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THIRTY YEARS AFTER
THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

the need for an INTERNATIONAL CONVENTION *against* TORTURE

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INTRODUCTION

The thirtieth meeting of the World Council of Churches' Central Committee (August 1977) urged the churches of the world to take the XXXth Anniversary of the Universal Declaration "as a special occasion to lay bare the practice of, complicity in, and the propensity to torture which exist in our nations".

Why of all the varieties of human rights violations should we single out torture? It is not only because torture is the most heinous, most persistent, most deliberate and most cruel of all crimes against the human person, but also because in many ways the propensity for torture acts as a kind of barometer for the dimensions of human values achieved by a society. Torture also illustrates most clearly the close relationship which exists between the violation of the rights of the individual and the achievement of full rights for large sectors of society. In most cases, victims of torture are persons who have become involved in the struggle for justice and human rights in their own societies, or are singled out as examples to intimidate large groups demanding fulfilment of their social rights. For Christians in particular, the example of the suffering and death of Christ has taught a special respect and reverence for those who suffer vicariously for others.

The notion that we are therefore speaking primarily about "underdeveloped" societies in the Third World, in this connection, must quickly be dispelled. The history of two World Wars has shown clearly that the most "civilized" nations can be the most barbaric and that "progress" in the scientific and economic fields bears no immunity from dark ages. In fact, the most sophisticated ages have always excelled in the sophistication of their evil. In the scientific age, torture has become a science. It is an undeniable fact that the most recent advances in techniques of torture emanate from our most "developed" societies. Both of the WCC's recent consultations on Militarism (November 1977) and Disarmament (April 1978) have drawn attention to the increasing use of torture for the systematic suppression of liberation and protest movements, and also the increasing transfer from "developed" countries to "developing" countries of technology and instruments of torture.

To be sure, the Universal Declaration of Human Rights made its appearance in an age perhaps more hopeful than ours (10 December 1948). The most devastating war of history was in the past, a United Nations Organization

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had been founded, the world looked forward to reconstruction, economic progress, decolonization and the emergence of new societies. The Declaration itself was an expression of that hope.

Unfortunately the world has been moving farther away from that "common standard of achievement for all peoples and all nations" held by the Universal Declaration. "In our generation", the Central Committee noted, "the darkness, deceit and inhumanity of the torture chamber have become a more wide-spread and atrocious reality than at any other time in history". This insiduously abominable trend runs counter to the preamble to the Declaration which states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

It is useful to remember, that the Declaration was adopted by a United Nations which could not have foreseen many of the new ways in which power, wealth and technology are misused today to violate the rights not only of individuals but of whole peoples. It is a product of its times and, over the years, it has been necessary to amplify its provisions and add legal weight to its implementation through the adoption and ratification of other international instruments.

The nurture and promotion of this process seems a most appropriate way in which to "celebrate" the XXXth Anniversary of the Universal Declaration of Human Rights. It avoids the temptation of yet more pious, yet perfunctory words, but it also undercuts the cynicism which often pervades an increasingly negative attitude towards the United Nations and other inter-governmental agencies, which still represent, for better or for worse, the only international fora capable of assembling the nations of the earth for the purpose of achieving a more human world through peaceful means.

On the occasion of this XXXth Anniversary of the Universal Declaration of Human Rights, we remind the churches of the Central Committee's call to undertake special actions with regard to the elimination of torture. One concrete effort that affords our combined support is the work done within the broad context of the United Nations system on a draft convention against torture. We are grateful to Hans Thoolen, Executive Secretary of the International Commission of Jurists, Geneva, for providing us with the ample background information contained

in this issue. In commending this study, we hope that it serves to encourage endeavours within each national situation to support and lobby for the quick adoption of such a convention.

Philip Potter
General Secretary, WCC

THE NEED FOR
AN INTERNATIONAL CONVENTION AGAINST TORTURE

by Hans Thoolen
Executive Secretary
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"Men are born free but are everywhere in chains", wrote Jean-Jacques Rousseau at the beginning of Le contrat social. This remains true even today, and not only figuratively. Hundreds of thousands of people are detained without good cause and without trial, many of them subjected to the most horrible and degrading abuse: torture.

The struggle against this barbarous phenomenon must be conducted on many levels and by many methods in order to be effective. The present paper will limit itself to legal matters at the international level. Its purpose is to provide the reader with the texts of pending proposals for an International Convention against Torture and to acquaint him with the background of this development.

The problem of torture is placed in the context of the XXXth Anniversary of the Universal Declaration of Human Rights (Section I). A short survey of present international instruments on human rights (Section II) and in the field of torture (Section III) are followed by a discussion of the need for a further and more definitive instrument on torture (Section IV). The most recent proposals for a torture convention are briefly discussed: the Swedish proposal (Section V), the IAPL (Section VI) and the proposed Optional Protocol (Section VII).

The Appendices provide the full text of the Swedish proposal and the Draft Optional Protocol and a summary of the IAPL proposal. The full text of the 1977 World Council of Churches Statement on Torture, including its proposed programme of action for the churches, is reprinted as Appendix V.

Appendix IV contains the texts of a speech delivered by the legal officer of the International Committee of the Red Cross, Dr. H.P. Gasser, at the Vth Round Table on Humanitarian Law in San Remo, 1978. The text is printed in French (original language) in order to introduce the three drafts to French-speaking readers. The French versions of the draft conventions and the Optional Protocol are also available (see foootnotes in the Appendices). I am grateful to Dr. Gasser, who is writing in his personal capacity, for his permission to reprint his speech.

German readers are referred to: Alois Riklin (Hrsg.): Internationale Konventionen gegen die Folter - St. Galler Expertengespräch 1978, Schriftreihe der Schweizerischen Gesellschaft für Aussenpolitik, Verlag Paul Haupt, 1978.

In preparing the text for this background paper, I have drawn heavily upon a speech given by the Secretary General of the International Commission of Jurists, Mr. Niall MacDermot at a seminar in St. Gallen in June 1978. The opinions expressed in the present paper and any errors contained therein are those of the author.

I. Torture and the XXXth Anniversary of the Universal Declaration of Human Rights

In 1968, the International Year for Human Rights, the Universal Declaration of Human Rights was 20 years old and this was celebrated around the world: member-states of the UN held an international conference on human rights in Teheran and the international non-governmental organisations (NGOs) held their own meeting in Paris. The International Commission of Jurists published a special issue of its Journal (Vol. VIII No. 2 and Vol. IX No. 1) and in the introduction the then Secretary-General Sean MacBride said the following: -

> "One of the factors that influenced the adoption of the Universal Declaration was the determination of world leaders in 1948 to ensure that the world should never again witness the genocide, the destruction of human rights and the brutality that engulfed humanity in the neo-barbarism that accompanied World War II. Yet, twenty years later, humanity is again witnessing in many areas acts of brutality which disgrace the present era. Such acts create a momentary horror which shocks the human conscience but are only too easily relegated to the 'lost property' compartment of the public conscience. Brutality is nearly always contagious. In a conflict, it engenders counter-brutality. The fact that cruelty is tolerated and even easily forgotten tends to encourage others to resort to it. Cruelty is a contagious disease that leads to a degradation of human standards. This is a serious problem which has grave ethical implications that require the urgent attention of church leaders, statesmen, sociologists, philosophers and lawyers alike. Would not the International Year for Human Rights be a suitable occasion to launch a campaign to arouse world opinion against brutality? Article 5 of the Universal Declaration must be given reality". (Article 5 of the Universal Declaration reads as follows: "No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

Such a campaign has since been launched and has been carried out by many organisations. In particular, Amnesty International, which in 1977 received the Nobel Peace Prize for its endeavours, has been an enormous driving force behind the efforts to focus attention on this issue during the last decade. The churches and professional organisations of lawyers, doctors and law enforcement personnel have increasingly demanded that states put an end to torture practices. The movement has been at least partly successful in as much as it has achieved international recognition by the adoption in 1975 of the UN Declaration on the Protection

of all Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (GA Resolution 3452 (XXX)). Without a single dissenting vote, the General Assembly adopted the Declaration, "as a guideline for all States and other entities exercizing effective power".

