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on the question of a draft optional
protocol to the Convention against
Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment
Geneva, 14-25 October 1996

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 1996/37

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INTRODUCTION

1. The present document has been prepared pursuant to Economic and Social Council resolution 6/22 of 23 July 1996 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-third 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 fourth session the working group completed the first reading of the draft optional protocol. Therefore, the text of articles, as contained in annex I to the report of the group (E/CN.4/1996/28) constitutes the outcome of the first reading of the draft optional protocol during the second, third and fourth sessions of the working group.

3. The Commission on Human Rights in paragraph 3 of its resolution 1996/37 of 19 April 1996, requested the Secretary-General to transmit the report of the fourth session of the working group to all 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.

4. Consequently, the present document consolidates comments, observations and suggestions relating to all articles of the draft optional protocol considered by the working group at its second, third and fourth sessions and contained in annex I to document E/CN.4/1996/28.

5. Any additional replies received by the Centre for Human Rights after 20 September 1996 will be submitted in an addendum to the present document.

I. GENERAL OBSERVATIONS

6. The Government of the Republic of Argentina believes that the Working Group has produced certain essential elements for the future instrument which it is most important to retain. It refers to the unconditional obligation to accept visits resulting from consent for the protocol to enter into force, as well as the prohibition of entering reservations and the indication that visits shall be made to any place where persons are deprived of their liberty. Another relevant aspect, in the opinion of the Government, is the fact that the delegation appointed to undertake the visit should be composed of independent experts with competence in the field.

7. Sweden considers the combat against torture and other cruel, inhuman or degrading treatment or punishment as a most important task for governments and the world community. It will therefore support all efforts made for the early adoption of an effective optional protocol including, if needed, more meeting time to the Working Group.

8. Sweden believes that a strong and efficient new preventive procedure open for all countries to adhere to, in order to better safeguard the protection of persons deprived of their liberty from torture and other forms of ill-treatment, is one of most promising ways in which the international community today can contribute to efforts to combat and eradicate torture and ill-treatment in places of detention. Government receive valuable and useful recommendations as to how they can prevent acts of torture and maltreatment from a new United Nations Committee, composed of internationally recognized and competent persons in the relevant fields. To link such recommendations to sources of assistance, if so needed, is another interesting aspect of the Protocol that Sweden supports.

9. Sweden hopes that a continuing good working atmosphere will prevail during the next meeting of the working group 14-25 October 1996 and that agreement can be found on the text of, at least, articles 1 to 12. Sweden proposes that the Working Group continues its second reading by examination of the content of the draft optional protocol article by article, with the exception that articles which are closely linked to each other could benefit from being examined together. As to the preamble, Sweden supports a short and distinct preamble containing no more than four articles.

10. The Swiss Government wishes again to emphasize the importance it attaches to the draft, which aims to establish a treaty mechanism for the prevention of torture through the establishment of an international committee of independent experts who would be able at any time to visit any place where persons deprived of their liberty by a public authority are held. Such a system, preventive in character, would form part of the efforts currently being made by the international community in the area of preventive diplomacy. Such an instrument would make it possible to anticipate human rights violations, which would help in implementing human rights before potential violations can occur and no longer only ex post facto. In other words, the function of this mechanism would not in principle be to denounce violations, but to prevent them, in particular by ensuring that conditions of detention do not have the

potential to lead to violations. Such a mechanism would establish the basis for cooperation between the competent authorities of the country visited and the international experts and would introduce a measure of confidence in this respect. The recommendations made by the experts would in principle be confidential. There would therefore be no question of pillorying a State, but rather of offering it advisory services and technical assistance in combating torture and other cruel, inhuman or degrading treatment or punishment.

11. The Andean Commission of Jurists (hereinafter referred to as ACJ) believes the present draft optional protocol to the Convention against Torture is an essential tool which would efficiently supplement the present Convention against Torture. One of the principal prevention mechanisms of this instrument is the development of a system establishing regular visits and inspections of areas of detention. Such a mechanism would thus contribute to the protection of persons deprived of their freedoms and to the monitoring and control of the treatment and prison conditions. Additionally, it would offer a more formal and official access, facilitating the visit to all areas of detention without passing through the tedious system of requesting previous authorization from the Government of the country in question. Furthermore, it would imply a certain international pressure along with an important impact on internal and external public opinion.

12. On 9 May 1995 the Andean Commission of Jurists held a working meeting in Santiago, Chile at the University Diego Portales on the draft optional protocol, where one of the major results of the meeting consisted of reflecting upon the possibility of a regional mechanism, which would have similar structure to that of the draft optional protocol to the United Nations Convention against Torture. Additionally, such a mechanism could include a combined strategy with the Organization of American States, in one of its non-conventional procedures. It was also emphasized that the Andean region ought not to wait for the adoption of the optional protocol, but to act now, in establishing a regional effort.

13. The International Federation of the Action of Christians for the Abolition of Torture (IFACAT) considers that it would be clearer, when brackets are used to express a choice between two alternatives, to emphasize those alternatives by separating them by the sign "/" (ex.: The members of the Sub-Committee shall be elected by [the States parties]/[the Committee against Torture], by secret ballot ...) (art. 5 (1) (c)). On the other

hand, when two terms are separated by the sign "/", they should be placed between brackets since only one of them will remain in the final text (ex.: [visit]/[mission]).

