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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR: (d) QUESTION OF A DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Introduction

1. The Commission on Human Rights, at its forty-seventh session, in its decision 1991/107 of 5 March 1991, decided to consider at its forty-eighth session the text, proposed by the Government of Costa Rica on 22 January 1991, of a draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see E/CN.4/1991/66), designed to establish a system of visits to places of detention with a view to the effective prevention of torture.

2. Consequently, the Commission, having considered the question at its forty-eighth session (E/CN.4/1992/SR.21-26, 47, 48 and 52), adopted resolution 1992/43 of 3 March 1992, by which it decided to establish an open-ended inter-sessional working group in order to elaborate a draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, using as a basis for its discussions the draft text proposed by the Government of Costa Rica, and to consider the implications of its adoption and the relationship between the draft optional protocol, regional instruments and the Committee against Torture.

3. The Economic and Social Council, in its resolution 1992/6 of 20 July 1992, authorized an open-ended working group to meet for a period of two weeks prior to the forty-ninth session of the Commission on Human Rights.

4. In compliance with the above-mentioned resolutions, the Working Group held 16 meetings, from 19 to 30 October 1992. The session was opened on 19 October 1992 by Mr. Antoine Blanca, the Under-Secretary-General for Human Rights, who made an introductory statement. The following sections of this report deal with the Working Group's consideration of the draft optional protocol.

I. ORGANIZATION OF THE SESSION

A. Election of officers

5. At its 1st meeting, on 19 October 1991, the Working Group elected Mrs. Elizabeth Odio Benito (Costa Rica) as Chairman-Rapporteur.

B. Attendance

6. The representatives of the following States, members of the Commission on Human Rights, attended the meetings of the Working Group, which were open to all members of the Commission: Australia, Austria, Argentina, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czech and Slovak Federal Republic, France, Germany, Hungary, India, Japan, Mexico, Netherlands, Peru, Philippines, Portugal, Russian Federation, Senegal, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Yugoslavia.

7. A number of delegations made statements regarding the participation of a representative of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the Working Group. Speaking on behalf of the European Community and its

member States, the representative of the United Kingdom stated that the European Community and its member States did not accept the automatic continuity of the Federal Republic of Yugoslavia in international organizations, including the United Nations. In this context, the European Community and its member States noted General Assembly resolution 47/1 of 22 September 1992, in which the Assembly decided, inter alia, that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly. The European Community and its member States also noted the United Nations Legal Counsel's advice on the applicability of that resolution to other United Nations bodies. Nevertheless, the European Community and its member States regarded General Assembly resolution 47/1 as a model for action in the specialized agencies and other United Nations bodies in due course, as appropriate, and would be examining ways to pursue this.

8. The following States non-members of the Commission on Human Rights were represented by observers at the meetings of the Working Group: Cameroon, Denmark, Egypt, El Salvador, Ethiopia, Finland, Greece, Guatemala, Honduras, Nicaragua, Norway, Morocco, New Zealand, Panama, Poland, Sweden and Turkey.

9. Switzerland, which is not a member of the United Nations, was represented by an observer.

10. The following non-governmental organizations in consultative status with the Economic and Social Council were represented by observers at the meetings of the Working Group: Amnesty International, International Association of Democratic Lawyers, International Commission of Jurists, and International Service for Human Rights.

11. The International Committee of the Red Cross was represented by an observer.

12. Upon the decision of the Working Group, the Association for the Prevention of Torture and the International Federation for Lawyers, which do not have consultative status with the Economic and Social Council, were also represented by observers.

13. The representative of the United States of America associated himself with the statement made by the United Kingdom and stated that the presence of a representative of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the Working Group was without prejudice to its position and any future decisions to be taken by the appropriate United Nations bodies. The representative of Austria stated that he did not accept an automatic succession of the Federal Republic of Yugoslavia (Serbia and Montenegro) in international organizations. Referring to General Assembly resolution 47/1, he added that the application of this resolution to other United Nations organs and their subsidiary bodies should be considered. He further stated that the participation of a delegation from the Federal Republic of Yugoslavia at the session of this Working Group could in no way prejudice any future decisions to be taken by the appropriate United Nations bodies.

14. The representative of Canada indicated that the presence at this session of a delegation from Yugoslavia (Serbia and Montenegro) did not prejudice the Canadian position on the succession of States or the recognition of any Government in Serbia-Montenegro.

15. In his statement, the representative of the Federal Republic of Yugoslavia (Serbia and Montenegro) indicated that the participation of his delegation in the Working Group was obviously without prejudice to the question of the continuity of the Federal Republic of Yugoslavia, in relation to the ex-Socialist Federal Republic of Yugoslavia. This was a question that was both legal and political, which was to be determined in bodies other than the Working Group. Until that determination was made, the Yugoslavian delegation would take part in the work of the Working Group.

16. The representative of the Russian Federation stressed that the status of the Working Group was defined by Commission on Human Rights resolution 1992/43 which established an open-ended working group and any changes in the provisions of the resolution, including that on the participation of any State, should be made by the Commission itself.

17. Speaking on behalf of the European Community and its member States, the representative of the United Kingdom stated that he had noted the statement of the representative of the Federal Government of Yugoslavia (Serbia and Montenegro). The European Community and its member States wished to make clear that they did not accept that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) could represent Yugoslavia at the meeting.

C. Documentation

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

E/CN.4/1992/WG.11/L.1	Provisional agenda
E/CN.4/1991/66	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.4/1992/WG.11/WP.1	Working paper submitted by the Secretariat pursuant to Commission on Human Rights resolution 1992/43
E/CN.4/1992/WG.11/WP.1/Add.1	Comments and proposals submitted by Australia, Ecuador, Ghana and Mexico
E/CN.4/1992/WG.11/WP.1/Add.2	Note by the Secretary-General
E/CN.4/1992/WG.11/WP.1/Add.3	Comments and proposals submitted by Spain
E/CN.4/1992/WG.11/WP.1/Add.4	Proposals submitted by Cameroon
E/CN.4/1992/WG.11/WP.1/Add.5	Comments submitted by Egypt

E/CN.4/1992/WG.11/WP.1/Add.6	Letter from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
E/CN.4/Sub.2/1991/26	Consolidated list of the Secretary-General of provisions in the various United Nations standards relating to human rights in the administration of justice
	The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: text of the Convention and explanatory note by the Council of Europe

D. Organization of work

19. The Working Group adopted its agenda, as contained in document E/CN.4/1992/WG.11/L.1, at its 1st meeting, on 19 October 1992.

20. The Chairman-Rapporteur made an opening statement referring to the work carried out to date by the Government of Costa Rica, the group of independent experts and by the Commission on Human Rights. She paid particular tribute to the late Genevan humanist Jean-Jacques Gautier who had originated the idea of the draft optional protocol. She made a proposal, which was approved by the Working Group, that the draft submitted by the Government of Costa Rica should constitute the basis and frame of reference for the Group's deliberations. She invited the Group to make every effort to consider the draft optional protocol, the implications of its adoption and the relationship between the draft optional protocol, regional instruments and the Committee against Torture, in accordance with the mandate assigned to it by Commission on Human Rights resolution 1992/43.

21. The Working Group established an informal open-ended working group chaired by the representative of Canada, Mr. Martin Low, to work out proposals on the method of work and the time-table for the consideration of articles and to prepare a preliminary draft of the report to be submitted to the Commission on Human Rights.