From this moment on, the anti-torture movement was joined by those States in the UN who in 1977 decided to request the Commission on Human Rights to prepare a draft convention against torture. In 1978, in response to this appeal, the Commission began consideration of such a draft, but not much progress was made, and the item was inscribed on the agenda of the Commission's next meeting in February 1979.

The UN has decreed that in 1978 the XXXth Anniversary of the adoption of the Universal Declaration of Human Rights should be observed throughout the world. For its part it has organized conferences and meetings and intends to award human rights prizes to individuals and organizations worthy of such distinction, and disseminate as widely as possible "appropriate public information" about human rights.

Non-governmental organizations and individuals throughout the world should seize this opportunity to remind the States of their continuing interest in the struggle against torture. They should bring pressure upon their governments to increase their activities in the outlawing and suppression of torture in their own countries and to create and accept with all deliberate speed international mechanisms designed to eradicate torture.

II. International Human Rights Instruments

States (1) are the principal actors in the international community, and one of the many ways in which they regulate their interaction is through treaties (2). These treaties can be bilateral (between two States) or multilateral among more than two States). One of the most important multilateral treaties is the Charter of the UN, which established in 1945 the most important international organization: the United Nations.

Within the framework of the UN there has been a growing concern for human rights, particularly in the legal field (3).The Charter lists as one of the purposes of the UN: "to achieve international cooperation... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race,

sex, language, or religion". An international "bill of human rights" was envisaged when the UN was established, but due to political controversy, a two-tier system had to be adopted:

First, on 10 December 1948 the General Assembly of the UN adopted without a dissenting vote a resolution containing the famous Universal Declaration of Human Rights as a "common standard of achievement for all peoples and all nations".

Secondly, on 16 December 1966, the General Assembly adopted two Covenants on Human Rights, one on civil and political rights, and the other on social, economic and cultural rights. States could become parties to each by signing and ratifying them (4). In doing so States undertake legally binding obligations. Up to now just over 50 States have ratified both the Covenants.

Many other treaties have been created within the UN which focus more on a particular right or problem, as for example the conventions against genocide (1948), against statelessness (1951 and 1954), against forced labour (1957), against sex discrimination, (1951, 1953 and 1957), and the Convention on the Elimination of all Forms of Racial Discrimination (1965). The latter is of special importance, as it brought into being separate implementation machinery (the Committee of Experts), imposing an obligation on States Parties to produce reports on the progress made under the Convention as well as opening the door to the right of individual petition (5).

The Covenant on Civil and Political Rights of 1966 has similar implementation provisions, but the right of individual petition was placed in a supplementary treaty, called the Optional Protocol, which States may ratify separately from, but in conjunction with the Covenant itself (6).

III. International Instruments in the Field of Torture

Torture is prohibited by national legislation in most countries (7) and in the following international instruments:

1. Article 5 of the Universal Declaration of Human Rights reads: "No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

2. Article 7 of the Covenant on Civil and Political Rights, which endorses article 5 of the Universal Declaration

adds:"In particular no-one shall be subjected without his free consent to medical or scientific experimentation".

3. The Geneva Convention of 1949 and the two additional Protocols of 1977.

4. Article 3 of the European Convention on Human Rights of 1950, which entered into force in 1953.

5. Article 5 of the American Convention on Human Rights, which entered into force on 11 July 1978.

6. The Standard Minimum Rules for the Treatment of Prisoners, adopted by the first UN Congress on the Prevention of Crimes and Treatment of Offenders, held at Geneva in 1955 and approved by the ECOSOC in its resolution of 31 July 1957.

7. To these one might add the Draft Body of Principles for the Treatment of Persons under Any Form of Detention, the Draft Code of Ethics for Law Enforcement Officials and the Draft Code of Medical Ethics, all of which are in various stages of drafting, but none of which have yet reached final formulation.

8. Above all, the Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the UN on 9 December 1975.

Only the instruments mentioned under 2, 3, 4 and 5 create legally binding obligations on those States which have ratified them. Those instruments under 4 and 5 are limited to certain geographical areas. The Geneva Conventions apply only to cases of armed conflicts, although States can, and sometimes do, allow visits by the Red Cross to places of detention in times of peace. None of the instruments provide for an effective and mandatory factfinding mechanism.

The General Assembly, by its Resolution in 1977, has requested the Commission on Human Rights to prepare a Draft Convention against Torture.

IV. Why a Special Convention against Torture?

Since torture is already prohibited under so many national and international instruments, it may reasonably

be asked what is the object of a special convention against torture? The General Assembly of the United Nations has already agreed, without a dissenting voice, to a Declaration against torture and other ill-treatment, which contains all, or virtually all, the provisions which would be contained in a convention. If the nations do not implement this Declaration, what reason is there to think that they would implement a convention? Moreover, the only countries which would ratify a convention against torture are those which do not practice torture. Further, a convention which only some States will ratify may weaken the effect of the General Assembly Declaration. So runs the argument.

The first answer is that the existing instruments are very general and impose no specific obligations upon States. It is true that the UN Declaration does contain more specific provisions declaring the duty of States to take effective measures, legislative, administrative and judicial, to prevent or repress torture, but declarations of this kind, important as they are, do not, themselves, create binding legal obligations upon States. They may in time contribute to their development under customary international law.

Secondly, various national laws have not been able to stop torture. Torture is a crime which is carried out almost entirely by States acting by their servants or agents, civil or military. It is, indeed, a crime committed by the law enforcement agencies, by the very persons whose duty it is to prevent crime. Such people are, and know themselves to be, to a very great extent outside the reach of the arm of the law, i.e. of their national law. Consequently, external pressure upon offending governments is the most important weapon in the campaign against torture, particularly when that pressure can persuade the government concerned that the continuation of these practices is no longer in their interest, that it is costing them more than the benefits they obtain from it.

Now, while the pressure of the international press, of non-governmental organizations and of public opinion can play a most important role in this respect, international pressure is most effective when it becomes inter-governmental pressure, pressure from other States.

As is well known, Article 2 (7) of the Charter of the United Nations provides that nothing in the

Charter shall "authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter". This provision is seized upon by offending governments in seeking to resist outside interventions and pressure.

The importance of an international convention on torture is that it would impose obligations, quite specific and not general obligations on the States Parties under international law. The effect of this would be that the implementation of those obligations becomes a matter of international concern. They could no longer be claimed to be "essentially within the domestic jurisdiction" of the State concerned. Other States would have the right, and even the duty,to do what they could to ensure the implementation of the obligations of each State Party.

This is the major argument in favour of a convention. It would convert the principles of the UN Declaration into binding obligations under international law, whose enforcement would be a legitimate matter of international concern.

In addition, adherence to a convention is a much more solemn engagement by the States Parties to eradicate this evil than a mere acceptance of a declaration of principles, and it thereby facilitates the task of those working within the country for the eradication of torture.

Another advantage of an international convention is that it could extend the jurisdiction to try an offence of torture beyond the country where the crime was committed. A torturer may be tried, for example, in the country of which he is a national or of which the victim is a national, or in the country where he is found if that country is not willing to extradite him to another country having jurisdiction.