II. COMMENTS AND PROPOSALS IN RESPECT OF THE TEXT OF THE ARTICLES WHICH CONSTITUTED THE OUTCOME OF THE FIRST READING OF THE OPTIONAL PROTOCOL DURING THE SECOND, THIRD AND FOURTH SESSIONS OF THE WORKING GROUP (arts. 1-21)

ARTICLE 1

Paragraph 1

14. The Government of Mexico considers that the visits by the body proposed in the Optional Protocol cannot be made without the prior consent of the State. The instrument's effectiveness in preventing acts of torture is dependent on the cooperation to be established between the body envisaged and the State party. The protocol therefore cannot go beyond what is stipulated regarding the conduct of visits in the Convention against Torture and such visits must fully respect the principles of the Charter of the United Nations and of international law.

15. The expression "to any place" requires greater legal precision, since it is too broad for the purposes of the Optional Protocol. The expression should refer clearly to places of detention as such. Should it not do so, the text itself would implicitly be accepting the establishment of places of detention not legally intended as such.

16. In the opinion of the Government of Portugal, it is essential to base the mechanism of this article on the compromise underlying the wording of paragraph 1, i.e. waiver of the consent of the State to the visit and possibility that the visit should be made to any place where persons deprived of their liberty are held. The words in square brackets at the end of the paragraph are therefore inappropriate.

17. The Government of Sweden proposes to stop paragraph 1 after the words "be held" and to delete the text of the paragraph in square brackets.

18. Amnesty International considers that the text of paragraph 1 must ensure that the Sub-Committee has the power to carry out missions to any State which has ratified the Protocol without having to seek further permission for each individual mission.

19. According to IFACAT, persons deprived of their liberty by a public authority are, by necessity, held, making the sentence pleonastic.

Furthermore, reference to the principles of non-intervention and sovereignty, which, moreover, does not appear in the Convention, is not justified in the case of instruments of this type, which are extensions of the Charter of the United Nations; in any case, the Charter will certainly be mentioned at the beginning of the preamble to the Protocol.

20. IFACAT suggests amending paragraph 1 to read:

"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 are being or may be deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence."

Paragraph 2

21. Mexico proposes that the text of paragraph 2 should read as follows:

"The object of the visits shall be to examine the treatment of persons deprived of their liberty so that the State may strengthen, if necessary, on the basis of the Sub-Committee's recommendations, its protection of such persons from torture and from other cruel, inhuman or degrading treatment or punishment in accordance with applicable international standards and instruments."

22. Portugal considers that although it is obvious that the purpose of the Protocol is to strengthen measures to prevent torture, it is important that the words now in square brackets, namely "and to take measures for the prevention ... in accordance with applicable international standards, instruments, law", should be included at the end of the paragraph.

23. Sweden prefers that the end of the paragraph reads as follows: "... in accordance with applicable international standards".

24. IFACAT takes the view that the link between the two paragraphs could be emphasized by demonstrative pronouns. Furthermore, the object of a visit, strictly speaking (and of the ensuing cooperation), is not so much to take measures as to cause them to be taken. According to IFACAT, the French version of the text is ambiguous: it makes it impossible to tell which verbs belong together or, in other words, whether the object of the visits is to "examiner ... et de prendre des mesures ..." or to "examiner ... en vue de renforcer ... et de prendre des mesures ...", whereas the English version, by its verb tenses, clearly shows that the first alternative is the correct one. IFACAT thinks that it would be particularly appropriate, rather than referring to standards and instruments in general, to mention here that the taking of

"effective legislative, administrative, judicial or other measures to prevent" acts of torture is already required under the Convention (art. 2, para. 1) to which the Protocol refers.

25. IFACAT recommends that paragraph 2 should be amended to read:

"The object of these visits shall be to examine the treatment of such persons deprived of their liberty with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment and to cause preventive measures to be taken as stipulated in article 2, paragraph 1, of the Convention."

ARTICLE 2

26. Mexico considers that the phrases in square brackets, "of the Committee against Torture" and "which shall carry out the functions laid down in the present Protocol" should be retained and that the phrase "... and shall provide the Committee against Torture with a report on its work." should be added at the end of the paragraph.

27. Sweden proposes to delete all words put in square brackets.

28. IFACAT considers that the reference to the Committee against Torture could place greater emphasis on its complementarity to the Sub-Committee. Dividing the existing sentence into two sentences, and making the second of them a separate paragraph, would better clarify the link between the terms "mission" and "visit".

29. IFACAT proposes that article 2 should be amended to read:

1. In conjunction with the Committee against Torture, there shall be established a Sub-Committee to ...

2. In order to carry out the visits mentioned in article 1, the Sub-Committee shall organize missions to the States parties to the present Protocol."

ARTICLE 3

30. 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 last sentence should read "The Sub-Committee shall be guided by the principles of confidentiality, objectivity and impartiality and shall ensure respect for the principles of non-interference and State sovereignty."

