

Distr.
LIMITED

E/CN.4/1994/WG.11/WP.1
27 September 1994

ENGLISH
Original: ENGLISH/FRENCH

COMMISSION ON HUMAN RIGHTS
Fifty-first session
Pre-sessional Open-ended Working Group
on the Question of the Draft Optional
Protocol to the Convention against
Torture and other Cruel, Inhuman or
Degrading Treatment or Punishment
Geneva, 17-28 October 1994

DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND
OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Working paper submitted by the Secretariat pursuant to
Commission on Human Rights resolution 1994/40

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
Introduction	1 - 4	2
I. GENERAL OBSERVATIONS	5 - 9	2
II. COMMENTS AND PROPOSALS IN RESPECT OF THE TEXT OF THE ARTICLES WHICH CONSTITUTED THE OUTCOME OF THE BEGINNING OF THE FIRST READING OF THE OPTIONAL PROTOCOL DURING THE SECOND SESSION OF THE WORKING GROUP (Articles 1-7)	10 - 36	3
III. COMMENTS, OBSERVATIONS AND SUGGESTIONS CONCERNING THE REMAINING ARTICLES 8-21 OF THE DRAFT	37 - 104	10

INTRODUCTION

1. The present document has been prepared pursuant to Economic and Social Council resolution 1994/250 by which it authorized an open-ended working group of the Commission on Human Rights to meet for a period of two weeks prior to its fifty-first session, in order to continue the elaboration of a draft optional protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

2. It should be noted that in the course of its second session, from 25 October to 5 November 1993, the Working Group considered articles 1 to 7 of the draft. As the Group pointed out in its report, that consideration constituted the outcome of the beginning of the first reading of the optional protocol. (See document E/CN.4/1994/25.) The Commission on Human Rights, in paragraph 3 of its resolution 1994/40 of 4 March 1994, requested the Secretary-General to transmit the report of the Working Group to Governments, the specialized agencies, the chairpersons of the human rights treaty bodies and the intergovernmental and non-governmental organizations concerned, and to invite them to submit their comments to the Working Group.

3. Therefore, the present document consolidates comments, observations and suggestions relating to articles 1 to 7 considered by the Working Group at its second session and contained in the annex to the report of the Working Group. In addition, it consolidates comments, observations and suggestions concerning remaining articles 8 to 21 of the draft, which were not considered at the second session of the Working Group.

4. Any additional replies received by the Centre for Human Rights after 27 September 1994 will be presented as addenda to the present document.

I. GENERAL OBSERVATIONS

5. The Government of Mexico considers that the present wording of the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contained in the report of the relevant working group is unclear and that many parts of it need to be clarified and explained. Also lacking in this draft are provisions that should be included in an instrument of this kind, such as a requirement that the Sub-Committee submit progress reports to the States parties and to the Commission on Human Rights or the Committee against Torture.

6. The Government of Mexico also considers that the draft should define the procedure to be followed and the criteria to be applied in the case of the visits to which the draft refers, all of which should be clearly set out in relevant rules.

7. The Government of Switzerland believes that the efforts made thus far to draft an effective legal instrument to establish a universal preventive system of visits to places of detention have already produced satisfactory results, with the drafting, at the October to November 1993 session of the Working Group, of seven substantive articles in first reading. It is particularly heartening to observe that a broad consensus has been reached on substantive issues, namely the principle of preventive visits to any place of detention, the establishment of a Subcommittee for the Prevention of Torture and Other

Cruel, Inhuman or Degrading Treatment or Punishment, to be responsible for organizing missions for this purpose, and the requirements for conditions of appointment to the membership of the Subcommittee. Various questions of procedure relating to the functioning of the Subcommittee were also settled.

8. The Government of Switzerland fully agrees with the assessment of the Working Group in its report (E/CN.4/1994/25), that further progress in the elaboration of this international instrument will be achieved at the next session of the Working Group (17-28 October 1994). It also considers that the initial draft referred to, which was submitted to the members of the Working Group for their consideration in document E/CN.4/1991/66, includes the relevant elements for drafting the other provisions of this instrument.

9. The Government of Switzerland believes that the spirit of cooperation shown during the first two sessions of the Working Group will continue to prevail throughout this elaboration exercise, and in particular at the next autumn session of the working group. It must do so if the Declaration adopted in June 1993 by the World Conference on Human Rights, which reaffirmed "that efforts to eradicate torture should, first and foremost, be concentrated on prevention, and therefore [called for] the early adoption of an optional protocol to the Convention against Torture [...]".

II. COMMENTS AND PROPOSALS IN RESPECT OF THE TEXT OF ARTICLES WHICH CONSTITUTED THE OUTCOME OF THE BEGINNING OF THE FIRST READING OF THE OPTIONAL PROTOCOL DURING THE SECOND SESSION OF THE WORKING GROUP

ARTICLE 1

1. A State Party to the present Protocol shall permit visits in accordance with this Protocol to any place in any territory under its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held [provided that full respect is assured for the principles of non-intervention and the sovereignty of States].