With respect to the argument that only countries which do not practice torture will ratify the convention, there are two answers: First, it is not wholly true. The experience of the ratification of the Optional Protocol to the International Covenant on Civil and Political Rights, which gives a right of individual petition to the Human Rights Committee established by the Covenant, indicates the contrary. Surprisingly, among the ratifying States are a number which most observers would say are serious violators of human rights. The reason is not far to seek.

Governments believe they can gain in prestige by showing their adherence to human rights conventions. This factor is likely to be particularly strong in relation to torture.

The other answer is that governments change. A State which does not practice torture under one administration may do so under a succeeding regime. Whatever the position may be about ratification of a torture convention, it would be exceedingly difficult for a State to denounce a convention against torture which a previous government had already ratified. Uruguay is an example. The former democratically elected government ratified the Optional Protocol to the International Covenant on Civil and Political Rights. The present military dictatorship has not seen fit to denounce it and is now exposed to the pressures of the Human Rights Committee's procedures.

V. The Swedish Proposal

When the General Assembly in 1977 had requested the Commission on Human Rights to prepare a draft convention against torture, the Swedish government consistent with its record of involvement in this field, submitted a draft to the February 1978 meeting of the Commission on Human Rights. The text of this draft is attached.

The Swedish draft basically follows the UN Declaration of 1975. It has for instance, taken over the definition of torture in Article 1. It elaborates on legislative, administrative and judicial measures which the States Parties would have to adopt, including the obligation to instruct law enforcement personal (Article 5) and to "keep under systematic review interrogation methods and practices" (Art. 6). Torture must be a criminal offence (Art. 7) for which extradition is possible and even obligatory if the State does not prosecute the offender itself (Arts. 8, 11, 14). Torture allegations must be made the subject of serious investigation (Arts. 9 and 10) and victims of torture would be entitled to compensation (Art. 12). A confession extracted under torture should be inadmissible as evidence in a court of law (Art. 13).

In Arts. 15 to 21 the implementation machinery is based on the Covenant on Civil and Political Rights. States Parties would be required to submit reports to the Human Rights Committee, which could start investigative proceedings even against the wishes of a State, although on-the-spot visits would be possible only with the consent of the State concerned. Complaints by States or by individuals could be considered by the Human Rights Committee, if the States concerned have made a declaration that they would accept such complaints.

VI. The IAPL Proposal

The International Association of Penal Law, a non-governmental organization with UN consultative status, organized an expert meeting in Syracuse in December 1977 where another draft convention against torture was elaborated (8). This text was also submitted to the Commission on Human Rights and was circulated as UN document E/CN.4/NGO/213.

The IAPL draft does not differ greatly from the Swedish draft and therefore inclusion of the full text in this paper was not judged necessary. In Appendix II the major differences in the IAPL draft are listed as amendments to the Swedish draft.

The main difference between the two, is that the IAPL draft declares torture to be a crime under international law, in the same way as war crimes, crimes against humanity, crimes against peace, genocide and Apartheid are already recognized as international crimes. Such a designation would add greatly to the public impact of the convention and thereby increase its deterrent effect.

Another marked difference is that the IAPL draft limits itself to torture, while the Swedish draft, in accordance with the UN Declaration of 1975, also covers cruel, inhuman or degrading treatment or punishment.

Concerning implementation, the IAPL draft also provides for a reporting system to the Human Rights Committee under the UN Covenant for Civil and Political Rights, but specifies that only nationals of a State party to the torture convention can be appointed to the special committee within the Human Rights Committee, that would consider the States reports.

VII. Optional Protocol, based on the "Gautier Proposal"

As mentioned above (Section II), the methods of implementation of existing or proposed international human rights instruments are of two kinds. First, a reporting procedure, under which States Parties submit to an international body periodic reports on the measures they have taken to carry out their obligations under the convention, and secondly, a communications procedure, under which other States Parties, or individual victims, or both, may make complaints to the

international body against a State Party alleged to have violated the convention. The weakness of these procedures is that there is no provision for an impartial investigation into the alleged violations.

The draft convention proposed by the Swiss lawyer, Mr. Jean-Jacques Gautier (9) does not suffer from this weakness. His proposal is based on the experience of the Interntional Committee of the Red Cross in visiting prisoners in detention in many countries. It would introduce a system of regular visits by impartial delegates to places of detention of all kinds in the States Parties. The delegates would be appointed by and report to an international committee of experts, serving in an individual capacity and appointed by the States Parties to the convention. The States Parties would bind themselves in advance to accept and facilitate visits organized by this committee.

These proposals, if accepted, would provide a most effective addition to the implementation procedures proposed in the other draft conventions. They would, provide procedures for regular inspection and investigation. The sponsors of the proposal recognize that ratification of an instrument containing proposals of this kind would take longer to gain acceptance and would initially be ratified by many fewer states. Nevertheless, once established, they believe that in time more and more countries would agree to ratify. Agreeing with these views, the International Commission of Jurists suggested that the proposals contained in Mr. Gautier's draft might be put forward as an Optional Protocol to the proposed UN convention against torture. It would represent a challenge to those countries which declare their desire to eradicate torture and it would be likely to obtain a greater number of ratifications as an Optional Protocol than it would as a convention standing on its own.

In cooperation with the sponsors of Mr. Gautier's proposals, the International Commission of Jurists has prepared a Draft Optional Protocol to this effect, the full text of which is printed in Appendix III.

The addition of such a Protocol would, it is believed, add greatly to the arguments in favour of an International Convention against Torture. Some have expressed a fear that consideration of the draft Optional Protocol would substantially delay obtaining agreement upon a draft convention. This is open to question. The experience of the formation of the Optional Protocol to the Covenant on Civil and Political Rights indicates

that governments which do not intend to ratify the Protocol would take little or no part in the discussion upon it. Moreover, the proposals for implementation in the present draft conventions raise a number of difficulties which could lead to prolonged discussion. In any event, any extra time taken on agreeing to the draft Protocol would, it is suggested, be time well spent. Adoption of these proposals would mark a major step forward in the international implementation of human rights.

VIII. Conclusion

In its 1977 Statement on Torture (10) , the World Council of Churches declares:

> "We recognize that there remain, even among the churches, certain differences of interpretation of human rights, and that sometimes different priorities are set for the implementation of human rights according to varying socio-economic, political and cultural contexts. But on the point of torture there can be no difference of opinion".

This is also true for other groups and individuals. Therefore, a case has to be made that on the question of torture there should be a strong and effective international agreement. If we frankly admit that the implementation machinery (i.e. the putting into practice) of international human rights instruments is, with rare exceptions, not yet very effective, we should bring all possible pressure upon governments to ensure that the hideous crime of torture is effectively prevented and suppressed. If the most effective way of doing so requires States to give up a small part of their sovereignty by agreeing to receive inspection visits by an international body, this small price should be paid.

The draft Conventions and draft Optional Protocol together are clear elaborations of the programme of action proposed in the World Council of Churches' Statement on Torture.

Notes

(1) International intergrovernmental organizations have increasingly been recognized as independent actors.

(2) Treaties are binding obligations in international law undertaken by States; such agreements can have different appellations, the most common of which are: treaty, convention, covenant, protocol, charter, statute, concordat or act.

Other expressions of the will of States can be morally binding but are, strictly speaking, not legal obligations. Declarations and resolutions of the General Assembly of the UN belong in this category, although in the case of the Universal Declaration it has been forcefully argued that this G.A. resolution has acquired a special status. It is worth nothing that in the Proclamation of Teheran, 1968, the International Conference (of States!) on Human Rights solemnly proclaimed that "the Universal Declaration... constitutes an obligation for the members of the international community".