31. IFACAT is of the opinion that the use of the word "concerned" after "State party" is inappropriate here since the cooperation is bilateral, if only because each State party provides the Sub-Committee with a list of the competent authorities; there is also a multilateral dimension as, for example, on the occasion of elections or the biennial meetings. The reference to the competent authorities is also inappropriate here since article 12 bis makes it clear that the State party, as such, also cooperates in the implementation of the Protocol by disseminating information to those authorities. Moreover, the list of those authorities (the ministries and services concerned, local officials, etc.) and the idea of a contact person should be mentioned in the rules of procedure.

32. IFACAT proposes that article 3 should be amended to read:

"1. The Sub-Committee and each State party shall cooperate in the application of this Protocol.

2. The Sub-Committee shall be guided by principles of confidentiality and impartiality."

ARTICLE 4

Paragraph 1

33. For practical reasons, effectiveness and costs, Sweden considers it advisable that the Sub-Committee be composed of 10 to 25 members. At the outset, with a number of accessions below 50, it proposes that the Sub-Committee should consist of 10 members. After the number of accessions has increased to 50 States, the number of members could increase to no more than 30 members. With a Sub-Committee composed of more than 15 members, Sweden would welcome that it could be envisaged in the Protocol that the Sub-Committee can decide, if it finds so advisable, to transform the Sub-Committee under its own rules of procedure to conduct most of its work and missions through two or three "plenipotentiary" groups. It will be required for the whole Sub-Committee to meet in plenary only occasionally.

34. IFACAT proposes that paragraph 1 should be amended to read:

"1. The Sub-Committee shall consist of [number to be inserted] members. However, until the number of accessions to this Protocol reaches [number to be inserted], the Sub-Committee shall consist of [number to be inserted] members."

Paragraph 2

35. Portugal felt that this paragraph should emphasize that the experts must always have experience in the field of human rights. In the last line, the words "or in the field of human rights" should therefore be replaced by the words "and in the field of human rights".

36. IFACAT takes the view that, in order to clarify the text and to avoid interpretations as a result of the numerous prepositions, "and" and "or", a comma is needed before each of the two uses of "or" separating the types of experience. The use of the term (medical) "treatment" is unfortunate in the context of this Protocol: it would be better to speak of "care". IFACAT therefore proposes that paragraph 2 should be amended to read:

"... 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 care of persons deprived of their liberty, or in the field of human rights".

ARTICLE 5

Paragraph 1 (a)

37. 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 from the text.

38. Sweden favours the text with the inclusion of the words in square brackets.

(b)

39. The Government of Mexico considers that the text in paragraph 1 (b), which is in square brackets and begins with the words "From the nominations received, ..." is acceptable.

40. Sweden prefers that members of the Sub-Committee be elected by the States Parties to the Protocol and that members be elected from the list of recommended candidates prepared by the Committee against Torture.

(c)

41. The Government of Mexico considers that the text of paragraph 1 (c) should read as follows: "The members of the Sub-Committee should be elected by the majority of the States Parties, by secret ballot, 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."

42. The Government of the Republic of Croatia favours the proposed election by the Committee against Torture in order to stress the impartiality and expert background of the members of the Sub-Committee.

43. In the view of Portugal, the election of the members of the Sub-Committee by the Committee would strengthen the independence of the experts selected.

Paragraph 3

44. The Government of Sweden proposes that the election be carried out no later than six months after the entry into force of the Protocol. Subsequent to Sweden's position in regard to (b), it supports the deletion of the square brackets around the last two sentences.

Paragraph 4

45. Sweden supports the text as it stands, including that a balanced representation of women and men be considered in the election of members of the Sub-Committee.

Paragraph 5

46. As regards the death or resignation of a member of the Sub-Committee, the Government of Mexico considers that the election of a replacement should not be restricted to the State of which that member of the Sub-Committee was a national. States parties should propose candidates, who should then be elected in accordance with the procedure laid down.

47. Sweden prefers the text contained in the last square brackets, i.e. that it should be the State party that appoints another person. Subsequent to Sweden's position on paragraph 1, it supports that an appointment may include persons other than nationals of the State party.

ARTICLE 6

48. The Governments of Croatia and Mexico consider that re-election of members of the Sub-Committee should not be for more than one additional term, in order to ensure renewal of the membership and make it representative. Sweden supports that members of the Sub-Committee be eligible for re-election twice.

49. IFACAT considers that the limitation could be to two consecutive terms, in other words, eight years of service. The article should be divided into two parts - numbered or unnumbered - in order to better set off the last sentence, which provides for an exception (and, moreover, one soon to be obsolete) to the rule. IFACAT recommends that article 6 should be amended to read:

"1. The members ... They shall be eligible for re-election to a single consecutive term if renominated.

2. However, ...".

ARTICLE 7

Paragraph 1

50. The Government of Mexico considers that the composition of the bureau of the Sub-Committee should be specified, that it should be indicated whether there will be a Chairman of the Sub-Committee and, if there is to be one, that his functions, manner of election and term of office should be laid down. As in the case of article 6, re-election of members of the bureau for more than one additional term should be avoided. The Government of Sweden supports the idea that the officers of the Sub-Committee may be re-elected once or twice.

