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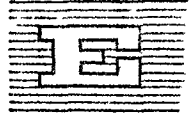


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COMMISSION ON HUMAN RIGHTS
Thirty-fifth session
Item 10 of the provisional agenda

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO
ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR:
TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT
OR PUNISHMENT

Summary prepared by the Secretary-General in accordance with
Commission resolution 18 (XXXIV)

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INTRODUCTION

1. In its resolution 32/62 of 8 December 1977, the General Assembly requested the Commission on Human Rights to draw up a draft convention against torture and other cruel, inhuman or degrading treatment or punishment, in the light of the principles embodied in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
2. The Commission examined this question at its thirty-fourth session. In accordance with Commission resolution 18 (XXXIV), entitled "Draft convention on torture and other cruel, inhuman or degrading treatment or punishment", the Secretary-General transmitted all relevant documents of the thirty-fourth session of the Commission concerning the draft convention to the Governments of States Members of the United Nations or members of specialized agencies for their comments and prepared this summary of comments received for submission to the Commission at its thirty-fifth session.
3. In the same resolution, the Commission recommended to the Economic and Social Council that it authorize the holding of a meeting of a working group open to all members of the Commission for one week immediately before the thirty-fifth session with the task of providing the Commission with concrete drafting proposals for the text of a draft convention on the basis of the relevant documents of the thirty-fourth session and any comments received from Governments.
4. The Economic and Social Council approved this recommendation in its decision 1978/24.
5. In its resolution 18 (XXXIV), the Commission also decided to accord priority to the consideration of the item at its thirty-fifth session.
6. This report summarizes the comments received, as of 12 December 1978, from the Governments of the following States: Austria, Barbados, Denmark, France, German Democratic Republic, Jordan, Norway, Portugal, Somalia, Spain, Sweden, Switzerland, the Union of Soviet Socialist Republics and the United States of America.
7. As a general rule, references to draft articles relate to the draft convention proposed by Sweden (E/CN.4/1285; articles numbered in Arabic numerals). When a reference is to an article in the draft convention proposed by the International Association of Penal Law (E/CN.4/NGO/213; articles numbered in Roman numerals), the fact is expressly mentioned.
8. In this document, the comments of Governments of States Members of the United Nations or members of specialized agencies are presented State by State in French alphabetical order.

I. GENERAL REMARKS

9. The Governments of Barbados, Spain, Jordan, Portugal, the German Democratic Republic, Somalia and the Union of Soviet Socialist Republics pointed out, for information purposes, that their Constitution and/or criminal laws contain provisions prohibiting and punishing torture and other cruel, inhuman or degrading acts. 1/

1/ The comments in question are made in these Governments' replies, which the Secretariat has on file and which may be consulted by any member of the Commission wishing to do so.

10. Several Governments expressed their support for the idea of drawing up an international convention against torture and other cruel, inhuman or degrading treatment or punishment and for the efforts being made by the Commission on Human Rights in that connexion. Several Governments expressed an interest in the draft convention proposed by Sweden.
11. Austria has emphasized its full support for the relevant efforts of the Commission, expressed its appreciation for the draft convention proposed by Sweden and suggested that this draft be used as a basis for the further work of the Commission in this field. Austria believes that combining essential provisions of the Swedish draft convention with certain elements of the draft of the International Association of Penal Law might constitute a practical method in order to elaborate an effective draft legal instrument.
12. The Danish Government finds it of paramount importance that the progress and momentum so far achieved within the United Nations to outlaw any use of torture or other cruel, inhuman or degrading treatment or punishment be now followed up by adoption of a legally binding instrument such as an international convention against torture. It states that the Swedish draft convention forms an excellent basis for further negotiation and, eventually, for adoption of a convention on the subject. On the one hand, the proposed text respects the contents and the formulation of the main principles contained in the Declaration on Torture, such as the actual definition of torture in article 1, and on the other hand the proposed draft convention has been given a form which is suitable for a legally binding instrument, for instance in the specific rules on implementation procedures, articles 16-21.
13. In recognition of the widespread use of torture, the United States supports the development of a convention which will provide a firm basis for deterring torture and bringing those responsible to fair trial. The Convention must be both politically acceptable and legally enforceable. Towards these ends, the United States believes the Convention should be focused primarily on the prevention and suppression of acts clearly identifiable as torture. Such a focus is necessary in light of the severe penalties, broad jurisdictional provisions, and definitional difficulties embodied in the Convention, and the need for broad international acceptance. This focus is not intended to denigrate the fact that acts of cruel, inhuman or degrading treatment or punishment not clearly amounting to torture are serious offences. The United States notes that previous international conventions have addressed both offences simultaneously, as does the unanimously adopted 1975 General Assembly Declaration.
14. The United States expresses its appreciation to the Government of Sweden for its initiative, supports the Swedish draft Convention with certain modifications and believes it provides the basis for completion of a legally enforceable convention which will attain broad international acceptance. The United States hopes all countries will actively participate in the development of this convention so that a draft may be presented to the General Assembly for its consideration very soon.
15. The United States firmly supports the creation of an obligation to prosecute or extradite as one of the most effective means of deterring torturers. A large number of international conventions have adopted this concept. The United States notes, however, that the proposed draft Convention contains a jurisdictional basis, nationality of the victim, not widely accepted in international law. The United States believes this asserted basis of jurisdiction is unnecessary in light of the other bases for jurisdiction in the Convention.

16. Norway is strongly in favour of developing the Declaration on Torture into an international convention. On this matter close consultations between the Nordic countries have preceded the elaboration of the draft proposed by Sweden. Norway considers it an important and urgent task for the Commission on Human Rights to terminate the drafting of an international convention against torture and other cruel, inhuman or degrading treatment or punishment, and the Norwegian Government fully supports the Swedish draft as a basis for the further work of the Commission.

17. The Portuguese Government notes that, with the exception of articles 8, 11 and 14 (in their entirety), none of the provisions in the Swedish draft convention contains regulations, principles or doctrines that could be regarded as contrary to the principles of Portuguese public order. 2/

18. The German Democratic Republic associates itself with the humanist concern of the Swedish draft. It holds, however, that the tasks, the subject and the objectives of the proposed convention should be defined more precisely. In so doing, account should be taken to a greater extent of the experience gained in codifying and enforcing laws by those States where, on account of their political and socio-economic conditions, torture and other types of cruel and inhuman or degrading treatment or punishment are ruled out.