General trend of the discussions

22. The main thrust of the interventions was to recognize in principle the importance of regular visits to places where persons are deprived of their liberty in order to strengthen the protection for these persons against torture and other cruel, inhuman or degrading treatment or punishment. A preventive mechanism providing for such protection would be of considerable value as an element of the universal protection of human rights. Such a mechanism should be based on the principles of cooperation with States parties, to the Convention against Torture, confidentiality, independence, impartiality, universality and effectiveness. It should not involve adjudication on individual cases nor seek to condemn States parties, but rather be preventive, involving an evaluation of current conditions in places

of detention and recommendations on how detention practices and facilities should be improved in order to strengthen the protection against torture. In particular, cooperation and confidentiality would be essential for its success.

23. Recognition by most of the delegations of the importance of such visits provides the basis for continuation of the Working Group's efforts to develop an effective mechanism acceptable on the widest possible basis.

Issues raised in general discussions

24. During the general sessions of discussion on the draft optional protocol at the 1st to 4th meetings of the Working Group, on 19 and 20 October 1992, a range of broad concerns, many of which are discussed in more detail elsewhere in the report, were raised. These included, but are not limited to, the need for:

(a) The relationship between the proposed mechanism and other instruments and bodies in this area to be closely examined to ensure complementarity and cooperation;

(b) Any mechanism not to be at the expense of the effective functioning of other areas of the human rights treaty system, especially at a time of considerable financial constraints;

(c) A detailed statement on the financial implications of the proposal;

(d) The optional protocol to be clear, transparent and balanced to ensure as close to universal acceptance as possible;

(e) Clarification of the working methods of the proposed subcommittee to ensure that they were workable and effective;

(f) Reconsideration of the position on reservations;

(g) Examination of ways in which States parties could be assisted to implement recommendations of the subcommittee.

II. GENERAL CONSIDERATIONS

25. The Working Group decided at its 2nd meeting, on 19 October 1992, that it would be desirable to undertake a review of the draft optional protocol from a conceptual perspective, by examining the essential policy elements that are inherent in the draft text which was submitted for consideration by the Commission on Human Rights. The Working Group took the view that by grouping the various components of the text, it could assess the various elements of policy or concept implicit in the draft, formulate a statement of the elements on which there seemed to be a convergence of opinions in the Working Group, identify the issues which emerged in the debates and on which further work would be required at a subsequent stage of consideration, and indicate the possible means of resolving the issues that were raised in debate. In this way, the report would provide an overview of the key concepts of the proposed

system of preventive visits for the consideration of the Commission on Human Rights and interested States, as well as an initial outline of the outstanding questions to be addressed.

26. The Working Group therefore divided the draft optional protocol into the following "baskets" of issues for the purposes of managing its deliberations:

1. Aims, object and purpose: title, preamble and article 1.

2. Basic principles: article 3.

3. Composition and structure of the subcommittee: articles 2, and 4 to 7.

4. Operation of the system: articles 8 and 10 to 15.

5. Relationships between the subcommittee and other institutions: article 9.

6. Logistics and financial considerations: article 16.

7. Final clauses and related issues: articles 17 to 21.

27. The Working Group had the advantage of hearing a number of significant presentations on the issues before it. A detailed statement was made by a representative of the International Committee of the Red Cross (ICRC), Mr. H-P. Gasser, who described the organization's experience in conducting visits in the various circumstances that fall within its competence. The Vice-Chairman of the European Committee for the Prevention of Torture Dr. J. Bernheim, described the work of the Committee and his practical experience in carrying out visits to States parties to that instrument. The Chairman of the Committee against Torture, Mr. J. Voyame, attended the Working Group and reviewed the practice and the views of the Committee against Torture in that regard. The Special Rapporteur on the question of torture, Mr. P. Kooijmans, also made a presentation on issues related to his mandate.

III. AIMS, OBJECT AND PURPOSE OF THE OPTIONAL PROTOCOL

A. Title

28. The members of the Working Group reviewed the title of the draft instrument and expressed general satisfaction with its formulation. The general view was that the instrument should be a protocol to the Convention against Torture which would be optional for States parties to the Convention, although certain States expressed reservations on this point.

B. Preamble

1. General trend of the discussions

29. The general view of the Working Group was that the preamble should state, in clear and simple terms, the overriding object and purpose of the proposed optional protocol. This would be a statement that would confirm an

appropriate relationship with the Convention against Torture and stress the key aim of protection by a system of a preventive character, through regular visits, rather than investigative or adjudicative measures that are post facto in character.

2. Issues raised

30. As a general observation, the point was made that the aim was to establish a mechanism to assist States to "take effective ... measures to prevent acts of torture" in the sense of article 2 (1) of the Convention against Torture, and that no substantive obligations should be articulated other than those necessary to achieve the purposes of the system of visits. However, some delegations wished to stipulate the basic objectives of the protocol in more detail and more precisely in the preamble, with a view to generating greater clarity of aim and therefore further confidence among States. This would also serve to facilitate its acceptance and enforcement and as a guide to interpretation. However, most interventions emphasized the value of brevity and simplicity and of retaining a formula for the preamble which respects the United Nations traditional way of drafting such texts, namely, a general, brief and clear wording. Otherwise, to detail and list other purposes than the basic or fundamental objective could be limiting, as well as create uncertainty among States about the primary thrust of the instrument. These delegations considered that these other important matters were better addressed in substantive articles.

31. Many delegations stressed the need to maintain, in the preamble, the clear link between the optional protocol and the Convention against Torture. The proposed instrument is conceived as a protocol to the Convention, to enhance and to perform the purposes of the Convention. This would promote coordination and cost-effectiveness, in their view, by supplementing the work of the body established by the Convention, the Committee against Torture.

32. The concept of a separate instrument, with a body unrelated to the Torture Convention and its Committee, was raised by two delegations. This would permit States not parties to the Convention to take part in the system of visits. A number of other delegations felt this could prejudicially affect the necessary coordination and the matter was discussed further in connection with article 2 (see below).

33. Some delegations considered that a reference in the preamble to the provisions of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights that relate to torture would be appropriate. Other speakers pointed out that such references are already set out in the preamble to the Convention against Torture.

34. Most delegations debated the desirability of specific reference to the principle of confidentiality and some saw the need to enhance it by stating it in the preamble. Other delegations considered confidentiality to be a key working method, rather than an aim, and expressed a preference for mentioning it in the operative articles of the protocol. One delegation felt that a reference to the confidentiality principle in the preamble would be prejudicial, in view of the possibility, under the protocol, to break confidentiality in certain restricted circumstances. It was generally

acknowledged that the principle of confidentiality represented a primary and essential means of achieving the objectives of the optional protocol.

C. Article 1

1. General trend of the discussions

35. The Working Group generally considered that it would be desirable to keep a very clear and simple expression of the basic international obligation that States would accept pursuant to the optional protocol: that they agree to permit visits to any place over which the State exercises either direct authority or control and in which any person is deprived of liberty. Further consideration should be given to the possible extension of visits to places of detention over which the State exercises control or influence of an indirect character.

2. Issues raised

Paragraph 1

36. Scope of States' obligations. One delegation took the view that the text of this paragraph should be expanded to cover other important responsibilities of States parties. This would include a particular reference to the obligation to cooperate with the subcommittee, which is presently in article 3, but which the delegation felt should receive the same prominence as the obligation to permit visits. It was also suggested that this paragraph should state the prevention of torture as a clear objective. Other delegations felt that it was not desirable to distract attention from the unique preventive mechanism of visits that is embodied in this paragraph by adding other important matters that are clearly and properly dealt with in other provisions. Their view was that further detail would diminish the clarity of the central obligation of the protocol to permit preventive visits. Nevertheless, one delegation said, with the support of certain other delegations, that the principles of cooperation and confidentiality were fundamental to the purposes and operation of the optional protocol and the responsibilities of States and all bodies concerned with its functions. From that perspective, these principles were said to be implicit in this and other important articles of the draft.