Paragraph 2

51. Subsequent to Sweden's position on article 4 it proposes the addition of the following text as a new (d): "The Sub-Committee shall establish such rules of decision-making and delegation as it finds most appropriate in view of the size of the Sub-Committee and an efficient way of carrying out the work in accordance with the Protocol."

Paragraph 3

52. The Government of Mexico proposes that paragraph 3 should read as follows: "After its initial meeting, the Sub-Committee shall meet for a regular session twice a year and on special occasions as shall be provided in its rules of procedure."

53. Sweden prefers the deletion of the text within square brackets in order to provide freedom of action for the Sub-Committee. In this context Sweden wants to point to article 15 according to which the Sub-Committee shall submit annual reports which would create a need to hold at least one regular session per year.

Paragraph 4

54. Sweden proposes to delete the text put in square brackets.

55. Concerning the functions of the Sub-Committee, as reflected in articles 2, 4 and 7, the ACJ considers that such a body should be of a multidisciplinary character (medieval staff ..., experts in prison matters, etc.) thus allowing for an ample diversified evolution.

Additionally, the indirect election of the members of the Sub-Committee will guarantee its independence in respect to the Member States. In view of

the ACJ, the Committee against Torture will play a large role in the election of the Sub-Committee members, as it will propose the candidates and intervene in matters it feels necessary in order to guarantee an effective function of the body.

ARTICLE 8

56. Regarding the provisions of the proposed article 8 (first unmarked paragraph), the Government of the Republic of Croatia is of the opinion that the extensive enumeration of the criteria and principles underlying the mission of the Sub-Committee is of a somewhat confusing and superfluous character. The stressing of principles could be achieved with the same effect by referring to the "criteria consistent with the principles set out in article 3".

57. The Government of Mexico proposes that the words in square brackets i.e., "[establish a programme of missions]", should be deleted from paragraph 1. The power granted to undertake "other missions as appear to it to be appropriate" is too broad. The nature of such "other" missions and the criteria for determining whether or not they are "appropriate" should therefore be clarified. In the second paragraph, it should be explicitly indicated that the missions shall be undertaken only with the express consent of the State party concerned. A reference should be made to the importance of cooperation between the two parties and the need for mutual agreement in determining the modalities of the mission. The third paragraph should read as follows: "The Sub-Committee shall send a written notification to the Government of the State party concerned regarding the modalities of the mission, and the Government shall give a written agreement or refusal, after which the Sub-Committee may at any time visit any place referred to in its plan."

58. Portugal considers that in the first alternative for the text of the first paragraph, the words "undertake missions" are more appropriate, since the second alternative might mean that the Sub-Committee would first have to publicize the programme of a visit to be made, and this would be unacceptable (see our comments on art. 1). It also prefers the alternative "based on criteria consistent with the principles set out in article 3". Referring to the principles of non-selectivity, impartiality, etc. has, in practice, often created obstacles to and restrictions on action to defend and protect human

rights. In its view, it is important to keep the last sentence in square brackets (possibility of additional missions) as a logical consequence of the objectives of the Convention.

59. With regard to paragraph 2 of this article, Portugal is of the opinion that wording similar to that of article 3 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment should be used.

60. In respect of paragraphs 3 and 4, it considers that, in accordance with what was suggested in the preceding paragraph, mechanisms of the kind proposed should be compatible with the solutions adopted in articles 2, 3, 7, 8 and 9 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

61. Sweden notes with concern the difficulties encountered in the working group in finding agreement on the content of this article. According to Sweden it is essential that a State party's adherence to the Protocol also entails a clear obligation to allow the Sub-Committee to make such missions to a State party it deems necessary, in order to render the purpose behind the Protocol meaningful. It should be the prerogative of the Sub-Committee to decide when and where such visits are to be carried out, with the exception that the Sub-Committee has to take into account a State party's representation against a particular visit in situations covered by article 13. Before a mission is carried out, practical modalities have to be arranged between the Sub-Committee and the State party.

62. Sweden would accept a text which entails the above-mentioned criteria, and submits the following proposal for consideration by the Working Group:

"1. The Sub-Committee shall each year adopt a Programme of Work, in which it sets out planned missions to States parties. If new information or unexpected events call for it, the Sub-Committee may decide, in accordance with its rules of procedure, to revise its Programme of Work to take these new circumstances into account in its planning of missions during a year.

2. The Sub-Committee shall notify the Government of the State party concerned of its intention to organize a mission, containing proposed dates of the mission and the composition of the delegation. The Sub-Committee shall consult the State party on the practical implementation of the mission."

63. The Special Rapporteur on the Question of Torture believes that the Sub-Committee must have a clear right to visit any State party, both periodically and on an ad hoc basis, and the State party must have a corresponding obligation to grant such access.

64. Amnesty International considers that a provision of this article must give the Sub-Committee the power to plan and implement the most effective missions and guarantee that the Sub-Committee has the right to undertake both periodic and ad hoc missions.