(3) A comprehensive survey of the UN activities in the field of human rights is contained in: "UN Action in the field of human rights", UN New York, 1973, 212 pages (sales No. E.74.XIV.2). An up-to-date compilation of international human rights instruments, containing the full text of all major Conventions and Declarations in this field, was published by the UN in 1978 under sales No. E.78.XIV.2.

(4) Signature and ratification are the two subsequent steps which States must take in order to bring a treaty into force. Signature has become a rather perfunctory ceremony, as ratification ("confirmation") is in fact the essential step necessary to bind States.

(5) Art. 14 of this Convention would allow a State Party to make a declaration at any time that it recognizes the competence of the Committee of Experts to receive and consider complaints from individuals. But this procedure would only come into force when at least 10 declarations had been made to that effect. Until now only 7 countries have done so.

(6) This Protocol required 10 ratifications before it could come into force and to the surprise of many observers it entered into force together with the Covenant on Civil and Political Rights, on 23 March 1976. At present 20 countries have become parties to the Protocol.

(7) An exhaustive list of provisions in national constitutions relevant to the prevention or prohibition of torture can be found in Revue Internationale de droit pénal, 1977 No. 3/4, Appendix A. (In spite of the title, the main part of this special issue on torture is in English).

(8) Idem

(9) Published for the first time in the Swiss weekly "La Vie Protestante", 29 October 1976.

(10) Statement on Torture, adopted by the 30th meeting of the Central Committee of the WCC, Geneva, August 1977, and included here as Appendix V.

Appendix I

Draft International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

("the Swedish draft")

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 constitues an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Article 2

1. Each State Party undertakes to ensure that torture or other cruel, inhuman or degrading treatment or punishment does not take place within its jurisdiction. Under no circumstances shall any State Party permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment.

2. 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.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 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.

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.

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.

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.

Article 7

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.

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 exercized in accordance with internal law.

Article 9

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.

Article 10

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.

Article 11

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 8.

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.

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.

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.

Article 14

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.

Article 15

1. States Parties shall afford one another the greatest measure of assistance in connection 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.

Article 16

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.

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.

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.

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.

Article 20

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.

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.

(Final clauses to be elaborated)

Note: This draft Convention is available in all official languages of the UN as Doc. E/CN.4/1285.

Appendix II

Suggested amendments to the Swedish draft based on the draft convention of the International Association of Penal Law (E/CN.4/NGO/213)

1. Crime under international law

If it were accepted to insert a first article declaring torture a crime under international law, further amendments could be considered re. the "period of limitation" (Art. VIII. I.A.P.L. draft) and the jurisdiction of an international criminal court (Art. IX., para. 2 I.A.P.L. draft).

2. Article 2 (definition)

Suggested amendments. Para. 1, line 3, leave out "for such purposes as obtaining" and insert "in order to obtain";

line 5, leave out "punishing" and insert "or to punish";

line 6, leave out "intimidating" and insert "to intimidate".

The amendments are needed to give the definition the precision required for a criminal offence.

Suggested amendment. Para 1, line 7, leave out "to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners" and insert "not constituting cruel, inhuman or degrading treatment or punishment".

The meaning of this reference to the Standard Minimum Rules in the General Assembly Declaration is obscure. This lengthy document, which is not an international treaty, sets out standards for prison conditions. It is surely not intended that any pain or suffering arising from a breach of one of the Standard Minimum Rules is necessarily to be regarded as torture. The wording suggested in the amendment is, of course, taken from article 7 of the International Covenant on Civil and Political Rights.

Suggested amendment. Leave out para. 2.

The effect of such a paragraph could be unduly restrictive, as is indicated by a recent decision of the European Court of Human Rights. Surely torture does not have to be an aggravated form of cruelty.

3. Article 2(2) (non-derogation)

Suggested amendment. Line 2, after "public emergency" insert "and no alleged necessity or urgency of obtaining information".

This is one of the commonest justifications put forward for torture, and merits a specific exclusion in the Convention.

4. Article 7 (criminal offences)

Suggested amendment.Add at end of para. 1, "Complicity for this purpose includes the failure by a public official to take appropriate measures to prevent or suppress torture when that person has knowledge or reasonable belief that torture has been or is being committed and has the authority or is in a position to take such measures".

The criminal responsibility of officials who tolerate or ignore torture practices which they are able to prevent should be clearly established.

5. Article 9 (complaints)

Suggested amendment. Line 1 (of the English texts), delete "alleges to have been" and insert "alleges he or she has been". This is a purely drafting amendment.

6. Article 13 (evidentiary effect)

Suggested amendment. Add at end, "except against a person accused of obtaining it by torture".

A statement extracted under torture which is manifestly untrue may be important evidence against the torturer.

7. Article 14 (extradition)

Suggested amendment. Add at the end, "but if the State Party decides not to extradite it shall be under a duty, where sufficient evidence is available, to institute criminal proceedings against the offender in accordance with its jurisdiction under article 8".

This would establish clearly the principle aut dedere aut judicare.

International Commission of Jurists

16.2.1978

Note: The full text of the I.A.P.L. is available in all official languages of the UN as Doc. E/CN.4/NGO/213. The special issue on torture of the Revue Internationale de droit pénal, mentioned in note (7), contains the text of both proposed convention and a commentary in both French and English.

Appendix III

Draft Optional Protocol to the Draft International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The States Parties to the present Protocol,

Considering that in order further to achieve the purpose of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and the implementation of its provisions, it would be appropriate to establish an independent International Committee authorized to arrange visits to places of detention of all kinds under the jurisdiction of the States Parties to the present Protocol and to report thereon with recommendations to the governments concerned,

Have agreed as follows:

Article 1

1. A State Party to the Convention that becomes a party to the present Protocol agrees to permit visits in accordance with the terms of the present Protocol to any place (hereinafter referred to as a place of detention) subject to the jurisdiction of a State Party where persons are held who have been deprived of their liberty for any reason, including persons under investigation by the law enforcement authorities, civil or military, persons in preventive, administrative or re-educative detention, persons who are being prosecuted or punished for any offence and persons in custody for medical reasons;

2. A place of detention within the meaning of this Article shall not include any place which representatives or delegates of a Protecting Power or of the International Committee of the Red Cross are entitled to visit and do visit pursuant to the Geneva Conventions of 1949.

Article 2

Exceptional circumstances, such as a state of war, state of siege, state of emergency or the passing of emergency legislation shall not suspend the application of the present Protocol.

Article 3

1. The States Parties to the present Protocol shall meet in Assembly once a year. They shall be convened by the Government of ... or such other Government as may accept their request to do so.

2. The Assembly shall elect the members of an International Committee responsible for the application of the present Protocol (hereinafter referred to as the Committee), shall adopt the budget for implementing the present Protocol, shall consider the general reports of the Committee and any other matters relating to the present Protocol and its application, and shall give general directions to the Committee.

Article 4

1. The Committee shall be composed of 10 members until such time as there are not less than 25 States Parties to the present Protocol. Thereafter the Committee shall be composed of 18 members.

2. The members of the Committee shall be persons of high moral character and recognized competence in the field of human rights and in the matters dealt with in the Convention and the present Protocol.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 5

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in Article 4 and nominated for the purpose by the States Parties to the present Protocol.

2. Each State Party may nominate not more than four persons or, where there are not less than 25 States Parties, not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 6

1. The members of the Committee shall be elected for a period of 4 years, half the membership being renewed every two years.