37. Criteria for carrying out visits. Some delegations indicated that the present text ["in accordance with this Protocol"] established criteria for the system of visits that were imprecise. They suggested that paragraph 1 should stipulate that the visits were to be carried out under the "conditions" prescribed by the protocol, to clarify the terms on which visits would take place. Many delegations considered that this was the effect of the present text in any event, while other delegations expressed a preference to ensure that the competence of the subcommittee is kept as broad as possible.

38. Places of detention. With regard to the places to which the subcommittee would have a right to visit, a number of issues were raised. It was argued by many delegations that the scope of the protocol should include persons detained in police stations, civil and military prisons, medical or mental health facilities and secret or irregular places of detention, among other possible places of detention, but that this list was by no means exhaustive.

39. The draft text under consideration covers both places where persons are detained by a public authority and other places where detention occurs at its instigation or with its consent or acquiescence. The question of the necessary degree of government involvement in "irregular" detention precipitated much discussion. Most delegations tended toward the view that an extended statement of the scope of State responsibility for all places of detention was necessary, but the present formulation gave rise to a number of questions of both scope and application. Consideration was given to the meaning of the concept of "acquiescence" and one delegate suggested that it meant that an official of a State was aware of conditions of torture and breached a legal responsibility to prevent it. A similar view was expressed by another delegate, who considered that the issue was really determinable by reference to the official character of those responsible for the detention and reference was made to article 1 of the Convention against Torture, which specifically refers to "the consent or acquiesence of a public official". One delegation indicated that, with an emerging trend in some countries toward the operation of penal institutions by private commercial entities, the concept of "public authority" needed review. Other delegations suggested that the language used to expand the authority of the subcommittee over places administered by powers other than public authorities might imply State responsibility for providing access to places where persons were in fact being held unlawfully and outside the factual authority of the local public authorities. While one delegate considered that it might be necessary to cover situations of "house arrest", another stated that the text might literally authorize visits to private residences, or similar interference with private parties that would normally require judicial authorization or a warrant under domestic law. Another delegation considered that the present approach of broadly defining the places which could be visited should be replaced by one which states the places to which the subcommittee should not have access. To avoid circumvention of the system, however, many delegations considered that the system had to extend beyond those institutions that are operated by public authorities alone and reference was made to the formulation of a similar provision in the Declaration on the Protection of All Persons from Enforced Disappearance. These delegations supported the concept that as a matter of State responsibility under the optional protocol, there should be a right to visit any place where a person is deprived of liberty, by a person or body who is either under the direct control of the State or is subject to such direct or indirect influence by the State that control or authority should be inferred or imputed.

40. Some imprecision and a level of concern was felt to exist in the draft through the reference to places where detainees "may be held". Some delegations felt that this had both a subjective and an objective component which enhanced the discretion of the subcommittee to decide where to go. It was observed in particular that this made it clear that the subcommittee's mandate extended to places capable of serving as places of detention even if they were not being used for that purpose at the time of a visit. On the other hand, certain delegations considered that this may give rise to difficulties of interpretation and administration as it was an indefinite criterion. One delegation proposed that the instrument should specify places to which the mission would not have the right to visit. It was generally recognized that this matter required further discussion.

41. Jurisdiction. Some delegations suggested that the formula used to express State responsibility for actions which occur within its territory or its "jurisdiction" should be reviewed, to ensure that it does not in fact create uncertainty. This was considered a possibility in federal States in particular, where the national authority may have responsibility over the whole territory, but other levels of government have legislative or administrative responsibility under domestic law or the constitution for places to which the subcommittee should have access. While the formulation is similar to that of article 13 of the Convention against Torture and other instruments in the field of human rights, it was felt that the operational or administrative activities of the subcommittee within the States parties may call for different language to ensure that the intent of the provision is in fact accomplished unequivocally. Certain delegations indicated that this was an important issue for future discussion, along with the more general question of the implementation of the protocol in federal States, having regard to article 18 (3), which precludes reservations.

Paragraph 2

42. Object of the visits. With respect to paragraph 2 of article 1, it was noted by some delegations that the object of the visits in the text could be broadened to reflect more clearly the full range of activities and responsibilities which the subcommittee will have as its aims. As a practical matter, these were said to include fact-finding, making recommendations and offering technical assistance, all within the framework of confidentiality. This would be consistent with the brevity and generality of the preamble. Some delegations stated that the objects should parallel those of the Convention against Torture.

43. Standards of assessment. A number of participants felt that the broad reference to unspecified "international standards", as the basis for the subcommittee's visits, was not sufficiently clear and could give rise to difficulty of administration. The point was made that national administrators must have a clear statement of the standards that are applicable, and it was unclear whether they would be aware of international standards and norms that might not have been expressly incorporated into national law. Further, certain delegations indicated that the differing legal character of existing standards was an important factor. They observed that many standards are recommendations, while others are legally binding in international law. Some participants also sought to clarify the relevance of regional international instruments relating to torture, which would seem to be covered by the present language of the draft. Reference was also made by one delegation to article 20 (3) of the Convention against Torture. That article does not allude to other standards, but this did not, presumably, prevent the Committee from referring to such standards as might be relevant to its mandate.

44. Other delegations were of the view that it was important to provide a broad frame of reference for the subcommittee and for States party that would include the major international standards. This would include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture, as well as the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), 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, the Code of Conduct for Law Enforcement Officials and other relevant international standards. It was felt that the subcommittee would need to have reference to these standards, not for direct application, but as a guide to a full appreciation of the scope and nature of torture and cruel, inhuman or degrading treatment or punishment. These instruments would both guide the subcommittee and direct it to the principal standards, rather than leaving it with unfettered discretion as to the relevant sources, or limiting the scope of its potential focus on torture and similar practices.

45. Most delegations recognized the importance of this issue and a number of possible solutions were suggested. Many considered that "international standards" meant the standard or the definition of torture set out in the Convention against Torture. Therefore, they suggested deletion of the words "in accordance with international standards" and, if necessary, inserting a specific reference to the Convention alone. Others, however, considered that it was necessary to have a means of expanding the focus of concern through established international standards and that the present text accomplished this. If further clarity was sought, they suggested that it might be achieved by making more specific reference to the instruments and standards in question. Other suggestions for amendment of the text were mentioned. Another intervener in the debate proposed that the aim might be accomplished by means of a specific list of relevant international standards in a declaration of intent that would accompany the optional protocol in some appropriate form or by stating this in an explanatory report. In one speaker's view, provision should also be made for reference to relevant standards that might evolve in future, rather than limiting the perspective to standards now in existence.

46. One speaker also suggested adjustment of the paragraph to elaborate on the aim of the visits, by putting at the end of paragraph 2 the words "with an aim of giving concrete assistance, with a view of providing for adequate protection".

IV. BASIC PRINCIPLES: ARTICLE 3

General trend of the discussions

47. The general trend of the interventions supported the principle of cooperation as essential to the system envisaged by the optional protocol. While the desirability of a short and emphatic statement of principle was recognized, there were several indications that other elements could usefully be stated.

Issues raised

48. Article 3 was considered at the 8th meeting of the Working Group, on 22 October 1992, and a number of interventions focused on the basic concept

of cooperation embodied in the text and the possible utility of elaborating on it, consistent with the general statements previously made about the system of the optional protocol.

V. COMPOSITION AND STRUCTURE OF THE BODY

A. Article 2

1. General trend of the discussions

49. The trend of interventions favoured the retention of a body to be responsible for the system of visits and endowed with substantial independence of action, but with some institutional connection with the Committee against Torture to be determined. Careful consideration should be given to the possibility of giving it some other name with a view to enhancing the prestige and credibility of the body, but views were divided on this.