2. The object of the visits shall be to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from [, and [to take] measures for the prevention of] torture and from other cruel, inhuman or degrading treatment or punishment in accordance with applicable international [standards], [instruments], [law].

Paragraph 1

10. As it was pointed out in footnote 1 to this paragraph, several delegations did not agree with certain aspects of the text of paragraph 1 of article 1. They believed that each visit should have the consent of the State party concerned. Several delegations also suggested that the words "any place in" should be deleted. One delegation had concerns in regard to the wording of the present draft of paragraph 1 of article 1 and reserved the right to revert to it in the light of future agreement on the remaining articles. These concerns did not refer to the words "any place in".

11. The Government of Mexico finds the phrase "or with its consent or acquiescence" unclear and considers that it should be drafted more clearly, as the present wording could encompass the concept of illegal detentions or places of detention. In its view reference should also be made to the consent of the State to the organization of such visits.

12. In the opinion of the Government of Mexico, the phrase in square brackets at the end of the paragraph, "[provided that full respect is assured for the principles of non-intervention and the sovereignty of States]", should be retained.

13. The International Federation of the Action of Christians for the Abolition of Torture (IFACAT) considers that the reference to "persons deprived of their liberty" who "are held or may be held" might give rise to inappropriate interpretations and quibbling, suggesting, for example, that a particular person was admittedly deprived of liberty but was not held. It would therefore be better, in its view, to avoid that double qualification in the wording.

14. IFACAT proposes that the following phrase should be incorporated in paragraph 1: "... where persons are or may be deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence".

Paragraph 2

15. The Government of Croatia considers the right to appropriate medical care as one of the fundamental human rights. In its opinion, the denial of the necessary medical care is a form of torture, therefore the right to medical care should be protected by the Protocol. In view of the above, it suggested to insert after the word "punishment" the words "or denial of necessary medical care".

16. The Government of Mexico considers that the first part of the paragraph should be more clearly worded, because in its present form it appears to imply that it is the Subcommittee that would undertake to adopt preventive measures, for example legislative measures. In its view, to avoid that inaccuracy, the phrase "with a view to strengthening" should be replaced by the phrase "so that the State may strengthen", in order to make it clear that it is the country itself and not the Subcommittee that would take the appropriate measures. In any case, Mexico is in favour of retaining the reference to "applicable international instruments", at the end of the paragraph.

17. The Government of Mexico also feels that, as a complementary measure, the part of the paragraph dealing with the taking of measures might constitute a new article which would read as follows:

"The States Parties to the present protocol undertake to adopt, in accordance with their constitutional procedures and the provisions of applicable international instruments, the necessary legislative and other measures for the prevention of torture and of other cruel, inhuman or degrading treatment or punishment, where such measures are not already required by legislative or other provisions."

18. Mexico considers it necessary also to explain the principles for determining the necessity of strengthening the measures already available to States.

19. In IFACAT's view the reports published by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment show the broad interpretation given to the term "treatment" which includes everything that touches more generally upon the conditions of detention, whereas that broadening of the interpretation was not necessarily implicit. According to IFACAT this interpretation by the States parties to the European Convention, would perhaps not immediately be accepted at the world level, if the article did not state it expressly.

20. IFACAT also proposed that the words "and the conditions of their detention" should be inserted after the word "liberty".

21. The Howard League for Penal Reform felt strongly that the full formula "torture and ... other ... degrading treatment or punishment" should be retained, and not watered down to a more limited version.

ARTICLE 2

There shall be established a Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [of the Committee against Torture] [which shall carry out the functions laid down in the present protocol] (hereinafter referred to as the Subcommittee); the Subcommittee shall be responsible for organizing missions to the States Parties to the present Protocol for the purposes stated in article 1.

22. The Government of Mexico considers that the phrases in square brackets, i.e. "[of the Committee against Torture]" and "[which shall carry out the functions laid down in the present Protocol]" should be retained. It also considers that the Subcommittee should submit to the Committee a report on the visits it has carried out, since it is the Committee which has the responsibility of communicating with States.

ARTICLE 3

In the application of this Protocol, the Subcommittee and [the competent national authorities of] the State Party concerned shall cooperate with each other. The Subcommittee shall be guided by principles of confidentiality and impartiality.

23. The Government of Mexico considers that the words in square brackets, i.e. "[the competent national authorities of]", should be retained and that the words "including the national institutions for the promotion and protection of human rights" should be added after the words "the State Party concerned". The Government of Mexico also points out that the first part of article 3 should constitute a declaration of principles in the draft and that, to that end, it should make reference to the concepts of objectivity and respect for the sovereignty of States and the principle of non-interference in their internal affairs.

24. The Government of Mexico believes that an additional paragraph should indicate whether all the members of the Subcommittee or only a group of them should participate in the visits and, if necessary, the exact number of persons who should constitute the delegations, and the manner in which the decision concerning their composition should be taken. In its view members of the Subcommittee who are nationals or residents of the State visited should also be prohibited from taking part in the visit, in order to ensure that the principles of confidentiality and impartiality are genuinely observed.