2. Initially the Committee shall not include more than 2 members from the same State. When there are more than 10 States Parties to the present Protocol, the Committee shall not include more than one member from the same State, save that members elected while there were 10 States Parties or less shall continue to serve for the unexpired portion of their term.

3. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the different legal systems.

Article 7

1. The Committee shall meet for regular sessions twice a year, and for special sessions at the initiative of its Chairman or at the request of not less than one third of its members.

2. The Committee shall adopt its own rules of procedure. Its decisions shall be taken by a majority of its members present and voting.

3. Half of the members shall constitute a quorum.

Article 8

1. The Committee shall be responsible for arranging visits to places of detention subject to the jurisdiction of the States Parties to the present Protocol.

2. The Committee shall establish a programme of regular visits to each of the said State Parties and shall arrange such further visits as may appear necessary from time to time.

Article 9

1. The Committee may nominate as its delegates to carry out such visits one or more persons being members of the Committee or members of a panel of qualified

persons chosen by the Committee from among the nationals of the States Parties to the present Protocol.

2. Members of the said panel shall be nominated for periods of 3 years. Their names shall be communicated to the States Parties to the present Protocol.

3. A State Party may exceptionally and for confidential reasons given to the Committee declare that a particular delegate will not be acceptable as a visitor to its territory.

Article 10

1. Subject to the provisions of Article 9, paragraph 3, when the Government of a State Party to the present Protocol has been informed of a mission assigned to one or more delegate(s), the latter shall be authorized to visit in all circumstances and without previous notice any place of detention within the jurisdiction of the State Party.

2. The delegates shall receive from the State Party concerned all facilities for the accomplishment of their task. They may, in particular, obtain all information about the places where there are persons deprived of their liberty and interview them there without witnesses and at leisure.

3. Delegates may enter into contact with the families, friends and lawyers of persons deprived of their liberty.

4. During each visit, the delegates shall verify that persons deprived of their liberty are being treated in conformity with the provisions of the Convention.

5. If appropriate, they shall at once submit observations and recommendations to the competent authorities of the State Party concerned.

6. They shall submit a full report on their mission, with their observations and recommendations, to the Committee.

Article 11

1. The Committee, after considering a report of its delegates, shall inform the State Party concerned in confidence of its findings and, if necessary, make recommendations. It may initiate consultations with the State Party with a view to furthering the protection of persons deprived of their liberty.

2. In the event of a disagreement between the State Party concerned and the Committee as to the Committee's findings or as to the implementation of its recommendations, the Committee may at its discretion publish its findings or recommendations or both in whole or in part.

3. The Committee shall submit to the annual Assembly a general report which shall be made public.

Article 12

1. The Committee shall appoint a Secretary-General and one or more assistants.

2. Under the authority of the Committee the Secretary-General shall carry out the tasks assigned to him by the Committee and shall be responsible for the day to day administration in the implementation of the present Protocol. He shall appoint the members of the secretariat.

3. He shall collect information from all available sources pertaining to the treatment of persons deprived of their liberty within the jurisdiction of the States Parties. He shall not communicate the source of any such information to the State Party concerned without the consent of the informant.

4. Between sessions of the Committee, if it appears to the Secretary-General that an urgent mission is required to one or more places of detention within the jurisdiction of a State Party, the Secretary-General may, with the agreement of the Chairman of the Committee, organize a mission to the State Party concerned and such mission shall be entitled to the same rights and facilities as a mission authorized by the Committee.

Article 13

1. Each State Party shall contribute to the expenditure incurred in the implementation of the present Protocol on the basis of the scale used by the United Nations Organization.

2. The draft annual budget, after approval by the Committee, shall be submitted by the Secretary-General to the annual Assembly of the States Parties.

Article 14

1. The present Protocol is open for signature by any State which has signed the Convention.

2. The present Protocol is subject to ratification or accession by any State which has ratified or acceded to the Convention. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

3. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 15

1. Subject to the entry into force of the Convention, the present Protocol shall enter into force three months after the deposit of the fifth instrument of ratification.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the fifth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 16

Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall inform the other States Parties and the Committee. Denunciation shall take

effect one year after notification. Denunciation shall not affect the execution of measures authorized prior to it.

21.6.1978

Note: The French text of the draft Optional Protocol is available from Comité contre la Torture, Case postale 2408, 1002 Lausanne.

Appendix IV

Les projets de la Convention contre la torture: état de la situation

Exposé de Hans-Peter Gasser, conseiller juridique au Comité International de la Croix Rouge, à la Table ronde 1978 de l'Institut du droit humanitaire à San Remo (7 septembre 1978)

La torture est un phénomène inventé par l'homme. C'est un "man made disaster". En tant qu'invention de l'homme, la torture doit et peut être combattue par des moyens à la portée de l'homme. Il n'y a pas de place pour le fatalisme.

La stratégie de la lutte contre la torture est aussi diverse que complexe. Mais toujours est-il que c'est l'homme qui doit être l'objet des mesures à envisager - celui qui torture, celui qui donne l'ordre de torturer ou qui ne prend pas les mesures adéquates pour arrêter la torture, ou encore le grand public qui demande des mesures exemplaires contre ceux qui attaquent l'ordre établi.

La tâche qui m'a été confiée consiste à exposer un aspect de la lutte contre la torture, aspect qui n'est peut-être pas le plus important ou le plus efficace : l'approche juridique. Il s'agit ici de décrire l'état actuel du droit positif et d'introduire les différentes initiatives visant à établir une Convention contre la torture.

1. Le droit en vigueur

En droit international public la torture est interdite. Mentionnons d'abord la Déclaration universelle des Droits de l'Homme qui dit, dans son article 5 :

> "Nul ne sera soumis à la torture, ni à des peines ou traitements cruels, inhumains ou dégradants."

Bien sûr, la Déclaration n'a pas la valeur d'un traité entre Etats. Mais n'est-elle pas, en ce qui nous intéresse aujourd'hui, l'expression d'une règle de droit universellement acceptée ? La question est posée.

La législation des droits de l'homme traite de l'interdiction de la torture. Je renvoie au Pacte international relatif aux droits civils et politiques (article 7) et aux deux instruments régionaux, la Convention européenne des droits de l'homme et des libertés fondamentales (article 3) et la Convention américaine relative aux droits de l'homme (article 5). (Rappelons, dans ce contexte, que la Convention américaine est entrée en vigueur au courant de cet été, soit le 18.7.78, liant 11 Etats).

L'interdiction de la torture a fait l'objet de différentes Déclarations qui n'ont pas toutes la force d'un instrument de droit positif. Toutefois, elles sont souvent l'expression de ce qui est déjà du droit. Parfois elles développent une idée, une notion, dans l'intention de la faire passer en droit positif, à un stade ultérieur. Dans ce contexte, il faut relever la Déclaration sur la protection de toutes les personnes contre la torture et autres peines ou traitements cruels, inhumains ou dégradants qui fut adoptée par l'Assemblée générale des Nations Unies le 9.12.75. Elle contient entre autre une définition de la torture. Cette Déclaration constate que tout acte de torture est "un reniement des buts de la Charte des Nations Unies" et "une violation des droits de l'homme et des libertés fondamentales proclamées dans la Déclaration universelle des Droits de l'homme" (article 2). L'Assemblée générale semble donc adopter la thèse selon laquelle la torture est interdite en soi, indépendamment des traités du droit positif.

L'Ensemble des règles minima pour le traitement des détenus et recommandations y relatives, élaboré par le premier Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants et adopté par le Conseil économique et social en 1957, proscrit tout traitement non compatible avec la dignité humaine et exclut par là tout acte de torture.