65. IFACAT is of the opinion that authorization is already implied in article 1, paragraph 1, of the Protocol; therefore, paragraphs 2 and 3 - which would be better combined - should, instead, state that all the modalities (such as matters concerning representatives, notification, visa, safe-conduct, etc.) must be determined once a State becomes a party to the Protocol, subject, of course, to the establishment of the Sub-Committee. At that time, the State party would be required to inform the Sub-Committee of the national laws and regulations that must be respected (art. 12, paras. 1, 6). IFACAT proposes that paragraphs 2 and 3 should be amended to read:

"2. Once a State becomes a party to this Protocol, the Sub-Committee, after its establishment, and the State shall together determine the modalities for carrying out future missions. At that time, the State party shall inform the Sub-Committee of any national laws and regulations specific to the places mentioned in article 1 of this Protocol."

66. With regard to paragraph 4, IFACAT considers that the reference to a "detailed plan" limits the Sub-Committee's independence and, therefore, its right to take the initiative in ensuring respect for the objectives of the Protocol and, for example, to respond to information gathered on-site. However, in keeping with the principle of cooperation, the Sub-Committee could attach to its mission notification a preliminary list of places that it plans to visit. IFACAT proposes that the paragraph should be amended to read:

"3. In preparation for such a mission, the Sub-Committee shall send a written notification to the Government of the State party concerned, together with a preliminary list of places to be visited. The Sub-Committee may also visit other places at any time during its mission."

ARTICLE 9

Paragraph 1

67. Portugal considers that, in paragraph 1, it would be better to use the words "may decide", which would strengthen the independence of this body. Sweden also prefers that the word "may" be retained.

Paragraph 3

68. Mexico considers that the words in square brackets in the second part of the paragraph should be retained. The text should then read as follows: "However, the Sub-Committee and the bodies established under such regional conventions are encouraged to cooperate and consult with a view to promoting the objectives of this Protocol and avoiding duplication of work."

69. Portugal proposed the following wording of paragraph 3:

(a) In the first sub-paragraph, the words "consult and cooperate" and the words "and avoid duplication of work and missions".

(b) In the second sub-paragraph, the words "exempt" and "missions" should be retained.

70. Sweden prefers that the word "cooperate" as well as the words put in square brackets at the end of the second sentence be retained. Sweden also prefers the words "preclude" to "exempt" in the third sentence. In addition, Sweden proposes that the text in sentence four, now in square brackets, be retained.

71. IFACAT considers that the procedure for cooperation with the regional committees could be expressed more simply by stating that all such bodies, while independent, base their cooperation or consultation on the primary objective of protecting persons deprived of their liberty and preventing such deprivation. IFACAT proposes amending the paragraph to read:

"3. ... universal application. The Sub-Committee shall contact the bodies established under similar regional conventions with a view to communicating and to coordinating their yearly programmes of missions and visits."

CONSOLIDATED ARTICLES 10 AND 11

72. Croatia supports the assistance and use of experts accompanying the members of the Sub-Committee in their missions to States parties. As to paragraph 8, it considers that the possibility to refuse to accept an interpreter or an expert as members of the mission by the respective country should be limited to exceptional circumstances only.

73. Sweden considers it essential that the Sub-Committee be assisted by experts known for their professional knowledge and experience in the areas covered by the Protocol. The selection of experts for a particular mission shall be made from a list made by the Sub-Committee based on proposals from States parties, from members of the Sub-Committee or from relevant entities of the United Nations. The experts shall act under the instructions and under the authority of the Sub-Committee. The composition of the delegation of each mission shall be announced to the State party in advance. Exceptionally, a State party may declare to the Sub-Committee that it has reservations against receiving a particular expert, a declaration which the Sub-Committee shall have due regard to.

74. Amnesty International considers that the provisions of this article must ensure that the Sub-Committee may effectively undertake its work by providing for experts to participate in missions and assist Sub-Committee members. The Special Rapporteur on the Question of Torture considers that the independence and impartiality of the work of the Sub-Committee must be fully guaranteed, including by ensuring that neither Sub-Committee members nor accompanying experts on a mission/visit to a State shall be a national of the State in question.

75. IFACAT considers that a definition of the concept of a delegation (its conduct, composition, role, etc.) would simplify the drafting and interpretation of the subsequent paragraphs and articles. For example, the second sentence of paragraph 5, together with paragraph 6, could be formulated at the outset. Paragraphs 3 and 4 and paragraphs 2 (a), (b) and (c) of the variant cited in annex II, because of their detailed nature, would be more appropriately placed in the rules of procedure. Since the experts and interpreters are chosen from a list that was on record, and since their names are indicated on the notification, any rejection of one of them by a State party should take place before the beginning of the mission in order to allow the Sub-Committee time to make other arrangements and to prevent the rejection from impeding cooperation between the Sub-Committee and the State party.

76. IFACAT proposes the following wording:

"1. The delegation shall be headed by at least two members of the Sub-Committee [in carrying out its mission, it shall respect the principles set forth in article 3].

2. If the Sub-Committee deems it necessary, the delegation shall also include a number of experts, interpreters and administrative assistants. They shall act on the instructions and under the authority of the Sub-Committee."