19. The Government of Somalia has decided to give its firm support to the draft convention on torture and other cruel, inhuman or degrading treatment or punishment.

20. It is the hope of the Swedish Government that the draft convention it has presented to the Commission will be of assistance to the Commission in its further work. For its part the Swedish Government is prepared to examine any suggestions for improvements of the Swedish draft which may be presented by other Governments.

21. Noting that, in violation of the rules of international law which unconditionally prohibit acts of torture under all circumstances, the use of torture is becoming increasingly widespread throughout the world, the Swiss Government thinks it necessary and urgent clearly to reaffirm the duty of States to refrain from such acts and to assume greater obligations with regard to the prevention and punishment of torture. The Swiss Government supports the draft convention proposed by Sweden.

21a. However, in preparing the future convention, every effort must be made to ensure that the provisions adopted do not weaken existing international law. The Swiss Government is referring in particular to provisions prohibiting acts of torture and inhuman or degrading treatment contained in the International Covenant on Civil and Political Rights 3/ and, for periods of armed conflict, the four Geneva Conventions for the protection of war victims and their two Additional Protocols of 1977. In humanitarian terms, these rules represent minimum guarantees that should be protected.

22. The Government of the USSR considers that any draft convention should be based on the Declaration on Torture approved unanimously by the States Members of the United Nations. It also thinks it necessary to conduct a careful study of the competence of the State with regard to crimes involving the use of torture and other cruel, inhuman or degrading treatment or punishment, since the legislation of many States excludes the possibility of recognizing the competence of a foreign State in respect of crimes committed within their territory, on grounds related to the nationality of the offender or of the victim.

2/ However, see Portugal's comment on article 8.

3/ See also the reservations of the Spanish Government in connexion with article 18 below.

II. COMMENTS ON THE DRAFT ARTICLES

Article 1

1. For the purpose of the present Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Comments

23. Several Governments suggest that the definition of torture should be modified and that the concept of cruel, inhuman or degrading treatment or punishment should be clarified.

24. For Barbados, perhaps the Commission could consider expanding the definition of torture to include the use of more sophisticated weapons such as "truth" drugs where no physical or mental suffering is apparent in the complainant.

25. Spain considers such clarification to be particularly important since, in paragraph 2, torture is defined as constituting "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". In this connexion, it may be argued that the difficulties involved in arriving at a legal definition of these concepts make it advisable to limit the scope of the convention exclusively to torture which, moreover, according to articles 7 and 8 of the draft, is the main concern of the convention.

26. In the view of the Spanish Government, the use of the word "penas" in the first sentence of paragraph 1 of the Spanish text for the definition of torture gives rise to ambiguity, because in Spanish law, "pena" is a legal concept referring to a penalty imposed by the competent bodies as a result of the infringement of a provision of criminal or administrative law. It is not, therefore, a synonym for "sufrimiento" (suffering). It is interesting to note that the French text uses the expression "une douleur ou des souffrances" - i.e., "dolor o sufrimientos". Moreover, the English text uses the expression "pain or suffering", the Spanish translation of which is the same. Accordingly, the word "pena", mentioned twice in the article, should be replaced by the word "dolor".

27. The modifications proposed by the United States are intended to emphasize that torture is the most extreme form of acts of cruel, inhuman or degrading treatment or punishment. Unfortunately, it is not possible to draw a sharp line between other, lesser forms of acts of cruel, inhuman or degrading treatment or punishment and torture. It may be useful to develop negotiating history which indicates that although conduct resulting in permanent impairment of physical or mental faculties is indicative of torture, it is not an essential element of the offence. On the other hand, the negotiating history should also reflect the requisite intensity and severity inherent in torture.

28. The United States suggests that the definition of torture state that the act must be deliberate and malicious. Inclusion of these terms could replace the listing of purposes presently in the Swedish draft. Since this listing is only partial, and meant to be indicative rather than all-inclusive, the United States believes it would be more appropriate to include discussion of such purposes in the negotiating history. Article 1 should read:

"1. For the purpose of the present Convention, the offence of torture includes any act by which extremely severe pain or suffering, whether physical or mental, is deliberately and maliciously inflicted on a person by or with the consent or acquiescence of a public official.

2. Torture does not include pain or suffering arising only from, inherent in or incidental to sanctions lawfully imposed; but does include sanctions imposed under colour of law but in flagrant disregard of accepted international standards."

29. In this definition, torture is limited to conduct "by or with the consent or acquiescence of a public official". The public official concept is retained to broaden acceptance of the Convention by dispelling fears of international criminal law attempting to encroach on traditionally domestic concerns. When there is no public official involvement of any kind it is highly probable that a torturer will be apprehended and punished under national laws. In this context, an international convention is unnecessary. However, the United States proposes the concept of "acquiescence" of a public official rather than "instigation by" so that public officials have a clear duty to act to prevent torture. This duty is further elaborated in the new article 2 proposed by the United States. 1/

30. The United States can accept the concept embodied in the Swedish draft that pain or suffering "arising only from, inherent in or incidental to sanctions lawfully imposed" should be exempted from the definition of torture since it would be inappropriate and politically unacceptable to use this Convention as a means of reaching sanctions practised by one culture of which another culture may disapprove.

31. France considers that the definition of torture should be revised. Since torture stands to be condemned per se, the Convention can have no justification other than to prohibit torture completely and should not confine itself to particular cases defined in terms of the status and motives of the perpetrators of acts of torture. The definition of torture must therefore be a definition of the intrinsic nature of the act of torture itself, in order to ensure that the Convention affords no means of evading the commitment of States Parties to prevent or punish all acts of torture regardless of the identity and goals of the perpetrator. The definition of the act of torture must enable a clear distinction to be made between, on the one hand, penalties affecting the person and honour of the criminal (peines afflictives et infamantes) that can legitimately be imposed as punishment and, on the other, treatment which, by causing violent physical pain or extreme mental suffering, altering the physical capacity of the victim or making the victim an object of derision or hatred, torture the person to whom it is applied. As France sees it, cruel, inhuman or degrading treatment involves acts of physical or mental torture. No distinction should be drawn between the two; on the contrary, torture should be defined in such a way as to encompass both.

1/ See the United States proposal under article 7.

32. The French Government also observes that, in the French text, the word "délibérément" should be replaced by the word "intentionnellement".