2. Issues raised

50. Status of the body. The Working Group considered article 2 at its 7th and 8th meetings, on 22 October 1992. Some delegations stated that there was a need for a body independent from the Committee against Torture to perform functions envisaged by the draft optional protocol. Therefore, this body should be invested with specific and sufficient powers and should have a name other than that of a "subcommittee".

51. A specific proposal to this effect was advanced by Chile, in paragraphs 20-22 of document E/CN.4/1992/WG.11/WP.1. According to this view, the Committee against Torture would establish a list of experts to be entrusted with the task of carrying out the visits. The aim would be to simplify matters and minimize delays, while keeping down the potential costs of the system set out in the draft. Certain speakers felt that it would be useful to consider further the positive ideas of this proposal, i.e to promote better coordination, streamline procedures and reduce the financial costs. An alternative was proposed: to consider the possible election of deputy members of the Committee against Torture and investing them with powers of implementing the provisions of the draft protocol. It was noted that the latter proposal would necessitate the amendment of the Convention against Torture. The further suggestion was made that a special institute be established with members of the Committee against Torture as members, since experts would not have the functional strength of the members.

52. Other delegations indicated that the body should have a status that would inspire respect and credibility in an area as sensitive as this. They considered that reliance on the Committee against Torture, acting alone or through experts, would not be administratively effectual, given the size and workload of the Committee. Some suggested that such a system would prejudice the principle of confidentiality, or even alter the character of the monitoring procedures of the Committee against Torture, unless some means were devised to ensure that the Committee would not use information generated in the course of visits for the purposes of reviewing the implementation of national obligations under the Convention. This principle could best be secured by a subcommittee, in their view. As well, it was argued that the

experts might not command the requisite respect. Some delegations indicated that the establishment of a separate committee would be undesirable for both financial and coordination reasons. One delegation felt that the issue could not be resolved in the abstract and without addressing the relationship with the Committee against Torture, which seemed, from its comments in E/CN.4/1992/WG.11/WP.1, to have different views from some of those expressed. The trend of the discussions seemed to favour the idea of a body with an appropriate institutional link with the Committee against Torture in the interests of coordination, cost and confidentiality.

3. Other matters

53. Some delegations raised concerns about the proposed mechanism for the establishment of a subcommittee by the Committee against Torture. They were concerned about an "indirect" election of the subcommittee by the Committee, rather than a "direct" election by States parties. Others mentioned the need to clarify the relationship between the functions of the Committee and the subcommittee. On this view, it was important to specify that the Committee had both a policy and a general oversight role to play in respect of the subcommittee. It was agreed that these matters would be addressed under other articles.

54. In relation to the future mandate and the composition of the body, great interest was expressed concerning the financial implications which would be relevant. Members of the Working Group recognized that the financial implications of the proposed system of visits might entail the commitment of substantial financial resources and members requested a full analysis of the financial implications of the proposed system at an early stage in the future work of the Group.

B. Article 4

1. General trend of the discussions

55. The general trend of interventions considered that the eventual determination of the appropriate number of members should take account of all relevant factors, including the workload of the body, the number of States parties, requisite qualifications of members and financial matters, inter alia. In the light of such considerations, the specific number of members, whether 25 or some lower number, would be established.

2. Issues raised

56. Number of members. Article 4 (1) was considered at the 8th meeting, on 22 October 1992. Many delegations considered that a maximum number of 25 members for the composition of the subcommittee was too high. Alternative proposals on the appropriate number of members were put forward, based on other human rights treaty bodies and having regard to the potential financial implications of a large body. These delegations also indicated that the subcommittee would be able to rely on assistance from experts for missions and that, accordingly, a large number of members for the body would not be necessary.

57. Other delegations thought that the figure of 25 was appropriate. With regard to the comparison with other United Nations instruments, they pointed out that existing bodies were essentially committees which operated in meetings and conferences, whereas the body established under the optional protocol would work in the field, conducting labour-intensive visits and missions on a universal basis with a potentially large number of States parties. They referred to the example of the European Committee, which has one member per State party, as well as experts, for the fulfilment of comparable responsibilities in a narrower framework than the universal system contemplated by the optional protocol.

58. Some delegations suggested that when there are less than 25 States parties, the subcommittee should not necessarily have a number of members equal to the States parties. One delegate considered that such an approach could be detrimental in this regard. Attention was drawn to the views expressed by Dr. Bernheim that sufficient staff with a larger pool of members with the appropriate expertise and qualifications was essential to the effective functioning of such a body.

Paragraph 2

59. General trend of the discussions. The trend of interventions concerning paragraph 2 emphasized the need to promote the election of persons with the greatest competence and the widest range of professional qualifications in relevant fields.

60. Issues Raised: Qualities of members. The point was made that the present formulation seemed to restrict potential candidates to persons with administrative experience in certain fields, which could preclude the election of persons with professional qualities closely related to the needs of the body to be established, such as judges, lawyers or academics who might have deep experience in matters of concern under the protocol but had not been "administrators" in the field of police or prisons. A number of specific qualities were raised for consideration:

(a) To add the words "with recognized competence in the field of human rights";

(b) Relevant professional or legal experience in the treatment of persons deprived of their liberty;

(c) Recognized competence in investigative work;

(d) Recognized ability to engage in constructive dialogue at a high level.

Most speakers saw the need for a wide range of different qualifications to be encompassed among the membership of the subcommittee. It was considered undesirable to be vague concerning the qualifications required by members. Thus, the range of qualifications should be specifically spelt out in the protocol.

C. Article 5

1. General trend of the discussion

61. Article 5 gave rise to a discussion at the 9th meeting, on 23 October 1992. Further consideration must be given to the most appropriate method of electing the members of the body.

2. Issues raised

Paragraph 1

62. Election procedures. The existing text contemplates an "indirect" system of election, whereby the Committee against Torture would elect the members of the body from a list of persons nominated by Governments. Some delegations considered that this mode of election was a desirable approach. It provided an appropriate and responsible role for Governments, through the power to nominate candidates, while leaving a highly knowledgeable and responsible international Committee to make the final selection from the list of qualified candidates. This would best ensure, in the estimation of some delegates, that the various fields of necessary expertise - "functionality" - would be included in the body's membership. Others argued that indirect election would be most conducive to the essential attributes of impartiality, independence and objectivity.

63. Other delegations took the view that direct election by States parties was more in keeping with other precedents, including that of the European Convention. The point was made that the Committee against Torture is composed of persons acting in their personal capacity and that electoral responsibilities would subject them to undue political influence (the Chairman of the Committee, in his presentation, discounted this factor). It was argued that direct election could best ensure the recognition of important factors, including equitable geographical distribution, which might not be given adequate weight by the Committee. It would also serve to bolster the prestige and credibility of the members in their dealings with representatives of national administrations. One delegate stressed that the key point was a system of election that would best promote such matters as competence and regional and other balance in representation, and thus enhance State confidence in the integrity of the system.

Paragraph 2

64. Nominations. Some delegations questioned the requirement in the text for member States to nominate three persons and the facility to nominate non-nationals. It was argued that it may be difficult to find qualified candidates with enough flexibility in their private positions that they may have the time to devote to significant and time-consuming responsibilities. The duty to nominate three persons was considered by these speakers to be onerous and not necessarily conducive to the nomination of the most highly qualified persons. Other delegations considered this technique highly useful, to enable the Committee against Torture to have the widest possible choice of candidates and qualifications.

65. The facility to nominate non-nationals was recognized as a policy drawn from the Inter-American system, where it was considered by its proponents to have worked well. Some delegates said that this would help smaller States to nominate appropriate candidates. One speaker proposed to delete the requirement that two nationals should be nominated, in the interests of enhancing the level of competence of nominees. On the other hand, some speakers saw the nomination of non-nationals as an innovation which would require very careful consideration in light of other articles of the protocol. They were concerned that members of the body should have a connection with the system through their States and that the full implications of this idea were not entirely clear.

