treatment or punishment of 26 June 1987.[6] The following section will explain the main elements of these two Conventions and outline several other initiatives being taken against torture.

## III

The 1984 UN Convention was the result of a process which began in December 1975 when the General Assembly adopted a *Declaration* put forward by Sweden.[7] On 8 December 1977, the General Assembly asked the UN Commission on Human Rights to draw up a *draft Convention* based on the principles contained in the Declaration. The Commission formed a working group whose task was lightened by draft texts submitted by the Swedish government and the International Association of Penal Law.[8] The working group, which concentrated on the Swedish text for its deliberations, at first made swift progress but then encountered major difficulties having mostly to do with the principle of universal penal jurisdiction and the effectiveness of a supranational system of control. For the second of these issues, it was possible to reach a consensus based on a rather low-level compromise and this was done only in the 1984 autumn session of the General Assembly—the session during which the Convention was adopted.[9]

[5] This UN-sponsored Convention came into force on 26 June 1987 after instruments of ratification or accession had been deposited by 20 States. The number of States party to the Convention was 34 as of 1 November 1988.

[6] This convention was approved by the Committee of Ministers of the Council of Europe on 26 June 1987 and opened for signature on 26 November of the same year. By 1 November 1988, all 21 member States of the Council of Europe had signed the Convention and eight of them (Great Britain, Ireland, Luxemburg, Malta, the Netherlands, Sweden, Switzerland, Turkey) had ratified it. It will enter into force on 1 February 1989.

[7] See the text in *The treatment of prisoners under international law* by Nigel Rodley, Paris/Oxford 1987, pp. 307-309.

[8] The two draft Conventions are published in: Alois Riklin (ed.), *Internationale Konventionen gegen die Folter*, Schriftenreihe der Schweizerischen Gesellschaft für Aussenpolitik, Bd. 6, Bern, 1979. The Swedish draft convention is available from the United Nations (document E/CN.4/WG.1/WP.1).

[9] Concerning the UN Convention on torture adopted on 10 December 1984: The statement issued by the *Swiss Federal Government* (Botschaft des Bundesrates/Bundesblatt 1985 Vol. III) on 30 October 1985 concerning the 1984 UN Convention; "Convention contre la torture: de l'ONU au Conseil de l'Europe" by Christian Dominicé, article published in *Völkerrecht im Dienste des Menschen, Festschrift für Hans Haug*, Bern, 1986; "Zur Zeichnung der UN-Folterkonvention durch die Bundesrepublik Deutschland" by Kay Hailbronner and Albrecht Randelzhofer, an article in *Europäische*

Article 1 of the Convention contains the following definition:

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

This definition contains various restrictions such as that torture must be inflicted "intentionally" (but not out of negligence) for objective purposes and that this be done by a public official or at his instigation or with his consent (not, however, by a private individual on his own initiative). Another questionable point is the sentence stating that the term "torture" does not include pain or suffering resulting solely from or incidental to "*lawful sanctions*". This wording is a concession to States which have Islamic law and impose cruel forms of corporal punishment (flogging, stoning or mutilation). With the present wording, these States may be party to the Convention and yet continue such practices provided that they are carried out in accordance with the law. The Committee against Torture, which was created by the Convention, will have the task of taking a stand against interpretations of the lawful-sanctions clause which excessively restrict the rights of the victim and of doing what it can to ensure that acts which are totally incompatible with the right to physical integrity, be regarded as "torture" in conformity with modern international law and thus be prohibited.[10]

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*Grundrechte-Zeitschrift*, 13. Jahrgang 1986, Heft 22; "Internationale Konventionen gegen die Folter", a contribution by Hans Haug to *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, Geneva—The Hague, 1984; "Die UNO-Konvention gegen die Folter vom 10. Dezember 1984", by Manfred Nowak, an article in *Europäische Grundrechte-Zeitschrift*, 12. Jahrgang 1985, Heft 5; "Recent Developments in Combating Torture", an article by Manfred Nowak, in the *Netherlands Institute of Human Rights Newsletter* No 19, Utrecht 1987; see footnote 8 for the work by Alois Riklin; see footnote 7 for the work by Nigel Rodley; "Probleme und aktueller Stand der Bemühungen um eine UN-Konvention gegen die Folter", an article by Stefan Trechsel in the *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, 33 (1982).