35. The Portuguese Government would prefer the phrase "torture or other cruel, inhuman or degrading treatment or punishment", which is used in several of the draft's provisions, to be replaced by the phrase: "cruel, inhuman or degrading torture, punishment or treatment". In the phrase which appears in the draft, torture would seem to be equated with punishment through the use of the word "or", when in fact, as can be seen from the list of purposes for which it might be used (article 1, paragraph 1), torture cannot be regarded as punishment.

34. Portugal considers that it would perhaps be useful to examine a question which is currently being discussed by certain international bodies, particularly the Parliamentary Assembly of the Council of Europe, and which concerns the use of psychiatry for political purposes and to eliminate dissidence. This question was referred to explicitly in recommendation 813 (1977) which was adopted at the Parliamentary Assembly's twenty-ninth regular session and concerns the situation of the mentally ill. The Portuguese Government would therefore suggest that a new paragraph 3, couched in the following or in similar terms, should be inserted in article 1 of the draft:

"3. For the purposes of the present Convention, the use of psychiatry for one of the objects referred to in paragraph 1 or the abuse of psychiatry with a view to prolonging the confinement of any person subjected to a measure or penalty involving deprivation of freedom shall be regarded as torture."

35. For the German Democratic Republic, the wording: "... act by which severe pain or suffering, whether physical or mental ..." can be interpreted in many ways. There is no definition of the criterion by which "other cruel or degrading treatment or punishment" is to be judged. Nor can these defects be remedied by listing certain actions described as torture. In this connexion it should also be considered whether it is reasonable and possible at the moment to list the multiple forms of "other cruel, inhuman or degrading treatment". It would therefore be appropriate to confine the draft convention for the time being to torture. If such an approach were taken, it would also be easier to exactly define the subject of the Convention.

36. In the view of the Swiss Government, the draft submitted by the International Association of Penal Law seems to cover only the act of torture, thereby excluding cruel, inhuman or degrading treatment or punishment, whereas the Swedish draft generally covers both categories. However, the Swedish draft draws a distinction between the two categories on the basis of the seriousness of the offence. Since any definition can have the effect of limiting the scope of the concept which it sets out to define, it is essential to ensure that the definition of torture does not result in any weakening of existing law, which prohibits torture and inhuman treatment unconditionally and in the same manner and makes no distinction as to the respective seriousness of such acts. The definition should cover acts of torture and cruel, inhuman or degrading treatment or punishment, on the same footing. To this end, article 1, paragraph 2, might read as follows:

"2. The term 'torture' includes cruel, inhuman or degrading treatment or punishment."

37. The definition should be as broad as possible, in order to cover all forms of torture and cruel, inhuman or degrading treatment. In this connexion, it may not be enough to base the definition of such acts, committed consciously and deliberately, on the motives of the perpetrator of the act. The motives listed in article 1, paragraph 1, of the Swedish draft, motives preceded by the expression "for such purposes as", are not exhaustive. However, it is not certain whether this formula would cover practices such as the conducting of medical experiments not required by a person's state of health. Accordingly, the following should be inserted after the first sentence of paragraph 1:

"It [the term 'torture'] also means medical or scientific experiments that are not justified by a person's state of health and serve no therapeutic purpose."

38. The USSR thinks it essential that the concept of "torture" and that of "cruel, inhuman or degrading treatment or punishment" should be regarded as legally distinct. The draft must not allow any imprecision or ambiguity whatsoever as to the specific meaning of the concept "cruel, inhuman or degrading treatment or punishment", since the institution of punishment is generally part of the legal system of all States and punishment is legally applicable to persons who have committed offences. The problem is to draw a clear distinction between measures that can legitimately be applied to offenders and forms of treatment or punishment which, because of their cruel, inhuman or particularly degrading nature, cannot be regarded as acceptable.

39. Several Governments think that more should be done to penalize torture as a criminal offence.

40. Considering that, in article 1 of the draft convention submitted by the International Association of Penal Law, torture is defined as a crime under international law, in accordance with certain precedents (e.g. the Genocide Convention) Austria would, in principle, welcome this special form of solemnly condemning torture. Nevertheless as the same purpose could be achieved by adopting the definition of article 1 of the Swedish draft, Austria would opt for the latter.

41. For Barbados, the insertion of an article declaring torture an international crime is acceptable as the Barbados Constitution recognizes that the individual has a right to be protected against cruel and unusual punishment.

42. The Swiss Government notes that, in the penal system established by the Geneva Conventions of 12 August 1949 concerning the protection of war victims, acts of torture and inhuman treatment are classified as grave breaches subject to penal sanctions and under universal jurisdiction. At present, these rules apply only to international armed conflicts. It might be appropriate, on the occasion of the drawing up of a convention against torture, to extend this regime to all situations; this would be an important development in international law relating to criminal penalties. To this end, the definition of the act of torture and cruel, inhuman or degrading treatment or punishment should be accompanied by a provision regarding the treatment of such acts as criminal offences. Moreover, even if, in general, the severity of the penalty, as determined by the gravity of the offence committed, will still be determined by national legislation, the proposed new provision should reflect the contents of article 7, paragraph 2, which obliges States Parties to punish such offences with severe penalties:

"1. The acts defined in article ... are serious offences subject to penal sanctions.

2. In this connexion, States Parties undertake to adopt all appropriate legislative measures to deal with persons who commit any such offence or order or allow it to be committed. They undertake to ensure that such offences are punished by severe penalties."

This new provision is intended to replace article 7 and article 11, paragraph 2. It could be inserted in the text of the future convention either immediately after the article on definitions or after the provisions dealing with the prevention of offences. It would be followed by all the rules concerning penal sanctions, including the rule on participation, complicity and incitement (article 7, paragraph 1).

43. With regard to the concept of "public official", the Austrian Government believes that this concept could be expanded, for example by using the words "persons, acting in an official capacity".

44. The Spanish Government observes that the words "funcionario público", used in the Spanish text to translate the words "public official", involve a very vague concept in Spanish law, and the concept of "funcionario" must be distinguished from that of "autoridad". It is proposed to amend the Spanish text as follows: "... se entenderá por tortura todo acto por el cual una autoridad o funcionario público, u otra persona a instigación suya ...". This amendment would also serve to bring the text of article 1 into line with that of article 2, paragraph 3, and articles 9 and 10. In articles 9 and 10, the words "autoridades competentes" ("competent authorities") should be replaced by the words "autoridades judiciales competentes" ("competent judicial authorities").