Paragraph 4

66. General trend of the discussions. The general sense of the debate was to the effect that the possibility of indefinite re-election should be subject to some appropriate limitation, to be defined.

67. Issues raised: Re-election. The unqualified eligibility for re-election contained in paragraph 5 (4) was challenged by a number of delegations. They considered that this was not conducive to renewal and dynamism in the body and that a limit on re-election for one additional term was more suitable. Most of the speakers on this point were of a similar view although there were differences about eligibility for re-election for more than one term. One delegate indicated that re-election to the Committee established under the European Convention was only possible once, and this should serve as a guide.

D. Article 6

1. General trend of the discussions

68. At its 9th meeting, the Group considered article 6. The trend of interventions on this article was that a less complicated mode of election would have to be devised.

2. Issues raised

Paragraph 1

69. Elections. One delegation indicated that the proposed procedures for "staggering" elections (to have half the members' terms expiring at different times) might have some unintended consequences due to the operation of articles 4 (1), 5 (3) and 6. Several speakers felt that the transitional arrangements for entry into force, presently fixed at 10 States party, with subsequent increases in the number of members of the body, would give rise to technical concerns about the periodicity of elections. They noted that this should receive further consideration.

Paragraph 2

70. Electoral criteria. A number of delegations emphasized the need for equitable geographical representation (as opposed to "distribution", as in the present text) as an issue of promoting confidence. One delegate questioned the

phrase "different traditions" and indicated a preference for a criterion such as different "forms of civilization and principal legal systems". Another delegation considered that competence, independence and experience should not be sacrificed to more general considerations.

E. Article 7

Paragraph 1

71. Issues raised: Special sessions. Article 7 was also considered at the 9th meeting of the Working Group. The capacity to convoke special sessions of the body at the request of only one third of the members was questioned by certain delegations. They considered that this had both financial and other implications and that it would be preferable to have a majority of the members make such a determination.

Paragraph 2

72. Quorum. Some delegations considered that a majority of the subcommittee should constitute a quorum rather than one-half the members.

Paragraph 4

73. Secretariat. One delegate inquired whether this provision for the staff and facilities required to service the needs of the body would be more logically placed with the other articles dealing with financial matters. The Representative of the Secretary-General indicated that the substance of the paragraph was a standard provision which should be retained, but that the location of the provision was not a significant issue.

VI. OPERATION OF THE SYSTEM

A. Article 8

1. General trend of the discussions

74. The Working Group considered article 8 at its 11th and 12th meetings, on 26 October 1992. The general approach of participants in the debates was to support the concept of a programme of regular missions of a preventive character to States parties, to be supplemented as required by the circumstances. However, a need for further clarity exists.

2. Issues raised

Paragraph 1

75. Kinds of visits. Some delegates emphasized that the programme of regular, preventive visits was the primary aim, but that it was not enough by itself and that specific or ad hoc visits should be foreseen. Other delegations felt that a clearer textual distinction should be drawn between the regular and the other visits, to avoid problems of administration for both the subcommittee, in its relations with States, and for the States themselves. Several speakers took the view that the system must be demonstrably

non-discriminatory and of equal application, which implied that all States must be subject to visits impartially; the concept of regular visits must be such as to make this clear and to maintain the preventive object of such visits. One speaker distinguished between a visit and a mission, on the basis that a visit was restricted to places of detention, while a mission might have other purposes to accomplish in a State. Some speakers were interested in a projection of the number of visits that might be carried out in a given country. A delegate suggested that considerations such as the number of States parties and the level of available resources would affect the periodicity of visits, which could not be assessed at the present stage of analysis. In his view, the optional protocol should not seek to stipulate this in any event. A further point was made that the programme of regular or fixed visits might lack responsiveness to changing circumstances and resource needs and that flexibility of administration could be an important attribute. One delegation proposed that visits should be selective and should not occur without reasons. In this way the programme would be more focused and effective. Another delegate asked for clarification of the criterion for initiating an ad hoc visit: the text says only that such a visit "appears to be required", without specifying the grounds or the authority that would make this determination. A final suggestion was that notification of visits should be required, a matter to be given further consideration under article 12.

Paragraph 2

76. Coordination of visits. Several delegations raised questions about the operation of the mechanism for postponement of a visit, where the Committee against Torture had arranged a visit under article 20 of the Convention. One delegate indicated that this paragraph did not make it clear whether both regular and ad hoc visits were to be postponed in such a case and that this should be clarified to avoid future difficulty. As well, the concept and the precise rationale for postponement were not evident to this delegation, which considered that the text reflected some imprecision about the relationship between the subcommittee and the Committee. Several other delegations shared this opinion, and discussion centred on this issue. Many delegations acknowledged that postponement was based on avoiding duplication, both to avoid unnecessary problems for States parties and to ensure rational and effective operations by the subcommittee. One speaker considered that postponement was appropriate for regular visits, but perhaps not for special or ad hoc visits. Several delegations expressed the view that the real issue was not postponement as such, but proper coordination between the subcommittee and the Committee against Torture. Thus, one delegation made the point that there may be good reasons for both visits taking place, even contemporaneously, if the object and purpose were complementary and not duplicative. He felt the same might apply to relations with regional bodies. A further issue of confidentiality of visits under article 20 (3) of the Convention against Torture was mentioned: if the regular programme of visits was publicly known, postponement might raise questions about the reasons for deferral. To avoid problems that might diminish the body's effectiveness if this approach were supported, the same delegate suggested that the circumstances in which suspension of the visit might be permissible should be set out specifically in the protocol and be carefully confined.

B. Article 10

Paragraph 1

77. Issues raised: Composition of the mission. At its 11th and 12th meetings, the Group considered article 10. Some delegates took the position that the need for experts to assist the mission was dubious, in view of the fact, inter alia, that members of the subcommittee themselves were to be experts in relevant fields. A related question about the rights and duties of such experts was raised, along with the need to clarify the way in which they would be identified and selected, their functions, and the right of a State to be visited to object to the presence of certain experts without having to advance reasons. Other speakers indicated that the real issue was the effective operation of delegations conducting a visit. They observed that on the experience gathered under the European Convention, a mission might be expected to visit many different places of detention, in different parts of the country, and engage in consultations with many national officials. The limited number of members of the subcommittee, presently fixed at two per visit as a general rule, implied that the members could not effectively conduct all these activities personally. The fact that these persons would normally have other responsibilities in their private capacities limited the workload that they could bear. Nor could it be reasonably expected that the two members would have the full range of professional qualifications in relevant fields that might frequently be required for the effective conduct of a visit within reasonable time-limits.

C. Article 11

Paragraph 1

78. Issues raised: Experts. At its 11th and 12th meetings, the Group considered article 11. One delegation suggested that care was needed in assessing the qualifications of experts and selecting them to complement the qualifications represented by the members of the subcommittee.

Paragraph 2

79. Exclusion from a mission. Several members of the Working Group questioned the authority given to a State party by this paragraph to exclude a person from taking part in a mission. The opinion of one delegation was that a State should not have to provide reasons for rejecting experts or other persons assisting the delegation. Another delegate asked if it would be appropriate to exclude a member of the subcommittee, because of his/her status while another questioned whether the instrument should seem to acquiesce in a decision by a State to exclude a member of the United Nations Secretariat. If exclusion was permissible, in one view, it must imply some system of advance notification of the composition of the delegation; other speakers said that the decision to exclude should only be permitted prospectively: a State should not be able to exclude a person’s participation during the mission but only prior to its commencement. Another delegate proposed that the right to exclude participants in a mission could be limited to a specific, maximum number of persons.