[10] In December 1975, the UN General Assembly made a declaration on torture which included a definition of the term "torture". Among other things, it stated that "it (torture) does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions *to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners*". This minimum was dropped in the 1984 Convention.

The main feature of the Convention is the *commitment by the States party* to it to take effective legislative, administrative, judicial or other *measures to prevent* torture throughout the territory over which they have sovereignty. To prevent torture, they must ensure that information about the prohibition of the practice is included in the *training* of civilian and military personnel who are involved in law enforcement and especially in the interrogation and treatment of people who have been deprived of their freedom. Another preventive aspect is the obligation to subject the regulations and procedures for interrogation and the precautions taken for the custody and treatment of incarcerated people *to regular and systematic review*. Preventing torture also means taking steps to ensure that people are not deported or extradited when reasonable grounds exist for fearing that they will be tortured. Another feature which makes torture less likely is the provision that statements which can be proven to have been extracted under torture may not be submitted as evidence in legal proceedings.

The convention sets out in detail the *sanctions* which the States party to it must apply in the event of violation. They must ensure that any act of torture is treated by national law as a criminal offence whose perpetrator is subject to *severe penalty*. War, the threat of war or any other public emergency may no more be used to justify torture than superior orders. The States party to the Convention are required to ensure—in accordance with the territorial principle and the personality principle—that their *jurisdiction* is exercised in cases of torture. In accordance with the principle of universal jurisdiction, they must act even where the act of torture was not committed on their territory and none of their citizens was either actively or passively involved in it. Those States must arrest anyone suspected of such acts and carry out a preliminary investigation. Finally, the States party to the Convention are obliged to hand persons suspected of having committed torture over to their own judicial authorities for *criminal prosecution or to extradite* them to another State (in accordance with the principle of *aut dedere aut iudicare*). Under the Convention, acts of torture are assigned the status of criminal offences for what the offenders are liable to *extradition* under existing treaties between the States. Where there is no bilateral extradition treaty, the Convention itself may be viewed as sufficient legal basis for extradition. In all criminal proceedings relating to acts of torture, the States party to the Convention are required to do everything possible to *render assistance to each other*.

The Convention further obliges the States party to it to launch an immediate and *impartial investigation* as soon as sufficient grounds exist

to assume that an act of torture has been committed on their territory. They are also required to ensure that any person who claims to have been the victim of torture has the *right to appeal to the competent authorities* and is entitled to an impartial investigation of his allegations. In addition, the States must ensure that the victim of torture receives *compensation* and has an enforceable right to just and adequate damages including the cost of the most complete possible rehabilitation.

Finally, the Convention requires the States party to it to *prevent* acts in the territory over which they have sovereignty which represent cruel, inhuman or degrading treatment or punishment and "do not amount to torture as defined in Article 1 of the Convention". This preventive obligation also applies only to acts committed by or at the instigation of or with the consent of public officials. Various obligations of the States party to the Convention (Art. 10-13) also apply to these acts which are considered to be short of actual torture.

While the above-mentioned obligations of the States party to the Convention to prevent and punish acts of torture through national law and international co-operation represent *progress*, the *supranational enforcement mechanisms* are only partially satisfactory. Of value is the provision creating a "*Committee against Torture*" consisting of *ten experts* serving in a personal capacity. The Committee's members are elected by secret ballot from a list of persons nominated by the States party to the Convention at a meeting of those States.[11] The Committee has *three main functions*: studying periodic reports submitted by the States, studying communications from States or individuals alleging a failure to implement the Convention's provisions or a violation of the Convention and, finally, conducting an investigation where systematic torture is found to take place in a State party to the Convention.

