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REPORT OF THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS ON THE STUDY OF ALTERNATIVES TO THE ARTICLES OF THE DRAFT INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

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REPORT OF THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS
ON THE STUDY OF ALTERNATIVES TO THE ARTICLES OF THE DRAFT
INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

At its meeting of June 5, 1985, the Permanent Council instructed the Committee on Juridical and Political Affairs to set up a working group to negotiate any points of the draft Convention defining torture as an international crime for which there were alternatives still pending. That draft Convention was seen by the General Assembly at its fourteenth regular session.

In response to those instructions, at its meeting of June 10 the Committee on Juridical and Political Affairs began its review of the matter, in the knowledge that because of the Organization's present financial difficulties, the Inter-American Specialized Conference convoked through resolution AG/RES. 736 (XIV-0/84) would not be held. In view of this fact, the topic would be included on the draft agenda for the fifteenth regular session of the General Assembly.

Although the Committee itself decided to study the matter, on a number of occasions the topic was set aside since certain delegations did not have instructions from their respective governments. Later, the Committee agreed to set up a working group to review the various pending suggested alternatives to the articles of the draft Convention.

At its meeting of November 19, 1985, the Committee received the report of the Working Group (CP/CAJP-624/85 rev.1) (ATTACHED). Having discussed the report, the Committee then decided to present it to the Permanent Council with the reservations indicated by certain delegations.

It should be noted here that all the alternatives contained in the draft text were negotiated and resolved, save for Article 3 where no agreement was ultimately reached. Alternatives A and B were presented for this article, as was a proposed amendment from the Delegation of Mexico.

"The Delegation of Venezuela reserved its position on the report of the Working Group, which incorporates the amendments to the Preamble of the Convention and to articles 1, 2, 3, 10 and 17, noting that it was not the mandate of the Working Group to amend the content of operative paragraph 6 of resolution AG/RES. 368 (VII-0/78), which instructs the Inter-American Juridical Committee, in cooperation with the Inter-American Commission on Human Rights, to draw up a draft convention defining torture as an international crime; the report changes the very title of the draft Convention and, accordingly, two paragraphs in the Preamble and Article 2. The Delegation of Venezuela is awaiting instructions from its Foreign Ministry as to these amendments and will make known its final position on these changes in Cartagena."

For its part, the Delegation of Mexico reserved the right to present a proposal either the same as or similar to the one contained in its working paper CP/CAJP-538/85 add.5, intended to define, "for the purpose of this Convention", the meaning of international crime should the topic be reintroduced at a higher instance.

The Delegation of Peru said that it had supported the text of Article 1 for the sake of a consensus, but it reserved its position on this article, as it would have preferred that torture be described as an international crime.

Therefore, the Committee on Juridical and Political Affairs submits the following draft Convention to the Permanent Council:

DRAFT INTER-AMERICAN CONVENTION
TO PREVENT AND PUNISH TORTURE

Preamble

The American States signatory to the present Convention;

AWARE of the provision of the American Convention on Human Rights that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment;

REAFFIRMING that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations, and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights;

NOTING that, in order for the pertinent rules contained in the global and regional instruments to take effect, it is necessary to draft an Inter-American Convention that prevents and punishes torture;

REAFFIRMING their purpose of consolidating in this hemisphere the conditions that make for recognition of and respect for the inherent dignity of man, and enable him fully and completely to exercise his fundamental rights and freedoms,

HAVE AGREED upon the following:

Article 1

The States Parties shall prevent and punish torture in accordance with the terms of this Convention.

Article 2

I. For the purposes of this Convention, torture shall be understood to be any act intentionally performed by which physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim, or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

II. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

Article 3

ALTERNATIVE A

The following shall be held guilty of the crime of torture:

- a. A public servant or employee who, acting in that capacity, orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
- b. Any employee who, at the instigation of a public servant or employee as mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

ALTERNATIVE B

A person who orders, instigates, or induces the use of torture, or who directly uses it, or is an accomplice to it, shall be guilty of torture.