25. In IFACAT's view article 3 sets out three principles that deserve to be enunciated in two successive paragraphs, because the first (cooperation) concerns the Subcommittee and the State party, whereas the other two concern only the Subcommittee. IFACAT therefore proposes that article 3 should be divided into two paragraphs, each sentence constituting a separate paragraph.

ARTICLE 4

1. The Subcommittee shall consist of [number to be inserted] members. After the [number to be inserted] accession to the present Protocol, the number of members of the Subcommittee shall increase to [number to be inserted].

2. The members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

3. No two members of the Subcommittee may be nationals of the same State.

4. The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee effectively.

Paragraph 1

26. Regarding the composition of the Subcommittee, Mexico considers that it is important to take account of the principle of equitable geographical distribution, as well as the multidisciplinary character of the Subcommittee, given its area of activity. In this connection, a balance should be maintained between the experts who are specialists in the administration of justice and in criminal law and those who are specialists in the medical fields concerning persons who have been tortured.

Paragraph 2

27. The Crime Prevention and Criminal Justice Branch of the United Nations Office at Vienna stated that it was very happy to see in paragraph 2 that "professional experience in the field of the administration of justice, in particular in criminal law", was required for the membership of the Subcommittee. In its view, such experience may be very important to address

problems in the area of detention. In this context, it would like to suggest to insert furthermore the words "the judiciary", before the words "prison or police administration".

Paragraph 3

28. IFACAT suggests that the word "national" should be replaced by the word "ressortissant" in the French version.

ARTICLE 5

1. The members of the Subcommittee shall be elected in the following manner:

(a) Each State Party may nominate up to three persons possessing the qualifications and meeting the requirements set out in article 4 [one of whom may be a national of a State Party other than the nominating State Party];

[(b) From the nominations received the Committee against Torture shall prepare a list of recommended candidates, taking due account of article 4 of the present Protocol. This list shall consist of not less than twice the number of members of the Subcommittee to be elected and not more than two and a half times the number of members to be elected;]

(c) The members of the Subcommittee shall be elected by [the States Parties] [the Committee against Torture] by secret ballot [from the list of recommended candidates prepared by the Committee against Torture].

2. Elections of the members of the Subcommittee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

3. The initial election shall be held no later than [to be determined] after the date of the entry into force of the present Protocol. At least four months before the date of the meeting of the Committee against Torture which precedes the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them [and shall submit it to the Chairman of the Committee against Torture]. [The Chairman of the Committee against Torture shall submit to the Secretary-General the list of recommended candidates prepared in accordance with paragraph 1 (b) of this article.] [The Secretary-General shall submit this list of recommended candidates to the States Parties.]

4. In the election of the members of the Subcommittee, eligible for election in accordance with article 4, consideration shall be given to equitable geographical distribution of membership, to a proper balance among the various fields of competence referred to in article 4 and to the representation of different forms of civilization and of the principal legal systems.

Consideration shall also be given to a balanced representation of women and men on the basis of the principles of equality and non-discrimination.

5. If a member of the Subcommittee dies or resigns or for any other cause can no longer perform the member's Subcommittee duties, [the Committee against Torture shall, after having consulted the State Party of which the member was a national,] [the State Party which nominated the member shall] appoint another person of the same nationality possessing the qualifications and meeting the requirements set out in article 4 to serve for the remainder of the member's term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Paragraph 1

29. Regarding subparagraph (a), the Government of Mexico believes that the phrase in square brackets, i.e. "[one of whom may be a national of a State Party other than the nominating State Party]", should be deleted, since the Subcommittee may not include more than one national of the same State, which limits this possibility to one State.

30. Regarding subparagraph (b), the Government of Mexico considers that in fixing the number of candidates account should be taken of geographical distribution and professional experience, applying the criteria proposed in article 4.

31. Regarding subparagraph (c), the Government of Mexico considers that the members of the Committee should be elected by the States parties to the Protocol, which would be consistent with what is proposed in article 5, paragraphs 2 and 3. In that regard, the Government of Mexico considers acceptable the proposal by Austria, that the members of the Committee should be elected by the majority of the States parties, from a list of persons meeting the requirements set out in article 4, drawn up by the Committee against Torture (on the basis of the proposals of the States parties).

Paragraph 5

32. The Government of Mexico considers that, in the case of the death or resignation of a member of the Subcommittee, the election of the new members should not be restricted to candidates nominated by the State party of which the deceased member or the member who resigned was a national. In the view of the Government of Mexico, the principle of rotation could be established in this case.

ARTICLE 6

The members of the Subcommittee shall be elected for a term of four years. They shall be eligible for re-election [once] [twice] if renominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these members shall be chosen by lot by the Chairman of the meeting referred to in article 5, paragraph 2.

33. The Government of Mexico accepts the principle of an immediate further election and of various elections at intervals, in order to avoid monopolization of seats and to make the Subcommittee more representative.

ARTICLE 7

1. The Subcommittee shall elect its officers for a term of two years. They may be re-elected [once].

2. The Subcommittee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Half plus one members shall constitute a quorum;

(b) Decisions of the Subcommittee shall be made by a majority vote of the members present;

(c) The Subcommittee shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee. After its initial meeting, the Subcommittee shall meet at such times as shall be provided in its rules of procedure [, but it shall meet for a regular session at least twice a year.]

4. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of [the Committee against Torture and] the Subcommittee under this Protocol.

Paragraph 1

34. The Government of Mexico finds the content of this paragraph incomplete, because the chairman and his functions are not expressly mentioned.

Paragraph 3

35. The Government of Mexico considers that the phrase in square brackets "[but it shall meet for a regular session at least twice a year]" should be modified, because it implies that two regular sessions will be held annually.

Paragraph 4

36. The Government of Mexico believes that the words in square brackets "[the Committee against Torture and]" should be deleted because it is the

Subcommittee that is referred to here and not the Committee. In its view, other sources of financing, such as voluntary contributions, should also be proposed.

III. COMMENTS, OBSERVATIONS AND SUGGESTIONS CONCERNING
THE REMAINING ARTICLES 8 TO 21 OF THE DRAFT

ARTICLE 8 1/

37. The Government of Egypt proposed that more specific wording and clear criteria be employed to define the possible grounds for action by the Subcommittee and to indicate whether the exceptional cases or important circumstances justifying the dispatch of missions other than regular missions are to be left to the sole discretion of the Subcommittee or whether there should be prior consultation with the State concerned in this regard. The State should be given sufficient advance notice of the date of the visit, which should be determined in the light of the circumstances of each individual visit. In addition, States should be permitted to request postponement of the visit to a subsequent date without being required to give reasons therefor.

38. In the view of the Government of Spain, the programme of regular missions is not clearly defined. More detail on how the regular missions are to be conducted, such as is found in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, would be desirable.

39. As regards paragraph 1 of article 8, it appeared necessary to the Government of Chile to establish a mechanism for the decision to make emergency visits should the situation of mass torture occur in a country. In certain cases, the Chairman of the Committee against Torture might find it advisable, after consultations with three members of the Committee, to appoint a "delegation" to undertake an emergency mission.

40. The Government of Cameroon proposed to insert the wording of article 3 in the new paragraph 1 of this article.

41. Some members of the Committee against Torture were of the view that, if a system of visits to places of detention at the universal level were to be adopted, the monitoring mechanism established under the Convention and that envisaged under the draft optional protocol should be independent of each other.

42. With respect to paragraph 2 of this article, the Government of Sweden pointed out that a duplication of mechanisms established under the Convention against Torture and that envisaged under the draft optional protocol should be avoided. At the same time, it emphasized the role of the Special Rapporteur on torture which should be regarded as complementary to the functions of the Committee against Torture. The additional workload that would be the result of new preventive tasks of the Committee against Torture would have to be

1/ For the text of articles 8-21 which were not considered by the Working Group at its second session, see document E/CN.4/1991/66.

considered by the working group. One possibility would be for the Committee to use independent experts to carry out missions under a possibly enlarged mandate of the Committee.

43. Members of the Committee against Torture expressed the opinion that the text of paragraph 2 should be changed or an additional paragraph added to outline in more detail how the relationship between the Committee against Torture and the Subcommittee to be established under the optional protocol would be affected by the postponement of a scheduled mission by the latter in cases where a State party had agreed to receive a visit of the Committee against Torture under article 20 of the Convention.

44. The Crime Prevention and Criminal Justice Branch pointed out that some delegates seemingly emphasized the need for an agreement of the State concerned prior to each visit by the Sub-Committee. However, if such a strict agreement is required,

(1) the preventive character of the new system may be greatly diminished;

(2) the establishment of the new Subcommittee may result in duplicating to some extent the present system of the Committee Against Torture;

(3) such consent is already implied in the ratification of the protocol, as reflected in its Article 1.

45. In the opinion of the Crime Prevention Branch, negotiations may be necessary prior to each visit between the Subcommittee and the State concerned with regard to the place and duration of the visit and other matters (see article 13). However, such negotiations may be understood as cooperation between both parties, stipulated in article 3. Therefore, formal agreement may not be required in article 8.

ARTICLE 9

46. In the view of the Government of Austria, the universal and regional mechanisms should include the possibility of mutual cooperation, guaranteeing strict confidentiality. While duplication has to be avoided, the decision on a supplementary visit by the universal mechanism to the region in exceptional cases and circumstances should lie with the United Nations body.

47. The Government of Cameroon wondered whether some reference to the cooperation between the Subcommittee and the national institutions responsible for the protection and promotion of human rights might not be incorporated into this article or elsewhere. In view of the way missions are currently organized, some States might be reluctant to authorize them unless some national "structure" was associated with the operation.

48. The Government of Costa Rica considers that the system of visits not only reinforces the purposes of the Convention against Torture but also serves to support possible efforts in other normative frameworks. Thus, article 9 of the draft highlights the flexibility of the proposed instrument and establishes the principles or bases of coordination and cooperation with other

regional systems such as the European one, where a system of visits already exists under the European Convention against Torture.