ARTICLE 12

Paragraph 1

77. In the view of the Government of the Republic of Croatia the inclusion of the proposed paragraph 1 of article 12 in the text of the instrument is not necessary. The question of the respect for national laws and regulations while undertaking the missions to States parties represents a self-evident fact arising from the rules of customary international law and the principles underlying general international law.

78. The Government of Mexico suggests that the sentence in square brackets, "Members of the delegation shall respect the national laws and regulations while undertaking the visits in the territory of the State party concerned.", should be retained, and therefore that the other sentence in square brackets "[National laws and regulations may not be used or interpreted as means or measures contravening the programme and purpose of the visits]" should therefore be deleted.

79. Portugal has the strongest reservations about the first sentence of this paragraph, which is contrary to the object and purpose of the Protocol and jeopardizes its chances of success.

Paragraph 2

80. The Government of Mexico suggests that, in the Spanish version, the phrase "... todos los servicios necesarios ..." should be replaced by "... todas las facilidades necesarias ...", and that the phrase in square brackets should be retained. In subparagraphs (a) to (d) the word "place(s)" should be followed by the words "of detention". In subparagraph (b), the phrase in square brackets, "in article 1" should be deleted. In subparagraph (c), the phrase in square brackets "in article 1" should also be deleted and the phrase "in the detailed plan" should be retained instead.

81. It is suggested that the text of subparagraph (e) should be deleted, since its contents can be considered as covered in subparagraph (a). If necessary, it should be made clear that the "access" provided is to any person

mentioned in the detailed plan in any place mentioned in the plan, instead of referring to "persons ... in situations referred to in article 1" as that phrase is too broad and imprecise.

82. The Special Rapporteur on the Question of Torture considers that the Sub-Committee must have a right to have access to any place of detention identified or suspected as such by the Sub-Committee. He is of the view that meetings of the Sub-Committee with persons deprived of liberty must be held in absolute confidentiality, with the possibility of follow-up to ensure the subsequent protection of such persons.

83. Amnesty International states that the provision of this paragraph in particular and the article as a whole must guarantee the Sub-Committee unlimited access to all places of detention and to all detainees; the right to interview detainees in private; and the right to interview other persons who may provide useful information.

84. IFACAT notes that the paragraph speaks variously of the "task" or "tasks" of the Sub-Committee; rather than this vague term, it would be better to keep to the word "mission" and, therefore, to speak of carrying out the mission. IFACAT recommends that the paragraph should be amended to read:

"2. The State party concerned shall provide the delegation with all the facilities that the latter needs to carry out its mission and promote the full cooperation of all competent authorities. In particular, the State party shall ...

(f) Other information ... to carry out its mission."

Paragraph 3

85. The Government of Mexico proposes that the first part of the paragraph, at present in square brackets, should be deleted and the second maintained, with the exception of the phrase "in article 1,", which should be replaced by the phrase "in the detailed plan". Paragraph 3 bis is acceptable.

Paragraph 4

86. The Government of Mexico considers this paragraph acceptable, provided the phrase in square brackets, "well-founded and reliable" is retained.

Paragraph 5

87. The Government of Mexico considers the scope of this paragraph to be vague, since it does not specify how to determine the "urgent cases" necessitating recommendations, which could therefore only be accepted after the corresponding visit had been made.

88. Concerning the procedures as reflected in articles 8, 10 and 12, the ACJ considers that before each visit, a delegation is established in which a minimum of two delegates from the Sub-Committee are present, to be assisted by experts and interpreters, if the case be needed. The Member State does have the choice to not accept the visit of invited experts, but are under the obligation to allow Sub-Committee members to undergo the visit. The draft includes periodic and regular visits along with ad hoc visits, depending on the circumstances. The instrument is based on the realization of systematic preventive visits, including follow-up visits and/or urgent visits. The purpose of this method is to efficiently prevent torture and ill-treatment, signifying that a State ought to be open to criticism and cooperate in urgent situations.

89. In view of the ACJ, in order to ensure the cooperation and dynamic efficiency, a notification within a specific time period to the States in question is necessary, such as a warning immediately prior to the visit, communicating the date and time in which the delegation will be making their visit. In accordance with article 1 of the draft, the Sub-Committee will be able to visit all areas of detention where there is suspicion of the deprivation of an individual's freedoms or ill-treatment without new authorization (the State will have committed to a general authorization in the moment of ratifying the Protocol). It is mentioned in the Working Group's report (E/CN.4/1995/38) that various States objected to the wording of "any place" and reserved the right to revert it in the light of future agreement. It is crucial that such wording not be modified but be maintained in order for such a system to function efficiently.

90. The ACJ considers that the delegation should be able to move around without restrictions and have access to any place in any territory under the jurisdiction of the State party. Also, the delegation should have the authority to undergo private interviews with the individuals deprived of their freedoms. An area which is not considered as an official area of detention should not be an obstacle in the delegation's regular procedure of visits, and it is crucial that the term "any place, in any territory under the jurisdiction of the State" be maintained within the text, thus allowing for the efficient function of a system of prevention. Additionally, the State is under the obligation to cooperate with the visiting delegation and to provide them with the necessary information.

91. IFACAT considers that it would be better not to limit either the (initial) moment or the form of cooperation: immediate observations must, in all cases, be permitted. IFACAT proposes the following wording for the paragraph:

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

ARTICLE 13

92. 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.

