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Recent Developments: The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

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INTERNATIONAL AGREEMENTS—*European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, opened for signature Nov. 26, 1987, Eur. T.S. No. 126, reprinted in 27 I.L.M. 1152 (1988) (entered into force Feb. 1, 1989)*

The Council of Europe broke new ground in the field of human rights on November 26, 1987 when it opened the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Convention) for signature. The Convention is the first human rights accord that sets up procedures for the prevention of torture and other ill-treatment of individuals. Although it represents a challenging development in the international fight against torture, loopholes in the document and the inherent difficulty of enforcing international human rights norms suggest that the Convention will engender more hope than progress.

The Convention¹ is the latest progeny of the recent international effort to combat torture that dates back to the 1948 Universal Declaration of Human Rights (Universal Declaration).² The strong stand against torture taken by the Universal Declaration has been reinforced by several subsequent international agreements.³ The succession of torture prohibitions in these international accords gave Amnesty International support for its 1973 claim that "[i]t can safely be stated

1. European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *opened for signature* Nov. 26, 1987, Eur. T.S. No. 126, *reprinted in* 27 I.L.M. 1152 (1988) [hereinafter Convention]. The Convention entered into force on Feb. 1, 1989.

2. G.A. Res. 217A, U.N. Doc. A/811, at 2 (1948) [hereinafter Universal Declaration]. Article 5 of the Universal Declaration states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.* The Universal Declaration built on article 55 of the United Nations Charter, which obligates the member states to "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. CHARTER art. 55. Although the Universal Declaration is an aspirational document rather than a binding treaty, *see* Universal Declaration, *supra*, preamble, its influence in human rights law and the fight against torture has been significant. *See* N. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 1 (1987).

3. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, art. II, 78 U.N.T.S. 277, 280 (1948) (prohibiting "serious bodily or mental harm to members of [a national, ethnic, racial or religious] group"); American Declaration of the Rights and Duties of Man, art. XXVI, res. XXX, *reprinted in* 43 AM. J. INT'L L. SUPP. 133, 137 (1949) (prohibiting "cruel, infamous or unusual punishment"); Geneva Conventions on the protection of war victims, Aug. 12, 1949, art. 3, 75 U.N.T.S. 1, 32, 88, 136-38, 288-90 (1950) (banning "at any time and in any place whatsoever . . . violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 5, 4 U.N. Doc. E/CONF. 24/20 (1956); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, art. 5, para. 2, 20 U.N. GAOR SUPP. (NO. 14) at 47, 48, U.N. Doc. A/6014 (1965); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 7, G.A. Res. 2200A, 21 U.N. GAOR SUPP. (NO. 16) at 49, 53, U.N. Doc. A/6316 (1966); American Convention on Human Rights, Nov. 22, 1969, art. 5, *reprinted in* 9 I.L.M. 673, 676 (1970).

. . . that under all circumstances, regardless of the context in which it is used, torture is outlawed under the common law of mankind."⁴ Western European states took a leading role in promoting the values embodied in the Universal Declaration by adopting in 1950 the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).⁵ Article 3 of the European Convention declares that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."⁶ The prohibition against torture in the European Convention is absolute; it may not be violated even in times of war or national crisis.⁷

The enforcement procedure for the rights in the European Convention involves three bodies: the European Commission of Human Rights (Commission), the European Court of Human Rights (Court), and the Committee of Ministers of the Council of Europe (Committee of Ministers).⁸ The European Convention empowers the Commission to receive petitions on alleged violations either from other state parties⁹

4. AMNESTY INTERNATIONAL, REPORT ON TORTURE 38 (1975). The United Nations Special Rapporteur on torture views the prohibition against torture as *jus cogens*, or a peremptory norm of general international law. Report by the Special Rapporteur, U.N. Doc. E/CN.4/1986/15, at 1 (1986); see also A. CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 314 (1986); N. RODLEY, *supra* note 2, at 70. In the United States, the Second Circuit has termed the torturer "an enemy of all mankind" and torture a crime against humanity. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

5. *Opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. The European Convention has been ratified by all 21 members of the Council of Europe: Austria, Belgium, Cyprus, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. EUROPEAN COMMISSION OF HUMAN RIGHTS, STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS: 1954 UNTIL 1984 1 (1984) [hereinafter STOCK-TAKING: 1954-1984].