45. The United States proposes that the term "public official" be defined in article 2 in order to clarify the breadth of the concept and to make clear that both civil and military officials are included. Any person vested with exercise of some official power of the State may well have sufficient authority to coerce another individual, and could escape prosecution under national law because of his public office. Paragraph 2 of article 2 would be basically a restatement of article 7 of the Swedish draft defining the scope of responsibility for committing an offence under the Convention. Article 2 would read:

"1. A public official is any person vested with exercise of some official power of the state, either civil or military.

2. Any public official who (a) consents to an act of torture, (b) assists, incites, solicits, commands, or conspires with others to commit torture, or (c) fails to take appropriate measures to prevent or suppress torture when such person has knowledge or should have knowledge that torture has or is being committed and has the authority or is in a position to take such measures, also commits the offence of torture within the meaning of this Convention."

46. Several Governments proposed the deletion of the reference to the Standard Minimum Rules for the Treatment of Prisoners.

47. In the opinion of the Danish Government, in article 1, second sentence, the reference to the Standard Minimum Rules for the Treatment of Prisoners, which do not at present have the status of a legally binding convention, might be changed to read: "... to the extent consistent with international rules for the treatment of persons deprived of their liberty".

53. The United States proposes a new article, very similar to articles 2(2) and 2(3), which would provide that there is no justification for an act of torture. This article would be limited to torture because there is no precise definition of cruel, inhuman or degrading treatment or punishment. The United States believes that "cruel, inhuman or degrading treatment or punishment" is a more relative term; international standards are more difficult to achieve and what might constitute cruel treatment in times of peace might not rise to that level during emergency conditions. The United States also notes that although orders from a superior officer cannot justify torture, it is a factor that should be considered in mitigation of punishment. This new article, which would be numbered article 4, would read:

"1. No exceptional circumstances whatsoever, whether a state or threat of war, internal political instability or any other public emergency may be invoked as a justification for torture.

2. An order from a superior officer or a public authority may not be invoked as a justification for torture."

54. France proposes that the words "within its jurisdiction" should be replaced by "in its territory" throughout the draft. The expression "internal political instability" in paragraph 2 does not correspond to any clear legal concept and could be deleted.

55. In connexion with paragraph 2, which provides that the convention is applicable in all circumstances, whether in time of peace or during a period of armed conflict, and the analogous provision contained in article VI (Non-derogation) of the draft submitted by the International Association of Penal Law, Switzerland notes that this rule is consistent with existing international law, which prohibits acts of torture and inhuman treatment at all times. In view of its very general material scope, the future convention will be superimposed on two complementary but distinct legal systems -- human rights regulations and the law of armed conflicts -- the characteristics of which vary according to the specific situation in which they are applied. The draft conventions against torture are more closely related to human rights regulations -- particularly with regard to the machinery for monitoring the application of the instruments -- than to international humanitarian law applicable in armed conflicts. Care should therefore be taken to ensure that the future convention does not restrict the application of the latter in any way.

56. To this end, the Swiss Government proposes the introduction into the Convention of a safeguard clause which, combined with paragraph 2, could constitute a separate article concerning the material scope of this instrument:

"1. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

2. The foregoing is without prejudice to the provisions of the Geneva Conventions of 12 August 1949 for the protection of war victims, as well as the Additional Protocol relating to the Protection of Victims of International Armed Conflicts, of 10 June 1977, and the Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts, of 10 June 1977."

Article 3 3/

Each State Party shall, in accordance with the provisions of the present Convention, take legislative, administrative, judicial and other measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction.

Comments

57. The United States believes it may be appropriate to address cruel, inhuman or degrading treatment or punishment in this article since a virtually identical obligation is already imposed under the Convention on Civil and Political Rights, and the nature of the obligation to be imposed is not likely to deter many States from ratifying the Convention.

58. A paragraph 2 should incorporate article 7(2) of the Swedish draft requiring that torture be punished by severe penalties.

59. France considers that the phrase "in accordance with the provisions of the present Convention", is unclear in scope and should be deleted.

Article 4

No State Party may expel or extradite a person to a State where there are reasonable grounds to believe that he may be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Comments

60. Austria thinks it useful to include a further article, according to which States Parties should re-examine extradition treaties already in force to determine whether they are in conformity with the provisions of article 4.

61. For Spain, article 4 raises the question of the existence of an extradition treaty with a State that is "suspected" of practising or tolerating torture and is not a party to the Convention, since it would necessarily prevent mandatory extradition under the extradition treaty.

62. France considers that this article could read: "No State may in any way expel, turn back or extradite a person to a State where there are serious grounds for believing that he may be in danger of being subjected to torture".

63. Switzerland is of the opinion that, in the context of a convention against torture, the provisions relating to extradition should be subject to special requirements based on the motives for the practice of torture, as well as the circumstances in which acts of torture are carried out. Extradition is inconceivable unless the requested State believes that the person extradited will be given a proper trial by a court affording guarantees of fair judgement and that he will be detained in humane conditions. Frequently, recourse to torture occurs in situations of domestic turmoil, in which the fate of individuals becomes very uncertain, particularly as a result of the suspension of constitutional rights and freedoms. Since the aim of the future convention is not to create new categories of victims but to ensure the equitable punishment of the perpetrators of acts of torture, steps must be taken to prevent the alleged offenders from being subjected to the rigours of summary justice as a result of extradition. That is why the Swiss Government thinks that article 4 should be retained.

3/ See the Austrian proposal under article 2.

Article 5

1. Each State Party shall ensure that education and information regarding the prohibition against torture and other cruel, inhuman or degrading treatment or punishment are fully included in the curricula of the training of law enforcement personnel and of other public officials as well as medical personnel who may be responsible for persons deprived of their liberty.

2. Each State Party shall include this prohibition in the general rules or instructions issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of persons deprived of their liberty.

Comments

64. Spain proposes that the word "adiestramiento" in article 5 should be replaced by the words "formación profesional". (In English the amendment would read "... the curricula of the vocational training of law enforcement personnel ...".)

65. The United States proposed a redraft of article 5 which would read:

"Each State Party shall insure that education and information regarding the prohibition against torture and other cruel, inhuman or degrading treatment or punishment:

1. is fully included in the curricula of the training of medical personnel, law enforcement personnel, and other public officials who may be involved in the custody or treatment of persons deprived of their liberty, and

2. is included in the instructions issued in regard to the duties of anyone who may be involved in the custody or treatment of persons deprived of their liberty."