Periodic *reports* from the *States* to the Committee on what they have been doing to meet their obligations under the Convention constitute the only *mandatory* element of the control system (Art. 19). The Committee must study each report but can only "make such *general comments* on the report as it may consider appropriate" and forward these to the State concerned. The possibility of making specific criticism and recommendations was ruled out in a compromise reached during the drawing up of the Convention. It should nevertheless be possible

[11] On 26 November 1987, representatives of the States party to the Convention meeting in Geneva elected the members of the Committee against Torture. One of them, Professor Joseph Voyame, a Swiss citizen, was elected Committee Chairman.

for the Committee to give some substance to the report system and establish a dialogue with the States.[12]

Participation in the system in which a State party to the Convention informs the Committee that another State party to the Convention is not meeting its obligations under the treaty or in which an individual asserts that he has been the victim of violations of the Convention by a State party to it is *optional* (Art. 21 and 22). The States must *declare* that they *recognize* the competence of the Committee to receive and consider such communications.[13] This system of communications by the States is aimed at a friendly settlement of disputes in which, if necessary, the Committee makes available its "good offices", perhaps through the setting up of an "*ad hoc* conciliation commission". Even if a friendly settlement is not reached, the process ends in the drawing up of a *report*. The Committee's conclusions *do not*, however, have a binding character. The same is true with communications from individuals. The Committee studies these communications, taking into account all the information submitted to it (including that which is submitted by the State in question) and then conveys "its views" to the individual and State involved.

The system of reports and communications provided for in the Convention is based on the system provided for in the 1966 International Covenant on Civil and Political Rights and its Optional Protocol but Art. 20 of the Convention contains an *innovation* in the form of an *inquiry procedure*. If the Committee receives reliable information that torture is being *systematically* practiced on the territory of a State party to the Convention, the Committee invites that State to co-operate in the examination of and make observations with regard to the information concerned. The Committee may, if it decides that it is warranted, designate one or more of its members to make a *confidential inquiry* and to report to the Committee immediately. In agreement with the State concerned, this inquiry may include a *visit* to its territory. The Committee transmits its finding to the State concerned together with any comments or suggestions which seem appropriate in view of the situation. The Committee may include a summary account of the results of the proceedings in its annual report.

[12] See "Zehn Jahre Menschenrechtsausschuss — Versuch einer Bilanz", an article by Christian Tomuschat in *Vereinte Nationen*, 35. Jahrgang, Bonn/Koblenz, 5/1987, about the comparable activity of the Human Rights Committee created by the 1966 International Covenant on Civil and Political Rights.

[13] On 1 November 1988, the following 14 of the 34 States party to the Convention made such declarations: Argentina, Austria, Denmark, Ecuador, France, Luxemburg, Norway, Sweden, Switzerland, Spain, Togo, Tunisia, Turkey and Uruguay.

The autumn 1984 session of the General Assembly placed this potentially effective mechanism in the consensus package which led to the adoption of the Convention only because it was combined with the provision in Art. 28 that a State may, at the time of signature or ratification of the Convention or accession thereto, *declare* that it *does not recognize* the competence of the Committee provided for in Art. 20. Thus, the inquiry procedure, like the procedure for communicating allegations of violations, cannot be imposed on an unwilling State. One noticeable difference between the two is, however, that under Art. 28 an *express rejection* is required while non-recognition of the competence of the Committee to deal with the above-mentioned communications, as set out in Art. 21 and 22, can be expressed simply by refraining from making any (i.e. positive) declaration.[14]

## IV

In addition to the endeavours being made within the UN framework, an initiative, which enjoys the support of the International Commission of Jurists, was launched in 1977 by *Jean-Jacques Gautier* and his Swiss Committee against Torture. Gautier realised that eradicating torture, which must be regarded as a particularly grave violation of human rights, requires other methods at the international level than the system of reports, "communications" and complaints provided for in human rights conventions and the UN Convention against Torture. He saw that what was required was not the often incomplete and cosmetic self-portrayals of the States in periodic reports and the lengthy procedures which have the form but not the substance of legal proceedings and bear meagre, and in any case, belated effect but a system of verification which, potentially, would take in all places of detention and internment and provide methods of ensuring rapid intervention when torture was detected and which above all would have a *preventive* effect.