49. The Government of Egypt stated that confidentiality should be a fundamental requirement in the Subcommittee's work and its principal tasks should consist in field visits. Accordingly, a balanced and clearly defined framework should be established to regulate its relationship with other institutions in such a way as to achieve coordination and cooperation without prejudice to the principle of the confidentiality of the information concerning the Subcommittee's field visits.

50. The Government of Mexico stated that the relationship the proposed group would have with the mandate of other bodies, such as the Committee against Torture and the Special Rapporteur on the Commission on Human Rights on the question of torture, must be made clear. The Government of Mexico considers that the draft text, as currently worded, could lead to overlapping with existing terms of reference, in particular those of the bodies mentioned above. The need is also seen for a revision of the conditions for the establishment of cooperation with regional organizations, particularly with regional agreements on this topic. It is felt, in this regard, that the protocol's provisions should be universal in scope and not exclude any region, even where relevant regional agreements exist. It also noted that the issue of "places of detention" will probably require very careful review.

51. In the view of the Government of Spain, article 9, paragraph 1, seems to imply that the Subcommittee would decide when to send a mission, whereas according to article 8 it is the Committee that establishes the programme of regular missions and schedules ad hoc or special ones. It would be worthwhile to spell this article out more clearly and avoid unnecessary duplication.

52. Concerning paragraph 1 of article 9, the view was expressed by the Committee against Torture that the system envisaged under the draft optional protocol could have a negative effect on the possibility of creating regional systems and on their functioning, but one member of the Committee was of the view that this objection had been taken into account by the authors of the draft optional protocol in its article 9 on relations with regional organizations.

53. Members of the Committee were of the view that the term "may", appearing at the beginning of the second sentence of paragraph 1, should be replaced by the term "shall". They were also of the view that consideration should be given to adding a paragraph to article 9 which would exhort all the international and regional organs or organizations concerned to engage in the fullest cooperation with each other.

54. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) took note with interest of article 9, paragraph 1, of the draft Optional Protocol. The Committee fully approved of the basic spirit of this provision, which was, through consultation, to avoid a wasteful duplication of efforts by parallel systems of control. To this end, the CPT would certainly be eager to have the closest possible relations with the Sub-Committee envisaged by the draft Optional Protocol.

55. However, the CPT had misgivings as regards the specific means of coordinating the respective activities of the Subcommittee set up under the draft Optional Protocol and regional bodies, highlighted in article 9, paragraph 1. The participation of a member of the Subcommittee, as an "observer", in missions carried out by regional bodies is foreseen; this member would subsequently make a "strictly confidential" report to the Subcommittee. The implementation of such a measure could give rise to significant legal and practical problems in so far as the CPT is concerned. Almost certainly it would involve amending the provisions of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment concerning the composition of visiting delegations and the rule of confidentiality. Further, the presence of an observer from the Subcommittee in the midst of a visiting delegation could well cause operational complications in the field, no matter how closely defined his position might be in advance. The effectiveness of a visiting delegation depends in large measure on its unity; the latter would not be facilitated by the proposal presently under consideration.

56. Moreover, it is far from certain that such a system would be the best method of ensuring a good coordination of activities, since the observer would obtain only an imperfect picture of the outcome of a visit. His detailed knowledge would be limited to those parts of the visit in which he participated personally (in this connection, it should be recalled that CPT visiting delegations operate for much of the time in sub-groups, often located in quite different parts of the country concerned). Further, he would possess neither the report subsequently sent to the State visited nor the latter's response. It follows that his report to the Subcommittee would be incomplete and hence potentially misleading.

57. In view of CPT, a possible alternative - and more efficacious - means of facilitating the desired coordination of activities could be for a State which has ratified both a regional system and the Optional Protocol to agree that visit reports drawn up by the regional body in respect of that country and the State's response are to be systematically forwarded to the Subcommittee on a confidential basis. In this way, the Subcommittee would have a full picture of the situation in the regional context, and the consultations between the regional body and the Subcommittee foreseen in article 9 (1) of the draft Optional Protocol could be held in the light of all the relevant facts. The implementation of this measure vis-à-vis the CPT's activities might not require an amendment of the European Convention.

58. The International Committee of the Red Cross (ICRC) pointed out that paragraph 2 of article 9 clarified the relations between the States parties to the Geneva Conventions of 1949 and their Additional Protocols of 1977 and ICRC, on the one hand, and between them and the Subcommittee envisaged by the draft optional protocol, on the other hand. ICRC was of the opinion that it was necessary to identify mechanisms for consultation which would avoid practical difficulties and optimize the complementary nature of the work of each institution.

ARTICLE 10

59. Concerning paragraph 1 of article 10, the Government of Cameroon considered that the text appeared to depart from the current United Nations

practice in which members of the Subcommittee were experts. Therefore, it would be necessary to redefine the term "experts" and the others.

60. As regards paragraph 2 of this article, the Government of Cameroon indicated that the exclusion of a member of the Subcommittee from missions to his country would appear to guarantee the security of the person concerned and avoid putting his impartiality to the test. It also wondered what would be the situation concerning the participation of a non-national appointed upon the proposal of the State that receives a mission and if "experts" and interpreters were sought locally.