Ces jours-ci, la sous-commission de la lutte contre les mesures discriminatoires et la protection des minorités, un organe de la Commission des droits de l'homme des Nations Unies, achève ses délibérations sur le Projet d'ensemble de principes concernant la protection des personnes soumises à toute forme de détention ou d'emprisonnement. Son Principe 5 (dans sa version du 29.8.78 : voir rapport du groupe de travail, E/CN.4/Sub. 2/406) s'énonce ainsi :

> "Aucune personne soumise à une forme quelconque de détention ou d'emprisonnement ne sera soumise à la torture ni à des peines ou traitements cruels, inhumains ou dégradants. Aucune circonstance quelle qu'elle soit ne peut être invoquée pour justifier la torture ou toute autre peine ou traitement de caractère cruel, inhumain ou dégradant."

Ceci pour expliquer la dernière étappe de la lutte contre la torture aux Nations Unies.

Afin d'être exhaustif je vous rappelle également les entreprises suivantes qui toutes s'attaquent d'une manière ou d'une autre, à la lutte contre la torture :

- le Projet de Code d'Ethique policière, actuellement en discussion dans la troisième Commission et transmis aux gouvernements pour commentaire (A/C.3/32/SR 42) et
- le Projet d'Ethique médicale dont s'occupe l'Organisation mondiale de la Santé, sur demande de l'Assemblée générale (1974).

Le droit humanitaire applicable dans les conflits armés interdit l'usage de la torture, tant pour les conflits armés internationaux que pour les conflits armés non internationaux. Les quatre Conventions, pour leur champ d'application respectif, bannissent toute forme de torture (I/12, II/12, III/17, IV/32). Les deux Protocoles additionnels consacrent et développent l'interdiction. Je vous renvoie à l'article 75 du Protocole I qui étend la protection à toute catégorie de victimes de conflits armés internationaux ainsi qu'à l'article 4 du Protocole II.

Cette introduction, un peu ardue, m'a paru nécessaire pour montrer l'universalité de l'interdiction de la torture en droit international public. Le droit positif en la matière couvre toutes les situations, d'autant plus que même en état d'urgence, aucune dérogation n'est tolérée (voir Pacte de 1966, art. 4, Convention européenne, art. 15, etc.) L'interdiction de la torture est non seulement universelle mais encore absolue.

Qu'en est-il des mesures de contrôle et du système des sanctions ?

Laissant de côté les mesures de répression interne nous distinguons quatre différents mécanismes internationaux :

- le contrôle judiciaire ou quasi-judiciaire qui est déclenché par la requête d'un individu, en général la victime (Convention européenne, Convention américaine, Protocole facultatif se rapportant au Pacte de 1966);
- le contrôle déclenché par la communication ou plainte d'une autre partie contractante (Pacte de 1966, art. 41, Convention européenne, Convention américaine, art. 45);
- le contrôle par l'évaluation de rapports soumis par les Etats à un organe supranational (Pacte de 1966);
- le contrôle par la visite des lieux de détention (Conventions de Genève).

La valeur et l'efficacité de ces différents mécanismes sont inégales. De plus, il est notoire que ces systèmes de contrôle n'ont pas réussi à faire cesser la torture dans le monde.

Quelle doit être la réaction à cette constatation ?

- Faut-il créer un droit nouveau ?
- Faut-il renforcer les mécanismes de contrôle et étendre leur champ d'application ?
- Faut-il inventer et introduire d'autres mécanismes ?

Les différentes initiatives lancées en vue d'une Convention contre la torture nous incitent à trouver une réponse à cette question fondamentale.

2. Propositions pour une Convention contre la torture

Quelques données d'ordre procédural :

Sur l'initiative de la Suède, l'Assemblée générale des Nations Unies a adopté, par consensus, lors de sa 32e session en décembre 1977, une résolution demandant à la Commission

des droits de l'homme d'élaborer un projet de Convention contre la torture (A/32/62 du 8.12.77).

La Commission des droits de l'homme, lors de sa session annuelle de 1978 (6.2 - 10.3), fut saisie de deux projets de Convention, l'un introduit par la délégation suédoise :

> Projet de Convention internationale contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (E/CN. 4/1285 du 23.1.78)

et, l'autre, distribué par l'Association internationale de Droit pénal (ONG - voir E/CN.4/NGO/213 du 1.2.78) :

> Projet de Convention sur la prévention et la suppression de la torture.

Après un premier débat sur les deux projets alternatifs la Commission invita les Etats membres et autres Etats intéressés à formuler des observations et chargea un groupe de travail, qui siégera en février 1979 à Genève, de rédiger des propositions concrètes. Les chancelleries sont invitées à se faire une idée de ces propositions.

Il y a un troisième texte dont les instances internationales n'ont pas encore été saisies :

> Projet de Protocole facultatif se rapportant à la Convention internationale contre la torture et autres peines ou traitements cruels, inhumains ou dégradants.

Ce texte est issu d'un long processus de prise de conscience et de délibérations. S'il y eut au début l'effort d'un particulier, M. J.-J. Gautier de Genève, l'iniative fut reprise par un groupe d'experts sous la direction du Professeur Dominicé qui rédigea un projet de texte (mai 1977). Entretemps,

les deux projets mentionnés ont été déposés. Devant cette nouvelle situation et sur proposition du Secrétaire général de la Commission internationale de Juristes, M. Niall MacDermot, on décida de donner au texte la forme d'un Protocole facultatif qui s'ajouterait à la Convention principale telle qu'élaborée par la Commission des Droits de l'Homme. Le projet de Protocole facultatif sera soumis à la Commission et différents gouvernements ont été approchés afin de soutenir cette initiative.

Nous avons donc deux projets de texte pour une Convention contre la torture, le texte suédois et le texte de l'A.I.D.P. Ils s'agit de textes alternatifs : l'un ou l'autre pourra être repris. De plus, on propose l'élaboration d'un Protocole facultatif. Ce Protocole facultatif doit nécessairement se rapporter à la Convention principale. Il n'est lié ni au projet suédois ni au texte de l'A.I.D.P, il irait avec l'un ou l'autre. Par contre, l'idée originale du groupe Gautier d'établir une Convention séparée a été abandonnée.

Projets de Convention contre la torture

Le projet suédois et la proposition de l'Association internationale de droit pénal ont ceci de commun qu'ils engagent les Etats à prendre toutes les mesures, préventives et répressives, d'ordre législatif, administratif, judiciaire ou autre, pour empêcher tout acte de torture. Ils élaborent des règles sur la juridiction en cas de poursuite pénale, sur l'extradition et sur l'entraide judiciaire. Une des idées de base se résume ainsi : "aut dedere aut iudicare" : une partie contractante est obligée de poursuivre un suspect en justice - ou encore de l'extrader vers un Etat ayant la juridiction sur le délit. Pour illustrer les mesures envisagées on peut mentionner le projet suédois qui oblige les Etats à exercer "une surveillance systématique sur les pratiques et méthodes

d'interrogatoire" de ses services (art. 6). Selon le projet A.I.D.P. , les autorités sont tenues de faire une enquête sur toute plainte ou chaque fois que les circonstances font craindre l'apparition de la torture (art. IV).

Les deux textes se passent de clause échappatoire : il est expressément mentionné qu'aucune circonstance exceptionnelle (telle que conflit armé ou tensions internes) ne peut justifier ou excuser un acte de torture.