*Gautier* took his inspiration from the *International Committee of the Red Cross* whose delegates visit prisoners of war and civilian internees under the Geneva Conventions but also political detainees on the basis

[14] By 1 November 1988, the following States party to the Convention had declared under Art. 28 that they did *not* recognize the competence of the Committee to carry out investigations: Afghanistan, Bulgaria, Byelorussian S.S.R., German Democratic Republic, Hungary, Czechoslovakia, Ukrainian S.S.R. and the USSR.

of *ad hoc* agreements with individual governments.[15] At his instigation, a group of international experts headed by Prof. *Christian Dominicé* of Geneva met in 1977 to draw up a *draft convention on the treatment of detainees*.[16] To ensure that this draft convention went hand in hand with the UN Convention against Torture, the first draft of which had just been presented, it was decided after a further meeting in 1978 of experts at the University of St. Gallen for Business Administration, Economics, Law and Social Sciences to redraft the convention into an *additional or optional protocol to the planned UN Convention*. On 6 March 1980, *Costa Rica* submitted this protocol to the UN Secretary-General with the request that the Commission on Human Rights discuss it after adopting the Convention against Torture. The protocol contains Gautier's proposed *system of periodic and case-by-case visits to places of detention* by delegates of an international commission, a system intended to reinforce the verification mechanisms provided for in the UN Convention.[17]

In March 1986, the *UN Commission on Human Rights* passed a *resolution* (56) which mentions the draft optional protocol submitted by Costa Rica as well as the *Council of Europe's* draft *European Convention* under which a system of prison visits would be set up. The

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[15] Under the Geneva Conventions of 1949 (in particular, Art. 126 of the Third and Art. 143 of the Fourth Convention), representatives of the Protecting Power and delegates of the ICRC are authorized to go to any place where prisoners of war and protected civilians (particularly civilian internees) are being held, in particular "places of internment, imprisonment and labour". The Conventions give them access to all premises occupied by prisoners of war and internees and the right to interview those protected persons without witness. The duration and frequency of their visits may not be restricted. The visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. In the event of a non-international armed conflict, the ICRC may offer its services to the parties to the conflict (Art. 3 common to the four Conventions).

Since 1919, and especially since the Second World War, ICRC delegates have visited some 500,000 "political detainees" in about 80 States, people who are not protected by the Geneva Conventions. See *Le Comité international de la Croix-Rouge et la protection des détenus politiques* by Jacques Moreillon, Lausanne 1973; "The International Committee of the Red Cross and the Protection of Political Detainees", by Jacques Moreillon, *IRRC*, no. 164, November 1974; "International solidarity and protection of political detainees", by Jacques Moreillon, *IRRC*, no. 222, May-June 1981; "ICRC protection and assistance activities in situations not covered by international humanitarian law", *IRRC*, no. 262, January-February 1988, pp. 9-37.

[16] Jean Pictet, then Vice-President of the ICRC, was a member of the group. The text of the draft convention was published in German in "*Wirksam gegen die Folter*", a publication of the Menschenrechtskommission des Schweizerischen Evangelischen Kirchenbundes, Basel/Fribourg 1977.

[17] See *Torture: How to Make the International Convention Effective*, a draft optional protocol published by the Swiss Committee Against Torture and the International Commission of Jurists, Geneva 1979, and *Internationale Konventionen gegen die Folter*, published by Alois Riklin (See note 8).

resolution recommends that the creation of similar conventions in *other regions of the world*, in which a corresponding consensus exists, be studied. Discussion of the optional protocol has been scheduled for the 45th session in 1989.

## V

It was a French Senator, *Noël Berrier*, the rapporteur for the committee for legal matters in the Council of Europe's Consultative Assembly, who seized the initiative in 1982 for the creation of a *European Convention*. Berrier was convinced that a system of visits was necessary for effective progress in eradicating torture and believed that such a system, which would noticeably impinge upon the sovereignty of the State, had little chance of gaining acceptance within the UN framework in the foreseeable future. On the other hand, he felt that the chances of such a system being accepted within the Council of Europe were good and he therefore asked both the Swiss Committee Against Torture and the International Commission of Jurists to submit a draft "European Convention on the protection of detainees from torture and from cruel, inhuman and degrading treatment and punishment." This was then quickly done and in June 1983 the Consultative Assembly's committee for legal matters approved the draft convention, all points of which had now been settled. In the following September, the Consultative Assembly voted unanimously for a Recommendation (971) in which the importance of a system of visits in effectively countering torture was stressed and the Committee of Ministers asked to adopt the draft Convention.[18]