61. In the view of the Crime Prevention Branch, the need for experts to assist the mission may require further consideration. Even if such experts are necessary, their required competence, criteria of selection, etc. may be carefully examined, especially in the light of the principles of confidentiality and impartiality.

62. As regards paragraph 1, IFACAT feels that the definition of what the delegation represents is not expressly stated and that, in particular, depending on whether it is seen as including experts and interpreters or not, it may not be consistent with the articles that follow. IFACAT states that paragraph 4 of the introductory memorandum refers to "a delegation consisting of members of the Subcommittee and experts", which would exclude any interpreters and administrative personnel who might accompany them. It would, in its view, probably be simpler and wiser to consider the delegation as constituting a whole, even though it might mean being more restrictive on one point or the other. It proposes that paragraph 1 should be worded as follows:

"1. Each mission shall be carried out by a delegation including at least two members of the Subcommittee, from among whom the head of delegation and his alternates shall be chosen, and they shall be accompanied by experts, interpreters and administrative assistants, if necessary".

63. As regards paragraph 2, IFACAT considers that distinguishing between a mission (to a State) and a visit (to a place) avoids making any reference to the State to be visited. In its view, because of the use of the word "member" - of the Subcommittee - the restriction would not a priori affect the experts and interpreters.

64. IFACAT proposes that paragraph 2 should be worded as follows:

"2. The delegation shall not include any national of the State to which the mission will be sent".

ARTICLE 11

65. With regard to paragraph 2, IFACAT finds the distinction between an "expert" and a "person assisting the Subcommittee" rather inconsistent with article 10, paragraph 1, where the experts are referred to as assisting the members of the Subcommittee. In IFACAT's view the objection could also be restricted to particular places of detention only.

66. IFACAT suggests that paragraph 2 should be worded as follows:

"A State party to which a mission is to be sent may exceptionally, and for reasons given confidentially, declare that one or more persons who have been proposed, with the exception of members of the Subcommittee, may not take part in the delegation. This objection may apply to the entire mission or to one or more of the places to be visited".

ARTICLE 12

67. Concerning paragraph 1 of article 12, the Government of Egypt considered that the draft optional protocol should explicitly provide for a "reasonable interval of time" between the notification of the State concerned and the dispatch of the Subcommittee's mission, instead of leaving this question to the rules of procedure of the Subcommittee (the Subcommittee could determine the reasonableness of the interval in consultation with the State concerned). It specified that it was important to make provision for such an interval in view of the fact that most countries of the third world would frequently be unable to provide such committees with the requisite facilities and information for various practical reasons relating to their current socio-economic situation and the circumstances of their governmental administration.

68. The Government of Spain was of the view that the minimum length of time that may elapse between the decision to organize a mission and the mission itself should be specified. As a result, it made the following comments and requests: more detail on the programme of visits and the decision to organize visits. Article 8, paragraph 1, authorizes the Subcommittee to undertake regular and special missions without stating what criteria should apply. Yet article 8, paragraph 2, allows the Subcommittee to postpone missions; article 2 says that the Subcommittee is responsible for organizing missions; and article 9, paragraph 1, allows the Sub-Committee to send missions to States parties to regional conventions. The text needs to specify who decides to organize a mission and who carries it out.

69. With respect to paragraph 2 of article 12, the Government of Austria submitted the following comments: all the words from the beginning of the paragraph until after "in particular" should be deleted, in order to achieve a more precise formulation. It is to be understood, however, that the provision of the proper facilities to the mission includes the non-obstruction of its related activities.

- Subparagraph 2 (b) and (c): These provisions are acceptable, provided the above-mentioned proposals concerning article 1 (1) are being met, as otherwise the State party would assume responsibilities which it objectively might not be in a position to fulfil.

- Subparagraph 2 (e): Replace "convenient" with "adequate", thus englobing also security, financial and other practical aspects that may arise, if the presentation of a person in a particular place requested (for example, outside the place of detention) by the mission meets with difficulties.

- Subparagraph 2 (f): Add at the end: "... having regard to applicable rules of national law and professional ethics."

70. IFACAT feels that, for the sake of logic, the order of subparagraph (c) (the right to move inside such places) and subparagraph (d) (access to any place) should be reversed. In its view, the word "producing" in the sense of exhibiting is more justified for a thing than for a person. IFACAT has proposed that the following sentences should be included in paragraph 2:

"(c) necessary assistance in gaining access to places ...

(d) the possibility of going to ...

(e) presenting any person ..."2/

71. The Government of Mexico considered it necessary that the draft text should set forth, in a balanced way, the conditions for the cooperation between the proposed group and the State parties.

72. Concerning paragraphs 2 and 3 of article 12, the Government of Australia considered that the nature, scope and effect of the powers of experts during their missions to order production of any detainee who the delegation wished to interview should be determined. While it presumed that the standards which were to be applied would be those based on the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, this should be clarified.

73. As regards paragraph 3, Austria suggested to replace "inside or outside his place of detention" with "at an adequate location", for the same reasons as specified with regard to article 2. The IFACAT proposed to insert in the last line before the words "data protection" the word "personal".