D. Article 12

Paragraph 1

80. Issues raised: Notification. Article 12 was considered at the 11th to 13th meetings of the Working Group, on 26 and 27 October 1992. Several delegations made the point that a notification to a State that a visit would occur was not adequate to permit the State to ensure the provision of the requisite facilities for the mission. One delegation noted that once a notification has been communicated to a State party it should, rather than remain indefinitely valid, be limited to a certain time period beyond which a new notification would be required prior to the dispatching of a mission. Some delegations were concerned that specific notice of the time and places of a visit might be conducive to abuse. One delegation said that agreement of the State concerned should be required for each visit of the subcommittee. But the observation was made that the lack of notice could generate delay and difficulties in ensuring access to the places to be visited and providing the other facilities required by this article. The potential for abuse was acknowledged, but delegations which supported the provision of more specific notice suggested that it could be minimized by providing notice a reasonable time before the mission began; that if abuse were perceived, the mission would undoubtedly be able to take account of this in its report.

81. Liaison. One delegation proposed that an amendment to the draft should be considered to facilitate the giving of notice required by this paragraph. Pursuant to such a provision, each State party would indicate to the subcommittee the name and address of a central authority, for example, its Ministry of Justice, to which notifications pursuant to the optional protocol should be communicated. A State to be visited would equally be required to advise the subcommittee of the name and address and official capacity of a liaison officer designated by the State to facilitate the tasks of the subcommittee during the visit and to ensure full cooperation with national authorities.

Paragraph 2

82. General trend of the discussions. The general duties of States to provide proper facilities to the mission and not to obstruct it seemed generally satisfactory to most participants in the debate. The specific requirements were, however, of concern on a number of points.

Paragraphs 2 (b), (f) and 3

83. Issues raised: Access to Information. Several speakers noted that information on specific persons might be subject to laws on privacy and data protection or the rules of professional ethics, and that some provision comparable to that set out in paragraph 3 might be needed. Some delegations felt that these paragraphs should be redrafted to reflect the corresponding principles of the European Convention, so as to incorporate principles of medical and professional ethics. One delegation sought clarification of the nature of the information that might be in question, to assist in assessing the need for such a provision. It was felt by one delegation that the consent of the person to be interviewed was essential, although a presumption of

consent might be created except where the person specifically refused consent. It also noted particular concerns about the legal capacity of minors and mental patients to consent and stressed the need for further attention to this. A further speaker emphasized that the obligation to provide information about specific persons served to protect them against torture, and that this aim should be borne in mind in addressing the matter, especially as the strict confidentiality rule of the subcommittee should enable States to provide information without fear of it being misused. Another delegation indicated that the aim of the provision was to protect the individual against abuse of private or personal information, rather than the State or public authority, and the provision should state the right to privacy and international standards relating thereto.

84. Safety and security. A number of delegations considered that the formulation of the freedom of movement of the mission within places of detention was too broad and that inadequate attention had been given to legitimate considerations of safety and security. It was considered by these delegations that if paragraphs 2 (c) and (e) were unchanged, a more detailed formula would be needed in article 13, to cover the normal or everyday incidents of safety that are implicit in the detention of dangerous offenders or some psychiatric patients. Other delegates argued that there could be no justification for restricting movement within places of detention and referred to the precedent of article 8 of the European Convention, where no difficulty had been experienced. It was also stressed that the principle of free movement inside places of detention was important for the effectiveness of the system. Some other speakers indicated that if the body wished to have access to a person outside the place of detention, both safety and financial implications might arise, and reference to the more detailed text of article 9 of the European Convention was made to assist in managing these risks along with its authorization for interviews "in private" rather than in any specific place. Others proposed the deletion of the words "inside or outside his place of detention" from paragraph 3, which they felt were not an adequate reflection of security and other considerations. They suggested the elaboration of a more general provision. One speaker indicated that the facility to interview the person outside the place of detention was to be at the discretion and for the convenience of national authorities, not an obligation to transfer detainees that could be invoked by the subcommittee. He took the same view of article 13. Another speaker indicated that this should be clarified by an appropriate amendment. One delegation stated that all the laws of the State to be visited should be respected by the delegation of the subcommittee.

Paragraph 4

85. Concern was expressed that this provision might have the effect of preventing recourse to domestic remedies for false or defamatory statements or breaching duties of confidence, inter alia. One delegate considered that the principle of confidentiality should alleviate any legitimate concerns of this nature. It was argued that this degree of immunity from civil liability was excessive and unnecessary. Another speaker stressed the need to protect the body's sources of information, which could be vital to its success, and that exceptional measures of protection, such as this form of immunity from sanctions, were required.

Paragraph 5

86. One speaker felt that the reference to "urgent cases" in this provision was unclear. His contention was that any clear violation of norms relating to torture constituted an urgent case. He asked whether the provision should also clarify what the delegation could do if such a situation were not corrected immediately once its observations or recommendations had been made to the State concerned.

E. Article 13

1. General trend of the discussions

87. Article 12 was considered at the 11th, 12th and 13th meetings of the Working Group on 26 and 27 October 1992. It was generally considered that the declaration of a "state of emergency" or similar derogation from legal regularity for an extended period should not, by itself, justify the suspension of a visit under the optional protocol.

2. Issues raised

88. Safety and security. Many delegations emphasized that so-called "states of emergency" of a general and sometimes prolonged character should not justify suspension of a visit, unless there were some specific and ongoing disorder that could justify such a step. One delegation proposed that a subparagraph to this article be adopted, to specify that such a state of emergency could not by itself justify suspension of a visit by the subcommittee. Reference was made once again to the principle of cooperation in this connection. Some delegates argued that the sole criterion of "serious disorder" as grounds for suspending a visit would require evidence of a situation similar to a riot or other comparable emergency. This would not, in their view, adequately cover other justifiable situations and they felt that greater recognition should be accorded reasonable, if unexceptional, security and other issues, including circumstances that might exist outside the particular place or institution to be visited which might impede the provision of appropriate facilities to the mission. They referred to the corresponding article 9 of the European Convention, which is more detailed in this regard and covers "public safety" as a safeguard for such interests. Other delegations made the point that particular care would be required in connection with this provision, which should not operate as a mechanism to frustrate the preventive operation of the system. The observation was made that this article was in the nature of a "negotiated reservation" to the optional protocol, which must be as limited in nature as possible to avoid abuse. Another viewpoint considered that further elements could be encompassed without detriment to the system, having regard also to the prospect that the subcommittee could make observations to the Government in the event of any abuse of the duty to cooperate. If this approach were supported, the speaker considered that to avoid problems that could diminish the body’s effectiveness, the circumstances in which suspension were possible should be spelt out carefully in the protocol and should be closely confined. Other delegates mentioned the risk of serious difficulty with a detailed list of exceptions, both in negotiating the list and in administering it, and therefore they supported a simple and general provision like the existing

text, leaving it open to reasonable interpretation. With regard to the possibility of transferring the person outside the place of detention, one speaker referred to the same issues as arose in connection with article 12, and a delegate confirmed his understanding that this possibility was for the convenience of States, not the mission.

F. Article 14

1. General trend of the discussions

89. Articles 9, 14 and 15 were considered at the 13th and 14th meetings, on 27 October 1992. Most participants recognized that these articles were based upon the principle of confidentiality. There was general acceptance of the importance of that principle, and most speakers addressed specific aspects which needed clarification.