In early 1984, the Committee of Ministers instructed the Intergovernmental Steering Committee on Human rights to submit a draft convention. The Steering Committee in turn passed the task on to the Committe of Experts for the extension of rights guaranteed under the European Convention which dealt with the matter until mid-1986. The Steering Committee then settled all questions which were still outstanding on the committee of experts' draft text and submitted the draft to the Committee of Ministers. After consulting the Assembly, the Committee of Ministers *unanimously* adopted the "European Convention

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[18] See the *Report on the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment*, drawn up by Mr. N. Berrier on behalf of the Council of Europe's Legal Affairs Committee and adopted on 30 June 1983 (Doc. 5099).

for the prevention of torture and inhuman or degrading treatment of punishment" on 26 June 1987 and decided that it would be open for signature by the member States of the Council of Europe from 26 November of the same year.[19]

The European Convention incorporates many of Jean-Jacques Gautier's ideas and contains most of the elements which had been in the draft text which the Swiss Committee against Torture and the International Commission of Jurists submitted in 1982/1983. The preamble refers to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the complaint procedure which it provides for and states the conviction "that the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by *non-judicial means of a preventive character based on visits*". In particular, the Convention provides for the following:

1. The establishment of a *European Committee* for the Prevention of Torture and Inhuman or Degrading Treament or Punishment. The number of the Committee's members is equal to the number of States party to the Convention. The members are elected by the Committee of Ministers for a four-year period; they may be re-elected only once. The members serve in their individual capacity and are independent and impartial and available to serve the Committee effectively. The Committee's Secretariat is provided by the Secretary General of the Council of Europe.
2. The Committee is given the task of organising *visits to places* within the jurisdiction of States party to the Convention and in which there are people who have been deprived of their liberty by a public

[19] For the text of the Convention and its background, see the *European Convention for the prevention of torture and inhuman or degrading treatment or punishment—Text of the Convention and explanatory report*, published by the Council of Europe, Doc. H (87) 4, 7 July 1987; statement issued by the *Swiss Federal Government* (Botschaft des Bundesrates/Bundesblatt 1988, Vol. II) on 11 May 1988 concerning the 1987 European Convention; "Auf dem Weg zu einer internationalen Konvention gegen die Folter", lecture given by Hans Haug to a conference of Swiss penitentiary officials, published in *Der Strafvollzug in der Schweiz*, Heft 1, 1981; "Recent Developments in Combating Torture", article by Manfred Nowak in the *Netherlands Institute of Human Rights Newsletter* no. 19, September 1987; "La Convention européenne de 1987 pour la prévention de la torture et des peines ou traitements inhumains ou dégradants", a contribution by Jean-Daniel Vigny to the *Annuaire suisse de droit international*, XLIII, 1987.

authority.[20] In addition to regular visits, the Committee may organise any other visits which appear to it be required in the circumstances. As a general rule, the visits are carried out by at least two members of the Committee. These members may be assisted by experts and interpreters.[21] The purpose of the visits is to "*examine* the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the *protection* of such persons from torture and from inhuman or degrading treatment or punishment".[22]

3. The States party to the Convention *must* permit *visits* by the Committee to any place within their jurisdiction where people are deprived of their liberty. After the Committee has notified the government of a State that it intends to carry out visits, these visits may take place *at any time*. The State must provide the Committee with the following *facilities*: access to its territory and the right to travel without restriction; full information on the places where persons deprived of their liberty are being held and any other information which is necessary for the Committee to carry out its task; unlimited access to any place where people are deprived of their liberty, including the right to move without restriction inside such places. The Convention goes on to specify that the Committee may interview *in private* the people it is visiting. The Committee may also communicate freely with any person whom it believes can supply relevant information. If necessary, the Committee may *immediately* communicate observations to the competent authorities.[23]

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[20] Deprivation of liberty is used here as it is defined in Art. 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The visits may be made in *all* "places" where people are being held by a public authority whether in temporary, preventive or administrative detention, to serve a prison sentence under civilian or military law, in internment for medical reasons or for the purpose of educational supervision.