74. With respect to paragraph 4, Austria indicated that it shared concerns expressed that the wording of this provision might prevent recourse for defamatory statements and induce immunity from civil liability. Therefore, in its view, the paragraph should be deleted as it stands now.

75. Regarding paragraph 5, IFACAT considers it unwise to refer specifically to urgent cases, for immediate observations should be allowed in every case, as this cooperation. Having regard to the provisions of article 14, paragraphs 1 and 2, and also taking into account the practice of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, IFACAT feels that the word "recommendation" refers to something included in the report, whereas the word "observation" denotes a suggestion (oral or subsequent) that is not in the report. IFACAT believes it would be useful to refer expressly to the persons in charge of the places visited, in order to prevent the expressions "competent authorities" and "authorities in charge" from giving rise to inappropriate interpretations.

2/ The subparagraph references would seem to be incorrect.

76. IFACAT proposes that paragraph 5 should be worded as follows:

"5. The delegation may at once submit observations either of general or specific nature to the competent authorities of the State party concerned and to the authorities in charge of the places visited."

ARTICLE 13

77. Concerning paragraph 1 of article 13, the Government of Australia considered that the conditions on which a State party may object to a visit should be determined.

78. Austria was of the view that competent authorities of the Party concerned may make representations to the Committee against a visit at the time or to the particular place proposed by the Committee. Such representations may only be made on grounds of national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to a serious crime is in progress.

79. Bearing in mind the terms of article 2 (2) of the Convention against Torture, Chile suggested with regard to the possible suspension of a visit by a State party for "urgent and compelling reasons" that it be expressly stated in this provision that the existence of "states of emergency" cannot serve as a basis for objecting to a visit.

80. IFACAT believes that paragraph 1 could be made more concise and clearer, and proposes the following wording:

"... against a visit to a particular place if serious disorder temporarily prevents access to it".

81. As regards paragraph 2 of article 13, the Government of Cameroon pointed out in reference to the terms "outside" in the first line of article 12 (3) and "transfer" that the risks of escape and the financial implications involved in the operation called for further reflection and that its preference was for the more general and more flexible formulation of article 12 (2) (c) "... at a convenient location", which allowed arrangements to be made to meet the particular case.

82. IFACAT considers that it is preferable to use the word "meet" for a person, rather than "visit", and suggests the following wording:

"... any person whom the Subcommittee proposed to meet. Until the meeting takes place, ...".

ARTICLE 14

83. IFACAT feels that, although paragraph 1 is identical to article 10, paragraph 1, of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, its wording could be improved. It proposes that, in the French version, the words "toutes observations" should be replaced by the expression "toutes les observations" or "toute observation". Concerning the distinction between observations (which would

tend to be outside the report) and recommendations (which would be included in the report), it considers it preferable to refer to the latter in the first sentence, in connection with the drawing up of the report, rather than in connection with the transmission of the report.

84. In IFACAT's view the relevant part of paragraph 1 should be worded as follows:

"... taking account of any observations which may have been submitted by the State party concerned and making to it any recommendations it considers necessary. It shall transmit this report to the State concerned and shall consult with it with a view to suggesting improvements in the protection of persons deprived of their liberty".

85. With respect to paragraph 2 of article 14, Australia was of the opinion that the conditions under which a report may be published against the wishes of the State party should be determined.

86. Austria suggested to add at the end of the paragraph the following sentence: "No personal data shall be published without the expressed consent of the person concerned."

87. In view of the Government of Chile, attention should be given to the concern about respect for the principle of confidentiality, which constitutes a method of work and a guarantee of the principles upon which the protocol is based. The use of experts by the Committee against Torture does not imply that that principle will be violated or that the Committee's methods for monitoring compliance with national obligations will be altered, as long as the two functions, namely prevention under the protocol and control under the Convention, are carried out in accordance with clearly defined rules.

88. Regarding paragraph 4, IFACAT considers that the definition of a delegation given in article 10 should simplify the formulation of the rule of confidentiality. In its view the relevant part of the last sentence of paragraph 4 should read as follows:

"Members of the Committee against Torture, of the Subcommittee, and of delegations and any person assisting them or having assisted them are required ...".

ARTICLE 15

89. Concerning article 15, some members of the Committee against Torture were of the view that there should be a clear link between the mechanism established under the Convention and that envisaged under the draft optional protocol in order to avoid conflicts of areas of competence and undue proliferation of organs dealing with the same issue. The Committee also considered that its provisions unduly restricted the information that should be made available to the Committee against Torture in respect of its jurisdiction under article 20 of the Convention. They accordingly suggested that the following proposal be taken into consideration as an alternative to article 15 of the draft optional protocol or to any other relevant provisions: "The Subcommittee shall submit to the Committee against Torture the following reports:

- (a) Reports which the State party concerned wishes to be published;
- (b) Reports upon which the Subcommittee wishes the Committee against Torture to make a public statement;
- (c) Reports which in the Subcommittee's opinion reveal that systematic torture has been practised by a State party;
- (d) Reports concerning a State party in respect of which the Committee against Torture has indicated to the Subcommittee that an inquiry in accordance with article 20 of the Convention against Torture is under consideration."