Amendment by Mexico

1. The following shall be held guilty of the crime of torture:

- a. A public servant or employee who, acting in that capacity, orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
- b. Any employee who, at the instigation of a public servant or employee as mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

2. Nevertheless, upon depositing their instruments of ratification or adherence, States may declare that vis-à-vis other States making the same declaration, the present Convention shall apply to any person who orders torture, instigates or induces its use, or who directly uses it, and to any person who, having the obligation and the possibility of preventing it, fails to do so.

Article 4

The fact of having acted under orders of a superior shall not absolve one of the corresponding criminal liability.

Article 5

The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for torture.

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.

Article 6

In accordance with the terms of Article 1, the States Parties hereto shall adopt effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law, and shall make such acts punishable by severe penalties that take into account their grave nature.

The States Parties likewise shall adopt effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

Article 7

I. The States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.

II. The States Parties, likewise, shall take similar measures to prevent other cruel, inhuman, or degrading treatment or punishment.

Article 8

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation, or well-grounded reason to believe that an act of torture has been committed within its jurisdiction, each State Party shall guarantee that its respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

Article 9

The States Parties undertake to incorporate into their national laws statutory regulations guaranteeing adequate compensation for victims of torture.

None of the provisions of this article shall affect the right to receive compensation that the victim or other persons may have by virtue of existing national legislation.

Article 10

No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and as evidence of perpetration of the crime of torture.

Article 11

The States Parties shall take the necessary steps to extradite anyone accused of committing torture, or sentenced for committing such a crime, in accordance with their respective national laws on extradition and their international commitments on this matter.

Article 12

I. Each State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases:

- a. When torture has been committed within its jurisdiction;
- b. When the alleged criminal is a national of that State; or
- c. When the victim is a national of that State, and it considers this appropriate.

II. Also, each State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11.

III. This Convention does not exclude criminal jurisdiction exercised in accordance with domestic law.

Article 13

1. The offence referred to in Article 2 shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include torture as an extraditable offence in every 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 torture. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize torture as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.

4. Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, or that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting state.

Article 14

When a State Party does not concede the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of an investigation, and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that requested the extradition.

Article 15 (new)

No provision of this Convention may be interpreted as limiting the right of asylum, when its exercise is appropriate, nor as altering the obligations of the States Parties in the matter of extradition.

Article 16

This Convention shall not limit the provisions of the American Convention on Human Rights, other conventions on the subject, or the Statutes of the Inter-American Commission on Human Rights, with respect to torture.

Article 17

The States Parties shall report to the Inter-American Commission on Human Rights about any legislative, judicial, administrative, or other kinds of measures they adopt in application of this Convention.

In keeping with its duties and responsibilities, in its annual report, the Inter-American Commission on Human Rights will endeavor to analyze the existing situation in the member states of the Organization of American States in regard to the prevention and elimination of torture.

Article 18

This Convention is open to signature by the member states of the Organization of American States.

Article 19

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 20

This Convention is open to accession by any other American state. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 21

The States Parties may, at the time of approval, signature, ratification, or accession, make reservations to this Convention, provided that each reservation is not incompatible with the object and purpose of the Convention, and concerns one or more specific provisions.

Article 22

This Convention shall enter into force on the thirtieth day following the date on which the second instrument of ratification is deposited. For each State ratifying or acceding to the Convention after the second instrument of ratification has been deposited, the Convention shall enter into force on the thirtieth day following the date on which that State deposits its instrument of ratification or accession.

Article 23

This Convention shall remain in force indefinitely, but may be denounced by any State Party. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, this Convention shall cease to be in effect for the denouncing State, but shall remain in force for the remaining States Parties.

Article 24

The original instrument of this Convention, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send a certified copy to the Secretariat of the United Nations for registration and publication, in accordance with the provisions of Article 102 of the United Nations Charter. The General Secretariat of the Organization of American States shall notify the member

states of the Organization and the states that have acceded to the Convention of signatures, and of deposits of instruments of ratification, accession, and denunciation, as well as of reservations, if any.