Passons aux divergences et à quelques problèmes soulevés par les deux projets : la différence principale réside dans la proposition de l'A.I.D.P. de déclarer la torture un crime international, à l'instar des crimes de guerre, des crimes contre l'humanité ou la paix au sens des Principes de Nuremberg, des crimes de génocide et d'apartheid. Par ce biais, le projet renforce la notion de responsabilité individuelle du fautif. Cette idée se trouve d'ailleurs dans les Conventions de Genève et leurs Protocoles additionnels tout comme dans le projet suédois. Ces textes criminalisent en effet un certain nombre d'actes considérés comme particulièrement répréhensibles. La technique juridique est cependant différente.

Une autre divergence réside dans le champ couvert par le projet et dans la définition du comportement visé : le projet suédois proscrit non seulement la torture mais encore "les autres peines ou traitement cruels, inhumains ou dégradants". Il est en accord avec la Résolution de l'Assemblée générale des Nations Unies

de 1977 qui englobe torture et autres traitements.

Cette approche a permis aux auteurs suédois de reprendre la définition telle qu'incorporée dans la Déclaration sur la torture de 1975. L'Ambassadeur Danelius a cependant émis des doutes au sujet du bien-fondé de cette approche et il s'est demandé s'il est judicieux d'étendre la Convention aux autres peines ou traitements cruels, inhumains ou dégradants (exposé St Gall).

La définition, dans le projet de l'A.I.D.P., est plus succincte et plus précise. Elle ajoute d'ailleurs un nouvel élément qui me paraît valable : selon ce projet, la torture peut être pratiquée non seulement "par ou à l'instigation d'un fonctionnaire public" mais encore par "une personne dont le fonctionnaire public est responsable" (art. I). Cette adjonction (qui est élaborée dans l'art. IIIc)) couvrirait l'activité de toutes formes de para-police et d'autres groupes qui agissent sous le couvert - mais pas directement sous les ordres - des autorités policières.

Est-il souhaitable d'inclure une définition dans la Convention ? La question pourra être débattue lors de la discussion. Je me borne à faire les considérations suivantes :

- une définition de la torture existe déjà : c'est celle de la Déclaration de 1975. Consacrée par l'Assemblée générale, cette définition influence sans doute déjà maintenant l'interprétation des différents instruments qui n'ont pas de définition;

- toute définition tend à être restrictive par rapport au sens ordinaire donné à une expression. S'il y a procédure judiciaire, une cour risque de restreindre encore plus cette notion. (L'arrêt de la Cour européenne dans l'affaire Irlande contre Royaume-Uni pourrait être analysé sous cet angle).

Passons au système de contrôle international. Le projet suédois propose d'adopter la procédure de contrôle incorporée dans le Pacte international relatif aux droits civils et politiques de 1966.

En résumé nous avons :

- un examen des rapports périodiques par le Comité des droits de l'homme (art. 16)
- un examen des communications provenant d'autres Etats parties à la Convention (clause facultative, art. 18)
- des examens de plaintes de particuliers (clause facultative, art. 20)
- une commission de conciliation (art. 19).

Une idée nouvelle émane du projet d'article 17 :

"Si le Comité des droits de l'homme apprend que la torture est pratiquée systématiquement dans un certain Etat partie, il peut charger un ou plusieurs de ses membres de faire une enquête et de lui faire rapport d'urgence. L'enquête peut comporter un séjour dans ledit Etat, si le gouvernement en cause y donne son agrément."

Il s'agit là d'un début pour un système de surveillance autonome : une procédure qui pourrait être déclenchée même contre la volonté de l'Etat mis en cause.

Mentionnons au passage une difficulté : selon le projet suédois le Comité des Droits de l'Homme se penchera sur les rapports, communications, etc. dont les membres peuvent être originaires d'Etats qui ne sont pas parties à la Convention contre la torture.

Le projet de l'A.I.D.P. qui, comme nous l'avons vu, se fonde principalement sur l'idée du crime international, prévoit - subsidiairement - la compétence de tous les Etats en matière de poursuite et punition pour le crime de la torture (juridiction universelle). Il ne propose pas, et pour cause, un tribunal international, ce qui serait cependant la suite logique de l'idée de base. De plus, le projet s'attache également à la procédure de contrôle du Pacte de 1966.

C'est à ce stade de l'analyse qu'il faut introduire le projet de Protocole facultatif. Le projet tend à renforcer considérablement le mécanisme de contrôle. Il part de l'idée qu'une action préventive est primordiale et que cette action préventive peut se réaliser au mieux par des visites régulières et périodiques dans les lieux de détention.

L'article ler, para. 1, se lit comme suit :

"Tout Etat partie à la Convention qui devient partie au présent Protocole consent à autoriser des visites, conformément aux termes du présent Protocole, de n'importe quel lieu (ci-après dénommé lieu de détention) relevant de sa juridiction où sont gardées des personnes privées de liberté pour une raison quelconque, y compris les personnes retenues aux fins d'enquêtes par les autorités civiles ou militaires chargées du maintien de l'ordre, les personnes placées en détention préventive, administrative ou rééducative, les personnes poursuivies ou punies pour un délit quelconque et celles qui sont internées pour des raisons médicales."

Ces visites seront effectuées par des délégués désignés par un Comité international chargé de veiller à l'application du Protocole (il serait d'ailleurs préférable de ne pas utiliser ici les termes de "Comité" ou "Committee" pour éviter toute confusion avec le CICR, ceci pro domo!). La tâche du délégué consiste à vérifier que le traitement des détenus soit conforme aux dispositions de la Convention. Sur la base de son rapport le Comité fera, le cas échéant, des recommandations à l'autorité concernée, aux fins d'améliorer la situation. En cas de désaccord entre le Comité et l'Etat concerné le Comité pourra publier ses constatations et recommandations (art. 11).

L'idée des visites périodiques fut bien entendu empruntée aux Conventions de Genève. Peut-il y avoir conflit entre les deux systèmes juridiques ou entre les institutions ? L'article 2 du projet de Protocole facultatif déclare d'une manière expresse que des circonstances exceptionnelles ne suspendent pas l'application du Protocole. D'autre part il est dit que les lieux de détention que les délégués d'une Puissance protectrice ou du CICR sont habilités à visiter et qu'ils visitent

effectivement ne sont pas soumis au contrôle de l'organe du Protocole facultatif. Dans des situations de conflits armés internationaux je ne vois guère de difficultés : le domaine d'activité du CICR pour lequel ce dernier est particulièrement bien préparé reste le sien. On pourrait toutefois imaginer la situation (surtout dans un conflit armé non international (article 3)), où une partie au conflit ferme la porte aux délégués du CICR en disant qu'elle est déjà ouverte aux délégués du Comité. Cette situation me paraît concevable. La longue tradition du CICR, son expertise dans le domaine de la protection ainsi que le fait que la visite de lieux de détention n'est qu'un aspect de son activité dans une zone de conflit devraient inciter les Etats parties au Protocole facultatif à réserver au CICR la priorité de l'action.

3. Remarques finales

Le problème qui nous est posé est - si je le conçois clairement - plutôt d'ordre politique. Il s'agit de savoir jusqu'où un projet de Convention contre la torture peut aller, sans trop porter atteinte à la souveraineté des Etats, à leurs impératifs de sécurité et au principe de non-ingérence dans les affaires intérieures d'un Etat.