Article 6

Each State Party shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.

Comments

66. The United States proposed a redraft of article 6 which would read:

"Each State Party shall keep under systematic, periodic review interrogation practices, and arrangements for the custody and treatment of persons deprived of their liberty within its jurisdiction with a view towards preventing cases of torture or other cruel, inhuman or degrading treatment or punishment."

Article 7 4/

1. Each State Party shall ensure that all acts of torture as defined in article 1 are offences under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.

2. Each State Party undertakes to make the offences referred to in paragraph 1 of this article punishable by severe penalties.

Comments

67. Spain observes that article 7 attempts to deal with the offence of torture in its various forms and covers acts of participation and enforcement arrangements. Regarding acts of participation, reference should be made not only to accomplices but also to accessories after the fact, and the word "incitación" ("incitement") could be replaced by the term used in article 3 of the Spanish Criminal Code, namely "proposición o provocación" ("proposal or provocation"). In paragraph 2 of the same article the expression "penas severas" should be replaced by the more technical term "penas graves".

68. France suggests that, in paragraph 1, the word "délits" should be replaced by the word "infractions" and the word "incitación" should be replaced by "provocation". Paragraph 2 could be made into a separate article and, in so far as the concept of "cruel, inhuman or degrading treatment or punishment" is maintained in the convention, such treatment or punishment should also be considered as an offence punishable by severe penalties.

Article 8

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 7 in the following cases:

- (a) when the offences are committed in the territory of that State or on board a ship or aircraft registered in that State;
- (b) when the alleged offender is a national of that State;
- (c) when the victim is a national of that State.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these offences in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 14 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

^{4/} See the amendments proposed by Switzerland under article 1.

Comments

69. The international community has conferred broad jurisdictional bases in the Hijacking, Sabotage and Protection of Diplomats Conventions, among others. Torture is an offence of special international concern and should have similarly broad jurisdictional bases. For this reason, the United States believes in addition to jurisdiction based on territoriality and nationality (of the offender), universal jurisdiction should exist for acts of torture. (Universal jurisdiction is appropriate since torture, like piracy, may well be considered an "offence against the law of nations".)

70. The United States does not support jurisdiction based on the nationality of the victim as an independent ground of jurisdiction, and thus proposes deletion of subparagraph (c) of paragraph 1. However, although States would not be required to establish nationality of the victim as a basis for jurisdiction, such jurisdiction could be exercised under article 8(3) if in accordance with the internal law of the relevant State Party.

71. France considers that the expression "to establish its jurisdiction" should be replaced by "to establish its competence to deal with offences ...".

72. It would be better to delete the reference to ships and aircraft in paragraph 1 (a): firstly, the proposed text is badly worded and would in any event have to be amended to read "or on board an aircraft registered in that State or a ship flying the flag of that State"; secondly, this wording does not cover all possible cases (continental shelf, etc.) and it would therefore be better to keep to the single concept of "territory", clarified as necessary by the legislation of each particular State.

73. As far as establishment of competence by States Parties is concerned, only the cases referred to in paragraph 1 should be retained in view of the difficulties involved in establishing the facts in the case referred to in paragraph 2.

74. The competence provided for in article 8 does not coincide with the general rule governing the territorial scope of Portuguese criminal law (article 53 of the Criminal Code). However, this would not be an obstacle to acceptance, since that rule establishes an exception in the case of a "conflicting treaty". Portugal suggests that the last part of paragraph 2 should be drafted as follows: "... does not extradite him to another State Party which is competent under paragraph 1 of this article".

Article 9 5/

Each State Party shall guarantee to any individual who alleges to have been subjected within its jurisdiction to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of its public officials, the right to complain to and to have his case impartially examined by its competent authorities without threat of further torture or other cruel, inhuman or degrading treatment or punishment.

5/ See the amendment proposed by Spain under article 1 (para. 44).

Comments

75. It is suggested by Austria to replace the words "the right to complain to" by "the right to an effective remedy before a national authority". It is suggested by Austria and Denmark that the words "without threat ... punishment" be deleted, since they give, Denmark added, a false connotation to the effect that other forms of threat than torture might be used.

76. The United States proposes a new article which would incorporate the concepts contained in articles 9 and 10 and would read:

"If there is reasonable basis for belief that an act of torture or other cruel, inhuman or degrading treatment or punishment has been or is being committed within a State Party's jurisdiction, its competent authorities shall initiate and carry out an impartial, speedy and effective investigation."

77. The United States believes it may be appropriate for the obligation to conduct a speedy, impartial, and effective investigation to apply to both acts of torture and cruel, inhuman or degrading treatment or punishment if there is reasonable basis for belief that an offence has been committed.

Article 10 6/

Each State Party shall ensure that, even if there has been no formal complaint, its competent authorities proceed to an impartial, speedy and effective investigation, wherever there is reasonable ground to believe that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed within its jurisdiction.

Comments

78. France considers that the words "reasonable ground" ("de bonnes raisons") should be replaced by "serious ground" ("des raisons sérieuses").

Article 11 7/

1. Each State Party shall, except in the cases referred to in article 14, ensure that criminal proceedings are instituted in accordance with its national law against an alleged offender who is present in its territory, if its competent authorities establish that an act of torture as defined in article 1 appears to have been committed and if that State Party has jurisdiction over the offence in accordance with article 3.

2. Each State Party shall ensure that an alleged offender is subject to criminal, disciplinary or other appropriate proceedings, when an allegation of other forms of cruel, inhuman or degrading treatment or punishment within its jurisdiction is considered to be well founded.

^{6/} Same amendment as in foot-note 5 applies. See also the amendment proposed by the United States under article 9 (para. 76).

^{7/} See the comments of Portugal in paras. 17 and 74.

Comments

79. The United States does not believe that the Convention does or should express a preference for prosecution or extradition but notes the obligation of a State Party to institute criminal proceedings against an alleged offender (under articles 1 and 2 as redrafted by the United States; see paras. 28 and 45) unless such offender is extradited. The United States submitted the following redraft:

"The State Party in whose territory there is present a person who is alleged to have committed an offence under article 1 or article 2 shall, if it does not extradite him, submit the case to its competent authorities without exception whatsoever and without undue delay, for the purpose of prosecution through criminal proceedings in accordance with the laws of that State."