19 November 1985

Roberto Leyton
Ambassador, Permanent Representative of
Panama
Acting Chairman of the Committee

Edmundo Hawkins Lake
Ambassador, Permanent Representative of
Antigua and Barbuda

Rafael García Velasco
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Juan Carlos Capuñay
Representative of Peru

José Luis Vallarta
Ambassador, Representative of Mexico

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Fernando Enrique Petrella
Representative of Argentina

Fernando Campero Prudencio
Representative of Bolivia

Edith Marquez Rodríguez
Representative of Venezuela

ANEXO

PERMANENT COUNCIL OF THE
ORGANIZATION OF AMERICAN STATES
COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

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REPORT OF THE WORKING GROUP TO STUDY THE ALTERNATIVES TO
THE ARTICLES OF THE DRAFT INTER-AMERICAN CONVENTION
TO PREVENT AND PUNISH TORTURE

REPORT OF THE WORKING GROUP TO STUDY THE ALTERNATIVES TO
THE ARTICLES OF THE DRAFT INTER-AMERICAN CONVENTION
TO PREVENT AND PUNISH TORTURE

At its meeting held on August 28, 1985, the Committee on Juridical and Political Affairs decided to form a working group to study the alternatives to the articles of the draft Convention Defining Torture as an International Crime. The Working Group was composed of the delegations of Brazil, Colombia, Guatemala, El Salvador, the United States, Jamaica, Mexico, and Peru. At the meeting of October 3, the Group elected Mr. Juan Carlos Capuñay, Alternate Representative of Peru, Chairman at the outset of the meeting.

The alternatives studied by the Working Group appear in the Preamble of the draft Convention and articles 1, 2, 3, and 17 as well as Article 10. Here, the alternative ensued from a proposal by the Delegation of Colombia to the Permanent Council. The draft Convention is included in the report of the Committee on Juridical and Political Affairs to the Permanent Council (CP/doc.1524/84).

Following its deliberations, the Working Group decided to suggest to the Committee that the fourth paragraph (in brackets) be deleted from the Preamble and that the text of paragraph 3 read as follows:

Noting that, in order for the pertinent rules contained in the global and regional instruments to take effect, it is necessary to draft an inter-American convention that prevents and punishes torture.

With regard to Article 1, the decision was to adopt Alternative "B":

The States Parties shall prevent and punish torture in accordance with the terms of this Convention.

As a result of the amendments made in the Preamble and in Article 1, the Group suggested that the title of the draft Convention be changed to Draft Inter-American Convention to Prevent and Punish Torture.

With regard to Article 2, the Group decided to delete the word "serious," which appears in brackets:

- I. For the purposes of this Convention, torture shall be understood to be any act intentionally performed by which severe physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim, or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

- II. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

With regard to Article 10, the Group adopted the proposal by the Delegation of Colombia, with an amendment submitted by the Delegation of Mexico. The text reads as follows:

No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and as evidence of perpetration of the crime of torture.

In reference to Article 17, the Group decided to delete the second paragraph, which appears in brackets. The text therefore reads as follows:

The States Parties shall report to the Inter-American Commission on Human Rights about any legislative, judicial, administrative, or other kinds of measures they adopt in application of this Convention.

In keeping with its duties and responsibilities, in its annual report, the Inter-American Commission on Human Rights will endeavor to analyze the existing situation in the member states of the Organization of American States in regard to the prevention and elimination of torture.

The suggestions on the Preamble, on Article 1, and consequently on the title of the draft Convention would be justified given the fact that the concept of international crime would not be immune to questioning in the legal science field. This was the reason also used for deleting the word "serious" from Article 2, since it could be subject to various interpretations.

As for Article 10, the Working Group recognized that the proposal by the Delegation of Colombia, with the amendment submitted by Mexico, clarified the rule enunciated in it.

Finally, the Working Group felt it best to retain the second paragraph of Article 17, in the view that the paragraph in question served to clarify the competence of the Inter-American Commission on Human Rights in matters of torture.

With regard to Article 3, the Working Group was unable to reach agreement.

Those delegations that preferred Alternative "A" argued that in international law torture only had relevance when it could be tied to the conduct of public servants, whereas torture as a crime restricted entirely to private parties would be punishable exclusively by each national legal system.