93. 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.

94. 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.

95. The International Federation of the Action of Christians for the Abolition of Torture (hereinafter referred to as IFACAT), believes that paragraph 1 could be more concise and clearer, and proposes the following wording: "... against a visit to a particular place if serious disorder temporarily prevents access to it".

96. IFACAT is of the opinion that, in the interests of clarity, the paragraph should be divided into two parts: the first would state that it is possible to make representations against a visit, and the second would list the acceptable serious reasons and unacceptable grounds for doing so. According to IFACAT, national defence or public safety alone is not an acceptable reason: the Sub-Committee, like the International Committee of the Red Cross, is not a body which could pose a threat on either count. IFACAT proposes that the paragraph should be amended to read:

"1. In exceptional circumstances ... against a particular visit. Such representations are acceptable only on the grounds that serious disorders such as ..., temporarily prevent the place from being visited. The existence ..."

97. 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.

98. The Association for the Prevention of Torture pointed out that the last sentence of paragraph 1 of article 13 reading as "The existence or [formal] declaration of a state of emergency as such shall not be invoked by a State party as a reason to object to a visit" was not reproduced in the French copy of the report of the Working Group (E/CN.4/1995/38). It should be included in the next report of the Working Group.

99. As to articles 12.2, 12.5 and 13, the ACJ considers that the dialogue between the Sub-Committee and the States, which should continue prior to the visit, will allow for an evaluation of the conditions and criteria to be considered in the elaboration of the recommendations to be presented to the Sub-Committee. In extreme cases, the draft includes the possibility to postpone a determined visit, in such a case the authorities and the Sub-Committee arrange an alternative time and method of visit. This disposition appears sufficient to allow for extraordinary circumstances, while not cancelling the visit in its entirety. Concerning the access to the areas of visit, it would be important to add the following sentence to article 12.2 "including the judicial orders necessary to permit his access".

100. IFACAT considers that, for the sake of consistency with paragraph 12 (2) (e), it would be better to speak of an interview rather than a visit in the case of a person. IFACAT proposes that the paragraph should be amended to read:

"... any person whom the Sub-Committee proposed to interview until the interview can take place ..."

NEW ARTICLE 12 BIS

101. In IFACAT's view, it would be a good idea to mention that this information falls within the ambit of cooperation with the Sub-Committee and contribution to the effectiveness of its missions. In an explanatory report, it might be useful to draw attention to the fact that failure to understand the role of the Sub-Committee may result in the issuing of orders that hinder its action and effectiveness. IFACAT proposes that the article should be amended to read:

"In order to cooperate effectively with the Sub-Committee, each State party shall disseminate information about this Protocol, the role of the Sub-Committee and the steps to be taken to facilitate its missions to the country to all concerned authorities. In particular, it shall ensure that ..."

ARTICLE 14

Paragraph 1

102. IFACT feels that, in the second paragraph, there is no justification for the addition of the adjective "feasible" (in brackets) before the word "recommendations" since the second sentence is specifically intended to facilitate implementation.

Paragraph 2

103. IFACT considers it unnecessary to mention the Committee here: the requirement of confidentiality on its part appears at a later point in the text, in article 15, paragraph 1. IFACAT proposes that the paragraph should be amended to read:

"2. ... The members of the Sub-Committee and any other persons assisting it are required, ..."

Paragraph 3

104. In IFACAT's opinion, the wording of the second paragraph does not clearly express the possibility of a State party's failure to consult the Sub-Commission prior to publication. IFACAT recommends that the paragraph should be amended to read:

"3. At the request of the State party concerned, the Sub-Committee shall publish its report, in whole or in part, by mutual agreement. If the State party concerned unilaterally decides to make part of the report public, the Sub-Committee may ..."

Paragraph 4

105. Regarding the proposed text of paragraph 4, the Government of the Republic of Croatia favours the inclusion of the proposed formulation in the text of the Protocol, having in mind its importance for the strengthening of the mechanism for the prevention of practices of torture and inhuman and degrading treatment or punishment.

106. The Special Rapporteur on the question of torture is of the view that the Sub-Committee must have the power to make its findings public in the event that a State party fails to cooperate with the Sub-Committee to implement recommendations made by the Sub-Committee or if it otherwise permits torture to continue.

107. Amnesty International considers that the text of this paragraph must allow for publication of the Sub-Committee's report or for a public statement to be made in the event that a State party refuses to cooperate or partially releases the Sub-Committee's report.

ARTICLE 15

Paragraph 2

108. IFACAT is of the opinion that it would be better to divide the paragraph into two parts, the first mentioning the submission to the Committee of a single general report on the activities of the Sub-Committee, which might include a confidential section, and the second mentioning the report to be submitted by the Committee to the General Assembly. IFACAT proposes the following wording for the paragraphs:

"2. The Sub-Committee shall submit every year a general report on its activities to the Committee against Torture, including a list of missions made to State parties, the composition of the visiting delegations and the places visited; the report may also include any general recommendations on ways of improving the protection of persons deprived of their liberty. The Sub-Committee shall also include any confidential information and recommendations that it considers useful regarding difficulties encountered in implementing this Protocol.