80. The United States could accept that, as in article 11(2) of the Swedish draft, a State Party should have an obligation to institute "criminal, disciplinary or other appropriate proceedings" in alleged cases of cruel, inhuman or degrading treatment or punishment. The broader range of permissible proceedings reflects the broader range of condemned behaviour inherent in cruel, inhuman or degrading treatment or punishment as opposed to torture. The United States submitted the following text:

"Each State Party shall take such measures as may be necessary to assure that criminal, disciplinary or other appropriate proceedings are instituted in accordance with its national law if its competent authorities have a reasonable basis for belief that an act or cruel, inhuman or degrading treatment or punishment has been committed."

81. France considers it essential to retain the principle of the advisability of instituting proceedings. Accordingly, in paragraph 1, the words "ensure that criminal proceedings are instituted" should be replaced by the phrase "submit the case to its competent authorities for the institution of criminal proceedings".

82. In Switzerland's view, paragraph 1 could be strengthened if it were specified that proceedings should be instituted without exception or undue delay:

"Other than in the case of extradition under article ..., each State Party undertakes to ensure that criminal proceedings are instituted without exception and without undue delay, in accordance with its national law, against an alleged offender who is present in its territory, if its competent authorities establish that an act of torture as defined in article 1 appears to have been committed and if that State Party has jurisdiction over the offence in accordance with article ...".

Article 12

Each State Party shall guarantee an enforceable right to compensation to the victim of an act of torture or other cruel, inhuman or degrading treatment or punishment committed by or at the instigation of its public officials. In the event of the death of the victim, his relatives or other successors shall be entitled to enforce this right to compensation.

Comments

83. For Austria, the right to compensation pursuant to this article should be as comprehensive as possible. In the event of death of the victim an enforceable right of any relatives to compensation with respect to alimony should be limited to cases where the victim was legally obliged to pay such alimony; all other forms of claims for compensation - with the exception of those of a purely personal nature - should be open to his heirs as successors.

84. The United States proposes that the text of article 12 should be redrafted as follows:

"Each State Party shall take such measures as may be necessary to assure an enforceable right to compensation to the victim of an act of torture committed by or with the consent or acquiescence of its public officials. In the event of the death of the victim, his heirs, dependents or successors shall be entitled to enforce this right."

This would clarify the group of people who may enforce the victim's right to compensation in the event of his death by substituting "heirs, dependents, or successors" for "relatives or other successors". The United States believes the right to compensation should be limited to victims of torture.

Article 13

Each State Party shall ensure that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment shall not be invoked as evidence against the person concerned or against any other person in any proceedings.

Comments

85. According to Austria, it would seem preferable to substitute article VII of the draft submitted by the International Association of Penal Law for article 13 of the Swedish draft, since article 13 could be interpreted in a manner which would prohibit the prosecution of a person accused of having inflicted torture.

86. The United States proposes that the deterrent effect of the article prohibiting the use as evidence of statements obtained by torture be maximized by providing an exception (as was done in the draft prepared by the International Association of Penal Law) allowing such statements to be used against the alleged torturer. The United States proposes the following redraft:

"Each State Party shall take such measures as may be necessary to assure that any statement which is established to have been made as a result of torture shall not be invoked as evidence against any person in any proceeding except that it may be invoked in evidence against a person accused of having obtained such statement by torture."

Article 14 8/

Instead of instituting criminal proceedings in accordance with paragraph 1 of article 11, a State Party may, if requested, extradite the alleged offender to another State Party which has jurisdiction over the offence in accordance with article 8.

Comments

87. Austria considers that article 14 and article X, paragraph 2, of the International Association of Penal Law draft are complementary and might accordingly be combined. Also, the wording ("may ... extradite") should be reconsidered. In case of an already existing extradition treaty an obligation to extradite should not be superseded by the optional possibility of extraditing as provided in article 14. Rather, a more stringent obligation might be created, e.g. by replacing the word "may" by "shall" in that article.

88. The United States proposes that the "prosecute or extradite" provision be modelled on the language used in the Protection of Diplomats Convention.

89. In the opinion of France, the words "if requested" should be replaced by the words "at the request of another State Party", and the words "in accordance with its legislation" should be added after the word "extradite". With regard to extradition, the principle of non-extradition for political offences should be maintained. Article 14 is acceptable because of its flexibility. 9/

90. Switzerland fears that the motives for the acts of torture might be such as to permit the torturers to invoke the political nature of their actions as an argument against their extradition. It also fears that a State of refuge might be able, for the same reasons, to refuse the extradition of a person charged with torture. The Swiss Government considers, therefore, that it would be advisable to include in the draft convention a provision similar to that proposed by the International Association of Penal Law in its article XII, to the effect that acts of torture shall not be considered political offences. That provision might be included in article 14 in the form of an additional paragraph reading:

"For the purposes of this Convention, the acts defined in article ... shall not be deemed to be offences of a political nature."

91. Finally, the Swiss Government proposed that the provisions on extradition contained in the Swedish Government's draft should be supplemented and strengthened by an additional article which would essentially restate the rules set out in article 8 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and of the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

8/ See the comments of Portugal in paragraphs 17 and 74.

9/ Same comment as with regard to article 8 (para. 71).

New article

92. The United States proposes the following text of a new article:

"1. Upon being satisfied that the circumstances so warrant, a State Party in whose territory an alleged offender under article 1 or article 2 is present shall take the appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition. Such measures shall be notified directly or through the Secretary-General of the United Nations to:

- (a) the States referred to in article 3(1)(a) and (b); and
- (b) all other States concerned.

2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

- (a) to communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights or, if he is a stateless person, which he requests and which is willing to protect his rights; and
- (b) to be visited by a representative of that State.

3. The State Party in whose territory the alleged offender is present shall immediately make a preliminary inquiry into the facts and promptly report to the States specified in article 3(1)(a) and (b) these facts and whether it intends to exercise jurisdiction."

Comments

93. The United States suggests addition of this article which would establish procedural safeguards during the preliminary investigation phase. This article would require the apprehending State to notify other concerned States of the results of its preliminary investigation, and its intention regarding prosecution/extradition, as well as guaranteeing the accused the right to communicate with the State entitled to protect his rights. This provision is based on similar articles in the Hijacking, Sabotage and Protection of Diplomats Conventions.