The argument of the other delegations preferring Alternative "B" was that it would be inadvisable to limit the responsibility of public servants; instead it would be better to include all potential active agents of the crime.

To reconcile the two positions, the Delegation of Mexico submitted an amendment to that Article, which was as follows:

The following shall be held guilty of the crime of torture:

- a. A public servant or employee who, acting in that capacity, orders, instigates, or induces the use of torture, or who directly uses it or who, being able to prevent it, fails to do so.
- b. Any individual who, at the instigation of a public servant or employee as mentioned in subparagraph (a) orders, instigates, induces, or is an accomplice in the use of torture, or who uses it directly.
- c. Nevertheless, upon depositing their instruments of ratification or adherence, States may declare that vis-à-vis other States making the same declaration, the present Convention shall apply to any person who orders, instigates or induces the use of torture, or who directly uses it, and to any person who, having the obligation and the possibility of preventing it, fails to do so.

Here again, this amendment did not meet with the consensus of the Working Group. Those in favor of Alternative "A" explained their disfavor with the existence of two parallel systems where States that did not make the declaration provided for in the amendment would seem to restrict unnecessarily the scope of the Convention where torture used by private parties would go unpunished, when the truth would be that they would merely be limited to maintaining that punishment exclusively within the scope of their respective national legal systems.

Accordingly, the Working Group is submitting to the Committee for consideration the draft articles on which there were alternatives as agreed, including Article 3, which is presented with its corresponding alternatives and with the amendment by the Delegation of Mexico suggesting that the Committee determine the procedure to be followed for the study and adoption of Article 3, in other words, whether to decide at that level or to refer it to a higher instance:

Preamble

The American States signatory to the present Convention:

AWARE of the provision of the American Convention on Human Rights that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment;

REAFFIRMING that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations, and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights;

NOTING that, in order for the pertinent rules contained in the global and regional instruments to take effect, it is necessary to draft an inter-American convention that defines torture as a crime;

REAFFIRMING their purpose of consolidating in this hemisphere the conditions that make for recognition of and respect for the inherent dignity of man, and enable him fully and completely to exercise his fundamental rights and freedoms,

HAVE AGREED upon the following:

Article 1

The States Parties shall prevent and punish torture in accordance with the terms of this Convention.

Article 2

I. For the purposes of this Convention, torture shall be understood to be any act intentionally performed by which severe physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim, or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

II. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures provided that they do not include the performance of the acts or use of the methods referred to in this article.

Article 3

ALTERNATIVE A

The following shall be held guilty of the crime of torture:

- a. A public servant or employee who, acting in that capacity, orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
- b. Any employee who, at the instigation of a public servant or employee as mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

ALTERNATIVE B

A person who orders, instigates, or induces the use of torture, or who directly uses it, or is an accomplice to it, shall be guilty of torture.

Amendment by Mexico

1. The following shall be held guilty of the crime of torture:
 - a. A public servant or employee who, acting in that capacity, orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
 - b. Any employee who, at the instigation of a public servant or employee as mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.
2. Nevertheless, upon depositing their instruments of ratification or adherence, States may declare that vis-à-vis other States making the same declaration, the present Convention shall apply to any person who orders torture, instigates or induces its use, or who directly uses it, and to any person who, having the obligation and the possibility of preventing it, fails to do so.

Article 10

No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and as evidence of perpetration of the crime of torture.

Article 17

The States Parties shall report to the Inter-American Commission on Human Rights about any legislative, judicial, administrative, or other kinds of measures they adopt in application of this Convention.

In keeping with its duties and responsibilities, in its annual report, the Inter-American Commission on Human Rights will endeavor to analyze the existing situation in the member states of the Organization of American States in regard to the prevention and elimination of torture.

19 November 1985

Juan Carlos Capuñay
Alternate Representative of Peru
Chairman of the Working Group

Eduardo Mayora Dawe
Ambassador, Representative of Guatemala

José Luis Vallarta
Ambassador, Representative of Mexico

Mauricio Granillo Barrera
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Cherrie J. Orr
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Jorge Saltarelli Junior
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Mario González Vásquez
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Michael Strachan
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