[3.] The Committee against Torture shall include non-confidential information on activities under this Protocol in its report to the General Assembly of the United Nations in accordance with article 24 of the Convention."

ARTICLE 16

Paragraph 1

109. The Special Rapporteur on the Question of Torture is of the view that the Sub-Committee should be guaranteed the material and financial means to carry out its work effectively.

110. Amnesty International considers that the Sub-Committee be funded out of the regular United Nations budget and in practice be provided with sufficient resources to carry out the functions mandated to it in the Protocol.

ARTICLE 16 BIS

Paragraph 2

111. IFACAT proposes the following wording for the French text of the paragraph:

"2. Ce Fonds peut être alimententé par des contributions ..."

ARTICLE 17

112. IFACAT recommends that paragraphs 3 and 4 should be combined, as was done with paragraph 2. The information to be provided by the Secretary-General under paragraph 5 should not be limited to States which have signed the Protocol or acceded to it, since the status of signatures and ratifications of, and accessions to, United Nations treaties is obviously a matter of public record. IFACAT recommends that the paragraphs should read as follows:

"3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Convention. Accession shall be effected ...

4. The Secretary-General of the United Nations shall inform all Member States of the deposit of each instrument of ratification or accession."

ARTICLE 18

Paragraph 1

113. Amnesty International considers that the provision of this paragraph must provide for the Protocol to enter into force with the lowest possible number of ratifications consistent with effectiveness so that the important work of preventing torture is not unnecessarily delayed.

Paragraph 3

114. The Government of Croatia and Amnesty International support the text that prohibits reservations since it is a procedural mechanism, the consistent and efficient functioning of which would be impeded by reservations.

115. The Special Rapporteur on the Question of Torture considers that no reservation that could adversely effect the above elements should be permissible. In his view, it is so hard to conceive of a reservation to an instrument of this nature that would not have such an adverse effect that a general exclusion of reservations would appear appropriate.

ARTICLE 19

Paragraph 2

116. IFACAT is of the opinion that the relevant part of the paragraph should be worded as follows:

"2. ... actions that the Sub-Committee or, as appropriate, the Committee against Torture has decided or may decide ..."

ARTICLE 19 BIS

Paragraph 1

117. IFACAT considers that the procedure for handling amendments should be the same as that described in article 29, paragraph 1, of the Convention.

ARTICLE 20

118. During consideration of article 20, the Secretariat was requested to obtain the legal opinion of the United Nations Legal Counsel concerning privileges and immunities of "experts on missions for the United Nations". The comments received are as follows:

"1. The consistent practice of the organizations has been to classify and consider as 'experts on mission', within the meaning of article VI of the Convention on the Privileges and Immunities of the United Nations (the Convention), various types of persons who are charged with performing a function or a task for the United Nations, as long as these persons were neither representatives of a State nor staff members or officials of the organization.

2. The draft protocol mentions several categories of persons who may be deemed to come within the scope of the mission. These are, inter alia, the members of the Sub-Committee and other members of the delegation of each mission of the Sub-Committee including experts, interpreters and other persons assisting the Sub-Committee. To the extent that the members of the Sub-Committee shall serve in their individual capacity, they are therefore not representatives of a State or

officials of the organization. Accordingly, the members of the Sub-Committee may be accorded the privileges and immunities enjoyed by 'experts on missions'.

3. However, the proposed Sub-Committee is a subsidiary of a treaty body established by a protocol to that treaty and not a subsidiary of a United Nations organ. As such, the United Nations regime, including the Convention and article VI thereof, does not automatically apply to the Sub-Committee. The States parties to the Protocol, which may or may not be States parties to the Convention and/or Member States of the United Nations, must therefore agree to undertake an obligation to apply the Convention to the members of the Sub-Committee and any other persons they deem within the scope of the mission.

4. To that end, the draft protocol could include provisions explicitly stating that the States parties shall apply article VI of the Convention to the members of the Sub-Committee and any other persons they deem within the scope of the mission. As an alternative, the draft protocol could include an article which, based on the relevant provisions of article VI of the Convention, specifies the privileges and immunities which shall apply to the members of the Sub-Committee and any other persons deemed within the scope of the mission without reference to the Convention or article VI thereof.

5. In this context, please be advised that section 22 of article VI of the Convention provides that 'experts (other than officials coming within the scope of article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their mission'. The particular privileges and immunities accorded to such experts are set out in subsections (A) through (F) of section 22 of article VI of the Convention."

ANNEX I

119. Insert after paragraph 3 of article 12 the following paragraphs:

3 bis. [In seeking information, the delegation shall have regard to a person's right to privacy, protection of personal data, as well as principles of medical ethics.]

4. No authority or official, on the basis of [any] [well-founded and reliable] information [regarding torture and other cruel, inhuman or degrading treatment or punishment,] provided to the Sub-Committee or its delegations, shall order, apply, permit or tolerate any sanctions against any person or [national legal] organization who provided that information, [and no such person or organization shall be otherwise prejudiced in any way.]

5. In urgent cases the delegation shall at once submit observations and recommendations either of general or specific nature to the competent authorities concerned.