[21] The Swiss Committee Against Torture and the International Commission of Jurists suggested that the visits themselves should—as is the practice with the ICRC—be carried out for the most part by *delegates*. The rule that the visits will generally be carried out by at least two members of the Committee brings with it the danger that at least the periodic visits will be carried out only infrequently.

[22] For this examination it will be useful to consult the rules for European prisons (contained in a recommendation adopted by the Council of Europe's Committee of Ministers on 12 February 1987) or the Standard Minimum Rules for the Treatment of Prisoners, approved by the United Nations Economic and Social Council resolution 633 C (XXIV) of 31 July 1957 and amended by resolution 2076 (LXII) of 13 May 1977, which may be found on p. 327-341 in Nigel Rodley's work (footnote 7).

[23] For a comparison with the ICRC's experience in carrying out prison visits, see "Torture: the need for a Dialogue with its Victims and its Perpetrators", an article by Laurent Nicole in the *Journal of Peace Research*, Norwegian University Press, September 1987.

4. After each visit, the Committee draws up a *report* on the facts found during the visit, taking account of any observations which may have been submitted by the State concerned. It transmits to the latter its report containing any *recommendations* it considers necessary. The Committee may *consult* with the State concerned with a view to suggesting, if necessary, improvements in the protection of people deprived of their liberty.
   The information gathered by the Committee in relation to a visit, its report and its consultations with the State concerned are *confidential*. The Convention makes clear that, in implementing it, the Committee and the competent authorities of the State concerned must *co-operate* with each other. If, however, a State fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the State has had an opportunity to make known its views, by a majority of two-thirds of its members to make a *public statement on the matter*.

5. Art. 21 of the Convention states that *no reservation may be made* by the States party to it. This provision would not have received general support if there had not been the provisions in Article 9 that in "exceptional circumstances" restrictions may be placed on the Committee's activities. Under Article 9, a State may make *representations* to the Committee *against* a visit at the time or in the particular place proposed by the Committee. Such representations may be made only on the grounds of national defense, public safety, serious disorder in places of detention, the medical condition of a person or on the grounds that an urgent interrogation relating to a serious crime is in progress. Under the Convention, such representations must be followed immediately by *consultations* between the Committee and the State to clarify the situation and seek agreement on arrangements to enable the Committee to exercise its functions expeditiously. Such arrangements may include the transfer of a person to another place. Until the visit takes place, the State must provide information to the Committee about any person concerned.[24]
   An objectively fully justified restriction of the Committee's activities is to be found in Article 17 (3) which states that "the Committe shall not visit places which representatives or delegates of Protecting Powers or the International Committee of the Red Cross effectively

[24] J.-D. Vigny (footnote 19) writes that Article 9 amounts to a negotiated reservation in the text of the Convention itself.

visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977". These are places in which, in connection with an international or internal *armed conflict*, people have been deprived of their liberty and have the status of "protected persons" (in particular, prisoners of war and civilian internees) under international humanitarian law. Article 17 does not cover the victims of disturbances and tension to which the law of war does not apply. Since the ICRC also takes action in such situations (e.g. on behalf of political detainees), arrangements are necessary between the Committee and the ICRC to prevent overlapping and ensure constructive co-operation. Co-operation is all the more desirable as the ICRC's work on behalf of detainees consists not only of protection but also of assistance, for example medical help or social welfare for members of their families.

## VI

The International Commission of Jurists and the Swiss Committee against Torture are convinced that, especially in terms of effectiveness, financial cost and acceptance, regional arrangements to set up systems of visits offer more advantages than world-wide arrangements and they are therefore encouraged by the Council of Europe's breakthrough. They are now working to promote the creation of an *American convention* under which a system of visits corresponding to Gautier's proposals and based on the model provided by the European Convention would exist for all States in the Americas. Action against torture in the Americas, especially Latin America, is needed urgently and this fact was demonstrated when the General Assembly of the Organisation of American States adopted the *Inter-American Convention to Prevent and Punish Torture* in December 1985.[25]

This Convention is to a large extent modelled on the UN Convention of 1984; the States party to it must take measures to prevent torture and punish its perpetrators and to set up a system of regional jurisdiction based on the *aut dedere aut iudicare* principle. The supranational system of verification is not as advanced as the one created by the 1984 UN Convention; it is limited to an obligation for the States party to the Convention to *inform* the Inter-American Commission on Human

[25] By February 1988, this Convention had been ratified by the Dominican Republic, Guatemala, Mexico and Suriname and thus came into force. See the text on pp. 322-326 of Nigel Rodley's work (footnote 7).