6. European Convention, *supra* note 5, art. 3, at 224. The European Convention does not define torture or inhuman or degrading treatment or punishment. The European Commission of Human Rights and the European Court of Human Rights have, however, developed definitions for the critical concepts in article 3. For extended discussions of these concepts, see Doswald-Beck, *What Does the Prohibition of "Torture or Inhuman or Degrading Treatment or Punishment" Mean? The Interpretation of the European Commission and Court of Human Rights*, 25 NETH. INT'L. L. REV. 24 (1978), and N. RODLEY, *supra* note 2, at 71-95.

7. European Convention, *supra* note 5, art. 3, at 224. Article 15 allows signatory states to derogate from the duties imposed by the treaty "[i]n time of war or other public emergency threatening the life of the nation." *Id.*, art. 15, at 232. Member states, however, shall not derogate from article 2 (protection of life), except for death caused by lawful acts of war; article 3 (torture or inhuman or degrading punishment or treatment); article 4, para. 1 (slavery or servitude); and article 7 (retroactive punishment). *Id.*, arts. 2, 3, 4 and 7, at 224-32. On the absolute nature of the prohibition, see Duffy, *Article 3 of the European Convention on Human Rights*, 32 INT'L. & COMP. L.Q. 316, 321-22 (1983). For a philosophical reflection on torture, see Shue, *Torture*, 7 PHIL. AND PUB. AFF. 124 (1978).

8. Article 19 created both the Commission and the Court. European Convention, *supra* note 5, art. 19, at 234.

9. *Id.*, art. 24, at 236. All but one of the state petitions submitted to the Commission have included allegations of violations of article 3. See *Greece v. United Kingdom*, 2 Y.B. EUR. CONV. ON HUM. RTS. 174 (1958); *The Greek Case*, 13 Y.B. EUR. CONV. ON HUM. RTS. 108

or from individuals, groups of individuals, or non-governmental organizations, provided the state party complained against has recognized the competence of the Commission to receive such petitions.¹⁰ The Commission decides whether to admit a petition.¹¹ If the petition is admitted, the Commission investigates the complaint and seeks a friendly settlement.¹² If no settlement is reached, the Commission sends the Committee of Ministers a report on the facts with an opinion as to whether the European Convention has been violated.¹³ If the states involved in the complaint have recognized the jurisdiction of the European Court of Human Rights, the Commission or the states may request the Committee of Ministers to refer the case to the Court for decision.¹⁴ The rulings of the Court are binding on the states involved,¹⁵ and the Committee of Ministers supervises the execution of the judgment.¹⁶ If the case is not brought before the Court, the Committee of Ministers decides whether the European Convention has been violated, and its decision is binding.¹⁷

Even though the European Convention's procedures have influenced other human rights efforts,¹⁸ two factors combined in the late 1960's and early 1970's to stimulate efforts by European human rights ad-

(1970) (Denmark, Norway, Sweden, and the Netherlands submitted charges against Greece); Ireland v. United Kingdom, 15 Y.B. EUR. CONV. ON HUM. RTS. 76 (1972); Cyprus v. Turkey, 18 Y.B. EUR. CONV. ON HUM. RTS. 82 (1975); The Turkish Case, 26 Y.B. EUR. CONV. ON HUM. RTS. part II, ch. I., at 1 (1983) (Denmark, France, the Netherlands, Norway, and Sweden in 1982 submitting charges against Turkey). For an overview of the above cases, see STOCK-TAKING: 1954-1984, *supra* note 5, at 7-19 (1984).

10. European Convention, *supra* note 5, art. 25, at 238. As of Dec. 31, 1986, 18 states had recognized the competence of the Commission to receive individual petitions: Austria, Belgium, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. EUROPEAN COMMISSION OF HUMAN RIGHTS, STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS: SUPPLEMENT 1986 v (1988) [hereinafter STOCK-TAKING: SUPPLEMENT]. The Commission has received many individual complaints alleging violations of article 3, most of which were declared inadmissible. The extensive Commission and Court case law on article 3 is summarized in Doswald-Beck, *supra* note 6, *passim*, and Duffy, *supra* note 7, *passim*.

11. European Convention, *supra* note 5, arts. 26-27, at 238.

12. *Id.*, art. 28, at 238-40.

13. *Id.*, art. 31, at 240.