The reports under (b), (c) and (d) shall be dealt with by the Committee against Torture in private meetings.

90. In addition, the members of the Committee felt that in paragraph 2 of article 15 of the draft optional protocol, after the words "general annual report on its activities", the following words should be added: ", including a list of all States parties visited, the composition of the visiting delegations and the places visited."

91. The Crime Prevention and Criminal Justice Branch stated that the work of the Subcommittee should be based on the principles of confidentiality, cooperation and effectiveness. Its main task would not be to publicly criticise countries, but rather to assist them to avoid unacceptable behaviour.

92. Concerning paragraph 1, IFACAT feels that, in the light of the preceding articles, it would be preferable to continue referring only to the mission and to the associated report (in the singular), instead of to the reports (in the plural). Regarding the recommendations, IFACAT considers that, if the reference is to those which are included in the report, there is no need to say so, as consideration of the report will necessarily involve reading them. Furthermore, if the recommendations are those made by the Subcommittee to the Committee, in other words, the requests mentioned in article 14, paragraph 2, it is pointless to say so again in this article. IFACAT proposes that the paragraph should read as follows:

"The Subcommittee shall transmit to the Committee against Torture a copy of the report sent to the State Party concerned. The Committee shall examine it, respecting the rule of confidentiality, as long as no public statement has been made in accordance with article 14, paragraph 2, or as long as the report has not been published in accordance with article 14, paragraph 3 of this Protocol."

ARTICLE 16

93. While welcoming initiative to work on the draft optional protocol, Australia was concerned that it provided for yet another monitoring body in the treaty system. When fully operational it would be costly and administrative support could well consume substantial resources in the Centre for Human Rights presently devoted to other high priority areas in the human

rights programme. Australia suggested that it may be possible to limit costs according to the number of States parties and for visits to be limited, initially at least, to jurisdictions where there is little evidence of an independent administrative or judicial framework to protect detainees from torture.

94. As regards paragraph 1 of article 16, Cameroon recommended that a preliminary evaluation of a mission by the competent services should produce an estimate of its cost. It expressed doubts whether the two thirds of States Members which were at present unable to pay the statutory contributions that at times conditions their right to vote within certain organizations would accept willingly and in good faith the creation of new statutory contributions. It suggested, on a preliminary basis, the creation of a special fund open to voluntary contributions whose operating procedures would be defined in the light of current experience.

95. Concerning paragraph 3 of the article, Cameroon suggested to insert the following sentence at the end of the paragraph: "The procedures for its operations shall be decided at the time of the entry into force of the Protocol for the States Parties".

96. With respect to the expenditures incurred by the implementation of the Protocol, Egypt considered that special attention should be paid to the following issues:

- (a) Funding should be provided by the State parties to the Protocol.
- (b) The expenditure of the subcommittee should be rationalized by specifying:
 - (i) The number of experts.
 - (ii) The number of annual field visits.
 - (iii) The mission taking part in the visit.
- (c) The activities of the subcommittee should not overlap with those of the Committee against Torture.
- (d) The Protocol should include an article providing for the establishment of a special fund to assist developing countries to develop their penal institutions and to finance training courses for persons specializing in this field, in a manner consistent with the lofty objective of the concept of the Protocol.

97. According to ICRC, its experience has shown that serious protection efforts in places of detention require a substantial commitment of staff and funds. The aspiration of adopting such an approach for all prisoners covered by the Convention would require considerable resources and entail vast organizational problems. The Subcommittee's objectives should therefore be adapted to the means which it can reasonably be expected to have at its disposal.

ARTICLE 17

98. No comments were made on this article.

ARTICLE 18

99. With respect to paragraph 1 of article 18, the Government of Australia was of the view that a realistic number of ratifications should be required before the protocol comes into force. It considered the current requirement of 10 too low illustrating that, for example, if the majority of ratification were European countries (given that they already have a similar mechanism under the Council of Europe), its entry into force would be meaningless.

100. Austria proposed that the number of ratifications needed for entry into force of the optional protocol be the same as in the relevant provision of the Convention against Torture, namely 20, to promote universal acceptance, in particular considering the growing number of United Nations Member States.

101. Concerning paragraph 3 of article 18, Austria pointed out that the possibility of reservations to the provisions of the protocol should not, a priori, be discarded.

ARTICLES 19, 20, 21

102. No comments were made on these articles.

Additional suggestions

103. In the view of the Government of Egypt, the Protocol should contain an article governing reservations in order to encourage a larger number of States to accede to the Protocol by permitting them to express reservations concerning the articles that are inappropriate to their actual circumstances. As a precautionary measure, the validity of a reservation could also be restricted to a specific time-limit (10 years, for example), on the expiration of which it would automatically become null and void with a view to inducing the States which expressed the reservation to make the necessary changes in keeping with the aims of the Protocol but without placing them under obligations that they might not be able to fulfil immediately.

104. Ecuador felt that it would be more suitable to entitle such an instrument "Optional Protocol for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment".