Rights about steps taken to implement the Convention. The Commission, for its part, has the task of *analysing* in its annual reports the situation in the various OAS member States with regard to the prevention and eradication of torture. In view of this weakness in the system of verification, there is an urgent need to create a convention providing a system of visits.

The International Commission of Jurists and the Swiss Committee Against Torture had *talks* in April 1987 in Montevideo, Uruguay and in May and October 1988 in Bridgetown, Barbados and Sao Paulo, Brazil, with *experts* from the Americas about creating an American convention which would set up a system of visits.[26] The experts' comments were generally *favourable*; however, it was obvious that difficult problems remain to be solved. One of these problems is the question of what the relationship will be between the new convention and the Organisation of American States (OAS); the convention's promoters want a link with the OAS but consider it absolutely necessary to form a new, independent body responsible for running the system of visits. A further problem is how this system would be financed. One solution could be—in addition to contributions of the States party to the convention—the creation of a *fund*.[27] Unlike the European Convention, under this new Inter-American convention visits to places of detention would not be carried out by members of a committee but rather by *delegates* who would work under such a committee's instruction and supervision. It would also be necessary to insert a provision for the co-ordination of such visits with those carried out by the *ICRC*; this would cover not only visits based on the Geneva Conventions or the Additional Protocols but also based on the ICRC's right of initiative.

## VII

Since there is no guarantee that an American convention creating a system of visits will come about in the near future and since the creation of similar regional conventions in say Africa or Asia could encounter even greater difficulty, the *option of a world-wide system* must not be abandoned. According to the resolution adopted by the

[26] The following reports have been published on the *Montevideo talks*: "Tortura: Su Prevención en las Américas, Visitas de Control a las Personas Privadas de Libertad", Montevideo, July 1987; "The prevention of torture in the Americas, visits to persons deprived of their liberty", Geneva, January 1988.

[27] The European system of visits is financed by the Council of Europe's budget.

UN Commission on Human Rights in the spring of 1986, the setting up of an *optional protocol* to the 1984 UN Convention in order to supplement that Convention's relatively weak supranational system of verification with an effective system of visits should be pursued.[28] The draft convention which was submitted by Costa Rica in 1980 would have to be adjusted to the present situation, that is, the entry into force of the UN Convention in 1987 and of the European Convention for the prevention of torture on 1 February 1989. A suitably amended optional protocol could provide for the *Committee against Torture* established by the UN Convention to organize visits to places of detention in States bound by the protocol and take responsibility for reporting to and consulting with the States while nevertheless having the visits themselves carried out by *delegates*. The revised protocol could also contain provision for *regional commissions*, under the Committee's supervision, which would organise the visits to places of detention. Finally, there could be a provision that the Committee against Torture would not organise visits—at least not periodic visits—in States bound by an international treaty under which a functioning regional system of visits is in operation.

Important though it is to keep open the option of a world-wide system under the United Nations, we must avoid excessive optimism because all the endeavours so far to create effective supranational systems of verification in the area of human rights have met with stubborn resistance from many States. On the other hand, bringing about respect for human rights and eradicating torture are such vital matters that discouragement and resignation cannot be allowed. Pervasive, dogged and purposeful vigilance must be our watchword.

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[28] M. P. Kooijmans writes in his 1987 report: "A measure which may have an important preventive effect is the introduction of a system of periodic visits by a committee of experts to places of detention or imprisonment. The element of periodicity is designed to ensure that a system of visits is seen as a means of co-operating with Governments rather than as an instrument for denouncing them. The fact that the idea of periodic visits would eventually form part of regional systems for protection of human rights (of which there are currently three, established in the context of the Organization of African Unity, the Organization of American States and the Council of Europe) would not necessarily stand in the way of the conclusion of a world-wide convention to which States which were subject to such a system of visits under a regional instrument could become party. However, the implementation of the world-wide system would be suspended for States subject to a regional system.", *op. cit.*, pp. 25 and 26.