New article

94. The United States proposes the following text of a new article:

"1. To the extent that the offences set forth in articles 1 and 2 are not listed as extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, at its option, consider this Convention as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the procedural provisions and the other conditions of the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those offences as extraditable offences between themselves subject to the procedural provisions and the other conditions of the law of the requested State.

4. Each offence under article 1 or article 2 shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 10, paragraph 1."

Comments

95. The United States believes it would be desirable to include an article establishing a legal basis under this Convention for treating torture as an extraditable offence, and detailing the relationship between this Convention and present or future extradition treaties. This provision is analogous to articles in the Hijacking, Sabotage, and Protection of Diplomats Conventions.

Article 15

1. States Parties shall afford one another the greatest measure of assistance in connexion with proceedings referred to in article 11, including the supply of all evidence at their disposal necessary for the proceedings.

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

Comments

96. The United States suggests specifying, as has been done in other recent international conventions, that when supplying evidence, the law of the State requested shall apply. Article 15, as redrafted, would read:

"1. Each State Party shall, consistent with its own laws, afford the greatest measure of assistance in connexion with proceedings brought under this Convention in any other State Party, including the supply of all evidence at its disposal necessary for the proceeding. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters."

97. France considers that the phrase "the greatest measure of assistance in connexion with proceedings" should be replaced by the phrase "the greatest measure of assistance in all criminal proceedings". Paragraph 2 of the article should follow the lines of the relevant provisions of the Hague Convention (article 10, para. 2) and the Montreal Convention (article 11, para. 2).

New article

98. The United States suggests the addition of a new article in order to safeguard the rights of the accused:

"Any person regarding whom proceedings are being carried out in connexion with any of the offences set forth in this Convention shall be guaranteed fair treatment at all stages of the proceedings."

Article 16 10/

States Parties undertake to submit to the Secretary-General of the United Nations, when so requested by the Human Rights Committee established in accordance with article 28 of the International Covenant on Civil and Political Rights (hereafter referred to in the present Convention as the Human Rights Committee), reports or other information on measures taken to suppress and punish torture and other cruel, inhuman or degrading treatment or punishment. Such reports or information shall be considered by the Human Rights Committee in accordance with the procedures set out in the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

Comments

99. Austria welcomes the reporting system which would be established by virtue of this article, that is, a system where reports would be submitted upon special request only. It would seem undesirable to establish yet another obligation of submitting regularly periodic reports, the number of such reports to be submitted in accordance with other international conventions having sharply risen over the past years.

100. Referring to articles 16, 18, 19, 20 and 21, the United States believes that an effective implementation mechanism is an essential feature of this Convention. The United States believes that the Human Rights Committee is particularly well qualified to administer the provisions of this Convention. The Committee already has certain responsibilities to review charges of torture under the Covenant on Civil and Political Rights (and Optional Protocol). Moreover, the Covenant and Optional Protocol establish certain procedures for reporting, and considering communications about violations of a State Party's obligations which appear readily adaptable to the present Convention. The United States supports the procedure (established in the Swedish draft) whereby State Parties are given the option of making a declaration recognizing the competence of the Human Rights Committee to consider such communications, and notes the precedent on this point in the Civil and Political Covenant.

Since the preceding articles of this Convention are tailored to reflect the distinction between torture and cruel, inhuman or degrading treatment or punishment, the United States believes it may be appropriate to have implementation provisions on both subjects.

A legal question does exist, however, as to the appropriate legal method for conferring the requisite additional competence on the Human Rights Committee. On this issue the United States would like to solicit the opinion of the United Nations Legal Counsel.

10/ See, in paragraph 12, the comment of Denmark concerning articles 16 to 21.

101. France notes that article 16 and succeeding articles confer on the Human Rights Committee established in accordance with the International Covenant on Civil and Political Rights competence to monitor the application of the convention. It considers that arrangement to be legally unsatisfactory, since the two instruments concerned are distinct from one another and the parties to them will not necessarily be the same. France believes that it would be better to establish an individual system for the monitoring of the convention, even if that system is based on the system created by the Covenant.

102. Switzerland thinks that, in order to ensure its effectiveness against torture, the convention must be accompanied by machinery for the monitoring of its application which is capable of exerting real influence on the conduct of States Parties. In choosing a solution to the problem of monitoring, account must also be taken of the need to ensure as far as possible the acceptance by the entire international community of the text adopted by the United Nations. In the light of those two requirements - for a universal convention and for monitoring machinery of adequate strength - the Swiss Government is of the opinion that article 16 and the succeeding articles of the draft convention submitted by the Government of Sweden represent a good basis for discussion and are, therefore, worthy of support.

103. Switzerland shares the view that it would be advisable to choose the Human Rights Committee established by the International Covenant on Civil and Political Rights as the monitoring organ. If that was done, the problems inherent in the establishment of a new body and the conflicts of authority that might result therefrom would be avoided and uniformity of jurisprudence would be ensured.

Article 17

If the Human Rights Committee receives information that torture is being systematically practised in a certain State Party, the Committee may designate one or more of its members to carry out an inquiry and to report to the Committee urgently. The inquiry may include a visit to the State concerned, provided that the Government of that State gives its consent.

Comments

104. For Austria, article 17 would add a very helpful new competence to the existing ones of the Human Rights Committee.

105. The United States proposes a redraft of article 17 which would read:

"1. A State Party may at any time declare under this article that it recognizes the competence of the Human Rights Committee to carry out an inquiry under procedures it shall establish if the Human Rights Committee receives information that torture is being consistently practised within the jurisdiction of that State Party. The Committee may designate one or more of its members to carry out such an inquiry and report to the Committee urgently. The inquiry may include a visit to the State concerned.

2. The results of the inquiry conducted under paragraph 1 of this article shall be communicated in confidence to the Human Rights Committee, which shall make an appropriate confidential report and/or recommendation to the State Party concerned."

The United States believes that a State Party should have the option of declaring whether it recognizes the competence of the Human Rights Committee to investigate allegations of the consistent practice of torture within its jurisdiction. The United States has substituted "consistent" for "systematic" practice because the former term is already used in various international conventions. Once exercising this option, however, the State Party would have committed itself to allowing a visit by the Human Rights Committee to facilitate its inquiry. Paragraph 2 would empower the Human Rights Committee to make appropriate recommendations to the State Party concerned, in confidence.