2. Issues raised

90. Confidentiality and relations with the Committee against Torture. One of the trends of the discussion related to the relationship between the subcommittee and the Committee against Torture, and the need for strict confidentiality, which articles 14 and 15 represented. One tendency was that the Committee should be the policy and monitoring body for all substantive aspects of torture, and that information generated by the subcommittee should not, in principle, be withheld from it, in the interests of consistency, coordination and efficiency, as well as to permit it to carry out its own responsibilities. On this view, public statements or the publication of reports under paragraph 2, after the breakdown of cooperation between the subcommittee and a State party, and general reports, as contemplated by article 15, would not be adequate for these purposes. Confidentiality could be maintained by requiring the Committee to respect the same conditions as the subcommittee. The other general tendency was that the operation of a system of preventive visits depended on the body establishing relationships of confidence with States parties and national administrators. Cooperation would inevitably be difficult to establish and maintain if another body, with jurisdictional responsibilities in relation to the State, had the full details of specific findings by the subcommittee other than in extraordinary cases where cooperation had broken down. This view considered that providing specific information to the Committee against Torture could also affect the nature of its supervisory and monitoring duties in respect of particular States under the Convention, and that the provision of specific information would adversely affect both the system envisaged by the optional protocol and that established by the Convention itself. One delegate indicated that the operation of articles 14 and 15 represented something of a compromise between these two tendencies, but that it might be necessary to make a clearer choice between them at some stage. In this regard attention was drawn to the observations and suggestions of the Committee against Torture, contained in document E/CN.4/1992/WG.11/WP.1/Add.2, which sought to distinguish on a functional basis between the two bodies. Several speakers spoke of the difference between the preventive aims of the subcommittee and the post facto and jurisdictional responsibilities of the Committee, but many interventions emphasized that confidentiality should not operate as an obstacle to the fulfilment of the proper role of each body.

Paragraph 1

91. It was pointed out that the source of this text was article 10 (1) of the European Convention, and the Vice-Chairman of the European Committee indicated that the reports of that Committee were based on facts found during the course of its visits. One delegation considered that the reports of the subcommittee should be transmitted to the State party for observations and that any such observations should be taken into account. Another suggested that all information provided by the State party should be annexed to the report.

Paragraph 2

92. Issues raised: Publication of information. Several delegates observed that this provision raised delicate issues, as the possibility of publication should not be used as a tool of compulsion but should be regarded as an element of the principle of cooperation. One delegate said that the subcommittee would have wide discretion to make information public, though it would need to exercise great care to ensure that confidential information was not revealed except in circumstances envisaged by this paragraph. It must also ensure that information normally protected by law, in relation to confidential information, privacy, legal professional privilege or similar interests, was not improperly disclosed. Because of the gravity of the steps proposed in this protocol, some delegations advised that the decision to make a public statement or to publish a report should be taken by a qualified majority of two thirds of the members. One delegation said that the present text gave too much discretion to the subcommittee to make decisions on the situation of a State party. The State subject to the visit should have a right and an effective opportunity to comment on the reports and recommendations of the subcommittee. The State should be given a reasonable time to consider and react to recommendations of the subcommittee before any publication is made.

Paragraph 3

93. Reports of the subcommittee. Dr. Bernheim spoke of the parallel functions of the Committee in reporting. He referred to the care that was necessary to ensure that the reports were properly structured and considered. He pointed out that the Committee sometimes requested the submission of additional information, which was normally forthcoming from the State party. He also advised that in the practice of that Committee, a provisional report was drafted after six months and the final report was completed within one year of the visit. One delegation queried the utility of this practice and suggested that the matter be considered in future work on this paragraph. One delegation asked that this experience be taken into consideration in future work on this paragraph. One delegation referred to the obligation to obtain the consent of the person concerned before publishing personal data, and argued that article 12 (2) should be guided by the same spirit. Another delegate asked that the position expressed in paragraph 91 on confidential and similarly protected information should also apply to reports of the subcommittee.

G. Article 15

94. The provisions of this article were examined by the Working Group in conjunction with article 14 and many of the considerations raised were inseparable from that article. One delegation indicated that in accordance with its view on article 5, the subcommittee should be a body separate from the Committee against Torture and its Convention; it did not agree that the Committee should exercise any control over the body to be established to fulfil duties under the protocol. Any information given to the Committee should therefore be exclusively at the discretion of the subcommittee. Other delegations repeated their view that the relationship between the two bodies required clearer definition, and they welcomed the contribution made by the Committee against Torture in paragraph 10 of document E/CN.4/1992/WG.11/WP.1/Add.2. They considered that those suggestions would help in the redrafting of this paragraph and in developing a cooperative relationship between the two bodies. Some delegations considered that the system of preventive visits foreseen in the optional protocol should be clearly linked to the Convention against Torture in order to avoid conflicts in their respective areas of competence. Emphasis was placed on the principles of confidentiality, cooperation and effectiveness. One delegation stressed that simultaneous visits should be avoided.

VII. RELATIONSHIPS BETWEEN THE SUBCOMMITTEE AND OTHER INSTITUTIONS: ARTICLE 9

1. General trend of the discussions

95. Most participants in the debate considered that a balanced relationship between the subcommittee and other bodies, including regional bodies and the International Committee of the Red Cross, was a very important element in the credibility and the administration of the system of visits. The need for appropriate measures of coordination, to avoid competition and duplication with other effective systems and to enhance complementarity was seen as a vital requirement of the optional protocol.

2. Issues raised

Paragraph 1

96. Relations between regional and universal systems. Numerous questions were raised about the approach taken by the present text to address this issue. The Working Group took note of the reservations expressed by the Chairman of the European Committee for the Prevention of Torture in document E/CN.4/1992/WG.11/WP.1/Add.6 about the proposed system of "observers", as found in the text, and its operation. Some delegations spoke of the nature of an appropriate relationship between a universal and a regional body and whether one should "defer" to the other. It was considered that the importance of the issue justified its further discussion in the Working Group, but that other possible arrangements could be contemplated that would (a) respect regional arrangements that were working effectively; (b) provide an appropriate degree of integration between the regional and

international systems without prejudicing their essential characteristics and requirements; and (c) avoid the appearance of subordinating either system to the other.

97. It was proposed that a possible solution to this concern might be found in the principle of complementarity of function of the bodies and in the principle of reciprocal cooperation between the bodies. One delegate suggested that the comparative effectiveness of the universal and the regional bodies should be a factor in assessing this interrelationship. A number of specific suggestions relating to the organizational and institutional nature of the body were made to achieve these aims and which were consistent with the essential prerequisite of confidentiality of both the regional systems (clearly expressed in connection with the European system) and the optional protocol. The latter point was stressed in the presentations of both Dr. Bernheim and Mr. Kooijmans and delegations were very aware of this issue. It was essential, in the estimation of some delegates, to avoid giving the impression that the existence of a regional mechanism could operate to exempt States parties to that mechanism from the purview of the international mechanism of the optional protocol. The further point was made that a careful analysis of this matter, and of the possible solutions, should be a priority for the Working Group at a future session.

98. Some delegations raised several other matters of concern, including the fact that other regional mechanisms that were still in the stage of development should be taken into account. These included the activities of the Inter-American Commission on Human Rights under the Inter-American Convention of Human Rights and the American Declaration on Human Rights, and any mechanisms that might be developed to supervise the implementation of the Inter-American Convention for the Prevention of Torture on its entry into force. The Chairman of the Committee against Torture was of the opinion that the universal mechanism must be able to operate in individual cases where regional systems failed or were unable to act. And some interest was expressed in clarifying the text, including the concept of "exceptional circumstances" that might justify action by the subcommittee despite the existence of regional bodies, and how such a conclusion would be reached.