14. *Id.*, art. 48, at 246. The Court achieved its competence to hear cases on Sept. 3, 1958. *Id.*, art. 56, at 248. As of Dec. 31, 1986, 19 states had recognized the competence of the Court to hear cases: Austria, Belgium, Cyprus, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. STOCK-TAKING: SUPPLEMENT, *supra* note 10, at v.

15. European Convention, *supra* note 5, arts. 52-53, at 248.

16. *Id.*, art. 54, at 248.

17. *Id.*, art. 32, at 240-44.

18. The European Convention's structure and practice influenced the drafting and adoption of the 1966 International Covenant on Civil and Political Rights, *supra* note 3, and the 1969 American Convention on Human Rights, *supra* note 3.

vocates to improve the European Convention's machinery to fight torture and other ill-treatment. First, Europeans became disillusioned with the European Convention's ability to deal effectively with torture. For example, although Denmark, Norway, Sweden, and the Netherlands filed petitions against Greece alleging torture, the European Convention's procedures were ineffective in stopping or preventing torture in Greece.¹⁹ Amnesty International commented that the Greek torturers' "appreciation of the international system and the effectiveness of the international protection of human rights was certainly more accurate than the hopes of the intellectuals and professors they were torturing."²⁰ Even where the European Convention's machinery had an opportunity to function, the process took years. In the *Ireland v. United Kingdom* case,²¹ six years passed from the lodging of the complaint to the ruling of the European Court of Human Rights—a pace grossly inadequate for the immediate needs of fighting torture and other ill-treatment.²²

Second, the efforts of Amnesty International in the early 1970's jolted the complacent international attitude toward torture. In its 1975 *Report on Torture*, Amnesty International reported that over sixty countries practiced torture.²³

European states began to push within the United Nations and the Council of Europe for new measures to protect individuals from torture.²⁴ In the mid-1970's, Jean-Jacques Gautier, a Swiss human rights

19. The Greek Case, *supra* note 9.

20. AMNESTY INTERNATIONAL, *supra* note 4, at 100.

21. 15 Y.B. EUR. CONV. ON HUM. RTS. 76 (1972). Ireland filed a complaint against the United Kingdom in 1971 and two supplementary memorials in 1972 in response to British detention and interrogation policies towards suspected Irish Republican Army terrorists. After the European Commission made its report to the Committee of Ministers, Ireland referred the case to the European Court of Human Rights. The Court ruled that the British techniques used in 1971 violated article 3. *Id.* For more on this case, see O'Boyle, *Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom*, 71 AM. J. INT'L. L. 674 (1977).

22. As one commentator has stated: "Although it takes an average of about six years for a case to be decided in Strasbourg, in some instances nine or ten years have elapsed before a case is resolved." Drzemczewski, *The European Human Rights Convention: Time for a Radical Overhaul?*, 10 B.C. INT'L. & COMP. L. REV. 9, 13 (1987).

23. AMNESTY INTERNATIONAL, *supra* note 4, at 31. Amnesty International summed up the painful paradox: "Never has there been a stronger or more universal consensus on the total inadmissability [sic] of the practice of torture . . . [but] at the same time the practice of torture has reached epidemic proportions." *Id.*

24. The effort within the United Nations led to a series of General Assembly resolutions concerning torture that reaffirmed the prohibition against torture but did not improve international protection or remedies. The pertinent resolutions are: G.A. Res. 3059, 28 U.N. GAOR Supp. (No. 30) at 74, U.N. Doc. A/9030 (1973); G.A. Res. 3218, 29 U.N. GAOR Supp. (No. 31) at 82, U.N. Doc. A/9631 (1974); G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975); G.A. Res. 3453, 30 U.N. GAOR Supp. (No. 34) at 92, U.N. Doc. A/10034 (1975); G.A. Res. 32/62, 32 U.N. GAOR Supp. (No. 45) at 137, U.N. Doc. A/32/45 (1977); G.A. Res. 32/63, 32 U.N. GAOR Supp. (No. 45) at 137, U.N. Doc.

lawyer, began promoting the idea of a new European convention for the prevention of torture.²⁵ Gautier wanted to incorporate the system of periodic visits and confidential recommendations to government authorities developed by the International Committee of the Red Cross in its work with prisoners of war under the four Geneva Conventions.²⁶ A draft prevention treaty followed. Through a confidential visitation system to detention facilities by an independent European body, Gautier and other European human rights activists hoped to *prevent* acts of torture and ill-treatment instead of merely reacting to them through the petition procedures of the European Convention.²⁷