106. France considers this article, which empowers the Committee to decide of its own accord to examine the situation in a State and to carry out an inquiry (even though the making of an on-the-spot inquiry would be subject to the consent of the State concerned), to be unacceptable.

107. The German Democratic Republic states that the mandate of the Committee is circumscribed by the tasks deriving from the International Covenant on Civil and Political Rights that have been approved by the parties to that Covenant. It appears impossible, therefore, to assign further responsibilities to that Committee.

108. Switzerland considers this draft article particularly important. It represents a minimal step forward in a direction in which progress must be encouraged. The Swiss Government feels that the provision should be strengthened by making it possible for the inquiry which the Committee may undertake on its own initiative to include a visit to the State concerned unless the Government of that State objects to the visit:

"If the Human Rights Committee receives information that torture is being systematically practised in a State Party, the Committee may designate one or more of its members to carry out an inquiry and to report to the Committee urgently. The inquiry may include a visit to the State concerned, unless the Government of that State objects thereto."

Article 18

1. A State Party may at any time declare under this article that it recognizes the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Human Rights Committee. No communication shall be received by the Human Rights Committee if it concerns a State Party which has not made such a declaration.

2. Communications received under this article shall be dealt with in accordance with the procedure provided for in article 41 of the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

Comments

109. As regards the possibility of having communications received by the Human Rights Committee (articles 18 and 20) Austria emphasizes its readiness to support those provisions. However, with regard to the possibility that individual complaints are dealt with by the Committee, Austria wants to point out that that

would be tantamount to obligations voluntarily assumed by States being controlled by persons whose nominating States have not assumed the same obligations. In order to avoid any such iniquity or at least reduce it to a minimum extent, one might envisage to refer individual complaints to a sub-group (or chambers) of the Committee composed of nationals of States which have made the declaration under article 20.

110. Spain observes that the draft convention represents a development of article 7 of the International Covenant on Civil and Political Rights, which expressly prohibits torture and cruel, inhuman or degrading treatment or punishment and thereby supplements the protection basically offered by domestic law. Spain also remarks that the international protection machinery proposed in the draft corresponds to that which is outlined in the Covenant. In both the draft convention and the Covenant, it is the United Nations Human Rights Committee which has competence to monitor the compliance of States Parties with their obligations under those instruments. Both article 41 of the Covenant and the Optional Protocol to that instrument provide for the recognition by States Parties of the competence of the Human Rights Committee to consider claims by other States Parties regarding failure to fulfil obligations under the Covenant (Covenant, article 41) or communications from individuals who claim to be victims of a violation of the rights set forth in the Covenant (Optional Protocol, article 1). In each case, recognition of the Committee's competence is to be signified by a separate declaration.

111. The draft convention reproduces virtually word for word the system of guarantees found in the Covenant: article 18 of the draft repeats article 41, paragraph 1, of the Covenant and then refers expressly, in its own paragraph 2, to article 41 of the Covenant. However, article 18 of the draft does not admit of the possibility that States Parties to the convention may recognize the competence of the Human Rights Committee to consider complaints from individuals.

112. The fact that the rules safeguarding the application of the convention and the corresponding rules in the Covenant are basically identical will result in the duplication of instruments, organs and procedures, and Spain is unable to see what practical benefits the proposed convention may offer as a means of combating torture: there is no doubt that, in the case of States Parties to the Covenant which have made the declaration mentioned in article 41 of that instrument and which have signed the Optional Protocol to it, the Covenant offers greater guarantees, in that it enables the Human Rights Committee to consider claims from individuals in addition to those from States. On the other hand, it is hardly likely that States which have not signed the Optional Protocol will recognize the competence of the Human Rights Committee under article 18 of the draft convention or, indeed, that they will give the consent referred to in article 17 of that text.

113. The United States submitted the following modifications: in paragraph 1, first sentence, delete the words "to receive"; in the second sentence, delete the words "received and", and after the words "in regard to itself", replace "the" by "such"; in the third sentence, replace the word "received" by the word "considered"; in paragraph 2, replace the words "dealt with" by the words "acted upon".

Article 19

If a matter referred to the Human Rights Committee in accordance with article 18 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint

an ad hoc Conciliation Commission. The procedures governing this Commission shall be the same as those provided for in article 42 of the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

(No comment received concerning specifically article 19.)

Article 20 11/

1. A State Party may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to have been subjected to torture or other cruel, inhuman or degrading treatment or punishment in contravention of the obligations of that State Party under the present Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Communications received under this article shall be dealt with in accordance with the procedure provided for in the Optional Protocol to the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

Comments

114. The United States submitted the following modifications: in paragraph 1, first sentence, replace the words "Committee ... consider" by the words "Human Rights Committee to consider and act upon"; replace the words "its jurisdiction" by the words "the jurisdiction of that State Party"; in the second sentence, replace the words "received by the Committee" by the words "considered by the Human Rights Committee"; in paragraph 2, replace the words "dealt with" by the words "acted upon".

Article 21

The Human Rights Committee shall include in its annual report to the General Assembly a summary of its activities under articles 16, 17, 18, 19 and 20 of the present Convention.

(No comment received concerning specifically article 21.)

New article

115. The United States proposes the following text of a new article:

"Obligations assumed by each State Party to this Convention are in addition to those obligations assumed under the Geneva Conventions for the protection of War Victims."

11/ See the comment of Austria in paragraph 109.

Comments

116. The United States believes this article should be added so as to eliminate any doubt that the requirements of this Convention are in addition to rather than in lieu of the requirements of the 1949 Geneva Conventions for the Protection of War Victims. The United States supports and commends the activities of the International Committee of the Red Cross in this connexion, and notes its belief that this Convention should not be read as superseding activities presently being carried out by the Red Cross.

New article

117. The United States proposes the following text of a new article:

"1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other States Parties shall not be bound by the preceding paragraph with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Secretary-General of the United Nations."

Comments

118. Recognizing that the Swedish draft left the final clauses to be elaborated subsequently, the United States would like to urge adoption of an article providing for submission of disputes to the International Court of Justice if a State Party to the dispute so requests. There are similar provisions in the Hijacking, Sabotage and Protection of Diplomats Conventions.

119. The Swiss Government also proposes that the machinery for monitoring the application of the future convention should be supplemented by an article concerning the settlement of disputes with respect to the interpretation and application of the instrument.