Paragraph 2

99. ICRC/subcommittee relations. The representative of the ICRC referred to the written statement submitted by the ICRC (see E/CN.4/1992/WG.11/WP.1) in which it stated its position on the draft optional protocol. He then reviewed the relationship between the activities of Protecting Powers and the ICRC on the basis of the Geneva Conventions of 1949 and the Additional Protocols of 1977, on the one hand, and the visits by the subcommittee envisaged by the optional protocol, on the other. Having different objectives, these two systems should not interfere with each other, on the condition, however, that the specifics of their respective mandates and approaches be respected. In his view, practice should develop informal mechanisms of consultation to avoid practical difficulties and maximize the complementary nature of each institution. Speakers in the debate emphasized the need to avoid overlap in the respective and separable fields of endeavour of the ICRC and the subcommittee and for the latter to benefit from the experience of the ICRC. Two speakers considered that this provision should state more clearly that the

mandate of the subcommittee would not overlap with the role of the ICRC under the Geneva Conventions. It was also stressed that too much detail in the formulation of this provision might prove to be detrimental to the flexibility of action that each body would require to fulfil its respective responsibilities; the representative of the ICRC expressed the opinion that the two bodies should have some latitude to develop an effective and mutually complementary working relationship, so as to fulfil its respective responsibilities.

100. Other protection under domestic and international law. Some delegations suggested that the draft should clearly state that its provisions do not prejudice the operation of aspects of domestic law or international agreements which provide greater protection for persons deprived of their liberty, as indicated in article 17 (1) of the European Convention and other international human rights instruments.

VIII. LOGISTICS AND FINANCIAL CONSIDERATIONS: ARTICLE 16

101. The Working Group considered article 16 at its 14th and 15th meetings, on 27 and 28 October 1992.

General trend of the discussions

102. The general approach of most delegations was that the implementation of the proposed system and the operations of the subcommittee should not be jeopardized by inadequate financing. There should be an assurance of sufficient financial and other resources, on a continuing basis, to meet the needs of the efficient operation of the system. Most of the delegations expressed the view that article 16 needed further consideration, based on a financial evaluation of the projected costs of implementing the protocol. Delegations requested the preparation of a detailed financial analysis of the costs associated with the operation of the proposed system of visits, to be provided to the Working Group at an early stage in the course of its future deliberations.

Issues raised

103. Many delegations supported the principle that expenditures deriving from the implementation of the protocol should be borne by the United Nations regular budget. In this connection, reference was made to the proposal made by the meeting of Chairpersons of the supervisory bodies that all treaty bodies be financed from the regular budget of the United Nations and that all new instruments should provide for the financing of new bodies from the regular budget. It was suggested that further consideration would be needed in light of the decision to be taken by the General Assembly at its forty-seventh session on the effective operation of the treaty bodies. If the General Assembly proposed changes to the Convention against Torture to allocate costs of the Committee against Torture to the general budget, this delegation suggested that the same system should apply to the optional protocol. These delegations considered that reliance on voluntary contributions, or on payments by States parties alone, would not provide the necessary assurance of resources to permit sound administration.

104. Other delegations considered that the idea that the States parties to the protocol should bear the expenditures should be retained for consideration. One observer stated that the idea of establishing a special fund based on voluntary contributions was worthy of consideration and that his country would contribute substantially to such a fund, if established. Other delegations expressed concern that if the entire costs were to be borne by States parties, it might inhibit many countries from ratifying the instrument.

105. One delegation stated that it had no difficulty with the idea of the establishment of a special fund based on voluntary contributions for this purpose, but expressed some apprehension about the extra cost which might result from the appointment of the board of trustees.

106. Several speakers stressed the need for adequate financial resources as a prerequisite to the efficient implementation of the protocol and expressed the fear that voluntary contributions would not be sufficient for this purpose. Furthermore, a number of delegations expressed the view that in a time of significant financial constraints, establishment of this mechanism should not be at the expense of the effective functioning of other areas of the human rights treaty system, including broadening adherence to the Convention against Torture and ensuring that existing mechanisms worked effectively.

IX. FINAL CLAUSES AND RELATED ISSUES

107. Articles 17 to 21, which contain the final clauses of the optional protocol, were considered at the 15th meeting, on 28 October 1992.

A. Article 17

108. Some delegations pointed out that this protocol, as a protocol to the Convention against Torture, was legally limited to the participation of the States parties to the Convention against Torture. Some considered that this consideration justified the preparation of a separate instrument which would not necessarily have an organic relationship with the Convention against Torture. Some delegations also said that because the protocol sought to implement the aims of the Convention against Torture, it would be necessary for States parties to the protocol also to have made the substantive commitments in the Convention against Torture.

B. Article 18

Paragraph 1

109. Issues raised: Entry into force. Some delegations expressed concern about the number of ratifications or accessions necessary for the present protocol to enter into force. While they supported a mechanism to promote expeditious entry into force, they felt that the proposed level of 10 States parties did not promote universal participation. Moreover, they felt that the figure chosen should ensure that there would be an adequate number of members of the subcommittee to facilitate efficient handling of its workload and effective operation of the protocol. Other delegations stated that the deposit of the tenth instrument of ratification or accession as provided for in this paragraph should be sufficient for it to enter into force. They

argued that early entry into force would attract further ratifications or accessions as the system demonstrated its worth and one speaker proposed to reduce the number of ratifications required.

110. Two delegations noted the particular issues of implementing the protocol in a federal State although the concept of a so-called "federal State clause" was not proposed.

Paragraph 3

111. Reservations. Several delegations considered that the present text, excluding any reservations, was the proper approach. They considered that, unlike the Convention against Torture, the optional protocol did not contain any provisions of substantive law and that the possibility of reservations might undermine the effective operation of the preventive system, although it was recognized that reservations inconsistent with the object and purpose of the protocol (as expressed in the preamble and article 1, for example) were inadmissible under the Vienna Convention on the Law of Treaties. It was mentioned that a form of "negotiated reservation" to preserve legitimate State interests was found in article 13, and that this should suffice. Other delegations argued that the a priori exclusion of all reservations should not necessarily apply, even though they recognized that there were dangers. These speakers felt that it was important not to take decisions that might inhibit States from participating or make the optional protocol unduly difficult for a State to implement in the domestic law or under its constitution. They also considered that if, after further analysis, there appeared to be some reason for relaxing the present provision, careful negotiation of permissible reservations could meet the concern of those who would exclude all reservations.

112. Other issues. One delegate noted that no provision was made for amendments or for dispute resolution, and thought this should be considered. Another delegation observed that the Convention against Torture covered this, but a further speaker pointed out that this would depend on the legal connection between the Convention against Torture and the optional protocol, which some delegates had put at issue.

C. Article 19

113. One speaker questioned the need to inform the Committee against Torture of denunciation, as contemplated by this article.

D. Article 20

114. Issues raised: Privileges and immunities. One delegation stated that there were no problems with respect to privileges and immunities of the members of the subcommittee, but that other considerations might apply to the privileges and immunities of experts, interpreters and other members of the delegation. Some delegations stated that the range of privileges and immunities should be such as to allow a delegation to carry out its mission, while another observed that such privileges and immunities should be available only during the mission itself.

E. Future work

115. At its 16th meeting, on 30 October 1992, the Working Group adopted its informal working group's proposals for the form and content of the present report. It then considered how the progress achieved to date could be continued. The Working Group agreed that in the framework of the initial examination of the draft optional protocol, useful progress had been made and that its work on the draft should continue. The Working Group considered that the record of discussions at the present session as embodied in the present report, together with any comments or suggestions that might be made by Governments, specialized agencies and non-governmental organizations would provide a satisfactory basis for decisions to be taken on revisions or amendments to the draft optional protocol, at its next session. The Working Group accordingly considered that substantial progress on the elaboration of the text could be achieved within a reasonable period of time.

X. ADOPTION OF THE REPORT

116. The report was adopted at the 16th meeting of the Working Group, on 30 October 1992.