Il n'y a pas de réponse à cette question : le niveau de ce qui est acceptable varie d'un Etat à l'autre. La question devient donc la suivante : vaut-il mieux une Convention acceptable pour tous et qui peut devenir universelle mais reste nécessairement faible ou bien faut-il plutôt un texte avec un mécanisme de contrôle fort qui risque de ne pas être adopté par

un grand nombre d'Etats ? C'est sous cet angle là - il s'agit, je le répète, de considérations purement politiques - que la proposition d'avoir une Convention principale suivie d'un Protocole facultatif paraît séduisante. Les précédents, pour cette manière de procéder, ne manquent certainement pas. Il suffit d'évoquer le Protocole facultatif se rapportant au Pacte de 1966 sur les droits civils et politiques, les Protocoles additionnels à la Convention européenne et les différentes clauses facultatives notamment dans le Pacte de 1966, dans les Conventions européenne et américaine. Comme chacun sait une des mesures de contrôle élaborée par la Conférence diplomatique de Genève est assortie d'une clause facultative : en effet, la Commission internationale d'établissement des faits ne pourra procéder à une enquête que si l'Etat en question en a expressément reconnu la compétence (art. 90, Protocole I). Les travaux préparatoires nous confirment que la clause facultative fut introduite à un stade ultérieur des délibérations alors qu'il était clair qu'un contrôle inconditionnel ne paraissait pas acceptable par les Etats.

L'exemple de l'article 90 du Protocole I montre qu'avec une certaine souplesse il est possible d'éviter l'abandon pur et simple d'une mesure de contrôle qui paraît essentielle.

Je vous remercie.

Hans-Peter Gasser

14.9.1978

Appendix V

STATEMENT ON TORTURE

World Council of Churches

"... the emphasis of the Gospel is on the value of all human beings in the sight of God, on the atoning and redeeming work of Christ that has given to humanity true dignity, on love as the motive for action, and on love for ones neighbour as the practical expression of an active faith in Christ. We are members one of another, and when one suffers all are hurt."

(Consultation on Human Rights and Christian Responsibility, St. Pölten, Austria, 1974).

The thirtieth meeting of the World Council of Churches' Central Committee (Geneva, 28 July - 6 August, 1977) has heard the words of its Moderator, who, with deep sorrow, directed its attention to "a steady increase in reports of violation of human rights, and in the use of torture in an increasing number of countries of the world". Then the General Secretary called it to "a style of thinking and of being which is a prerequisite for furthering the unity, witness and service of the people of God according to God's purpose". One essential element of this is a determination "to be true, and live the truth". "Being human", he said, "means to uncover things, to bring them to light, to disclose them, to deprive them of their hiddenness, to bring them into consciousness".

We are called to bear witness to the light which has come into the world through our Lord Jesus Christ. At the same time, we know "the judgement, that the light has come into the world, and men loved darkness more than light, because their deeds were evil. For everyone who does evil hates the light, lest his deeds be exposed". (John 3 : 19-20).

Today we stand under God's judgement, for in our generation the darkness, deceit and inhumanity of the torture chamber have become a more wide-spread and atrocious reality than at any other time in history. No human practice is so abominable, nor so widely condemned. Yet physical and mental torture and other forms of cruel and inhuman treatment are now being applied systematically in many countries, and practically no nation can claim to be free of them.

Next year the world will be called upon to mark the thirtieth anniversary of the adoption on December 10, 1948, by the United Nations General Assembly of the Universal Declaration of Human Rights. The preamble to that Declaration states that "recognition of the inherent dignity and of the equal and inalienable rights

of all members of the human family is the foundation of freedom, justice and peace in the world."

The WCC Nairobi Assembly has urged us to hold high this concern for justice, to work for the implementation of all the rights enunciated in the Universal Declaration, and the elimination of the causes of violations of human rights.

The struggle to abolish torture involves "work at the most basic level towards a society without unjust structures" (Nairobi Assembly, Section V Report, para. 13). Torture is most likely to occur in societies which are characterized by injustice, but it can also happen in situations where most rights are protected. While torture is sometimes applied to common prisoners, the victims are most likely persons who have become involved in the struggle for justice and human rights in their own societies, people who have had the courage to voice the needs of the people. In the face of political opposition, rulers of an increasing number of countries have decreed emergency laws in which the basic guarantee of habeas corpus is suspended. Detainees are forbidden contact with a defense lawyer, their families, religious leaders, or others, creating conditions propitious for torture. Under the pretext of "national security", many states today subordinate human dignity to the selfish interests of those in power.

Given the tragic dimensions of torture in our world, we urge the churches to take this thirtieth anniversary year as a special occasion to lay bare the practice of, complicity in, and the propensity to torture which exist in our nations. Torture is epidemic, breeds in the dark, in silence. We call upon the churches to bring its existence into the open, to break the silence, to reveal the persons and structures of our societies which are responsible for this most dehumanizing of all violations of human rights.

NB: The United Nations Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as: "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.

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

We recognize that there remain, even among the churches, certain differences of interpretation of human rights, and that sometimes different priorities are set for the implementation of human rights according to varying socio-economic, political and cultural contexts. But on the point of torture there can be no difference of opinion. The churches together can and must become major forces for the abolition of torture.

We therefore urge the churches to:

1. a) intensify their efforts to inform their members and the people of their nations about the provisions of the Universal Declaration of Human Rights, and especially of its Article 5, which reads:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

b) continue and intensify their efforts to cause their governments to ratify the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights adopted by the United Nations General Assembly, December 16, 1976. Special efforts should be made to achieve the ratification of the "Optional Protocol" of the Covenant on Social and Political Rights by which states agree to allow to be considered communications from individuals subject to their jurisdiction who claim to be victims of a violation of the rights set out in that Covenant by their own state. Similarly, attention of governments should be called to the importance of ratifying specifically Article 41 of the Covenant on Civil and Political Rights, by which a state can express its willingness to allow other nations to raise questions, through a careful procedure, about its compliance with the provisions of this Covenant, including its Article 7 which prohibits torture or cruel, inhuman or degrading treatment or punishment.

c) inform their members and the people of their nations of the contents of the "Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" unanimously adopted by the United Nations General Assembly on December 9, 1975.

d) study and seek the application at all levels of governments of the "Standard Minimum Rules for the Treatment of Prisoners" adopted on August 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

e) study and seek the application of the "Declaration of Tokyo: Guidelines for Medical Doctors concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in relation to Detention and Imprisonment" adopted by the twenty-ninth World Medical Assembly in Tokyo, October 1975.

2. Seek to ensure the compliance of their governments with the provisions of these important international instruments, recognizing that while the Declarations are not legally binding, they do represent a large international consensus and carry very substantial moral weight.

3. Express their solidarity with churches and people elsewhere in their struggle to have these provisions strictly applied in their own countries.

4. Urge their governments to contribute positively to the current effort of the United Nations to develop a body of principles for the protection of all persons under any form of detention or imprisonment, and to strengthen the existing procedures for the implementation of the "Standard Minimum Rules"; and of the World Health Organization to develop a "Code of Medical Ethics Relevant to the Protection of Detained Persons Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment".

5. Work for the elaboration by the United Nations of a Convention on the Protection of all Persons against Torture.

6. Encourage other initiatives to establish an international strategy to fight against torture and to create an efficient international machinery to ban torture.

7. Ensure that law enforcement officials, members of the military and of special security branches, members of the medical profession and others be informed of the above-mentioned international standards and to press for their non-participation in torture, and their non-complicity with others directly involved.

8. Work against any further international commerce in torture techniques or equipment and against the development in the scientific community of even more sophisticated techniques of physical or mental torture.

9. Seek access to places of detention and interrogation centres in order to ensure that persons held there are not mistreated.

10. Be especially attentive to the fact that torture most often occurs after secret detention, abduction and subsequent disappearance of victims, and see to it that special rapid and appropriate measures be taken to locate them and to provide legal protection for such persons by the competent authorities.

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