In deference to the United Nations' efforts to prepare a United Nations Convention against Torture, the International Commission of Jurists and the Swiss Committee against Torture²⁸ turned Gautier's draft prevention treaty into a draft Optional Protocol to the proposed United Nations Convention against Torture.²⁹ In 1980, Costa Rica submitted this draft Optional Protocol to the United Nations Commission on Human Rights for consideration. Although the Council of Europe threw its support behind the draft Optional Protocol,³⁰ the

A/32/45 (1977); G.A. Res. 32/64, 32 U.N. GAOR Supp. (No. 45) at 137, U.N. Doc A/32/45 (1977). For more on this aspect of the renewed effort against torture, see *infra* note 29.

25. Nowak, *Recent Developments in Combating Torture*, SIM NEWSLETTER, Oct. 1987, at 24, 27. See also Vargas, *Adoption of a European Convention against Torture*, COUNCIL OF EUROPE FORUM, Oct. 1987, at 1.

26. See Vargas, *supra* note 24. The texts of the four Geneva Conventions are available at 75 U.N.T.S. 1, 31, 89, 135, and 287 (1950).

27. Similarly, Amnesty International in 1973 included as one of its recommendations for strengthening the implementation and protection of individuals against torture the idea that the press, lawyers, families, and national and international inspectors have access to all prisons and detention facilities. AMNESTY INTERNATIONAL, CONFERENCE FOR THE ABOLITION OF TORTURE: FINAL REPORT 14 (1973).

28. For a more detailed look at the proposals of these two bodies, see INTERNATIONAL COMMISSION OF JURISTS AND SWISS COMMITTEE AGAINST TORTURE, TORTURE: HOW TO MAKE THE INTERNATIONAL CONVENTION EFFECTIVE (2d ed. 1980).

29. G.A. Res. 32/62 (Dec. 8, 1977) (requesting the UN Commission on Human Rights to prepare a draft convention against torture and other cruel, inhuman or degrading treatment or punishment). The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly on December 10, 1984, and it entered into force on June 26, 1987. G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984). For a detailed examination of the Convention against Torture's remedies for torture, see N. RODLEY, *supra* note 2, at 125; Boulesbaa, *An Analysis of the 1984 Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 4 DICK. J. OF INT'L. L. 185 (1986). The Convention against Torture is not the only UN action on torture in the 1980's. In 1981, the UN General Assembly established a United Nations Voluntary Fund for Victims of Torture. See N. RODLEY, *supra* note 2, at 133-42; *The United Nations Fund for Torture Victims: The First Years of Activity*, ICJ REV., Dec. 1986, at 35; Danelius, *The United Nations Fund for Torture Victims: The First Years of Activity*, 8 HUM. RTS. Q. 294 (1986). The United Nations Commission on Human Rights appointed in 1985 a Special Rapporteur on Torture to examine torture and report on its occurrence and extent. See N. RODLEY, *supra* note 2, at 120-25.

30. See *Recommendation 909 (1981) on the International Convention against Torture*, Eur. Cons. Ass., Doc. No. 4650 (1980).

United Nations Commission decided to delay consideration of the draft Optional Protocol until after the United Nations Convention against Torture was established.³¹

In 1983, when it was clear that the proposed United Nations Convention against Torture would not include the prevention system envisioned in the draft Optional Protocol, the Council of Europe's Parliamentary Assembly recommended that the Committee of Ministers adopt the prevention system in a new European convention on torture.³² On June 26, 1987, the Parliamentary Assembly of the Council of Europe adopted the Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and opened it for signature on November 26, 1987.³³ The Convention entered into force on February 1, 1989, three months after the Council of Europe received the seventh ratification.³⁴

The first chapter of the Convention establishes a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Committee) and authorizes it to make visits to examine "the treatment of persons deprived of their liberty" by the state in order to strengthen the protection of such individuals from torture or other ill-treatment.³⁵ The Convention empowers the Committee to visit any place within the jurisdiction of the parties in which the state allegedly deprives individual liberty.³⁶ State authorities must cooperate with the Committee during such visits.³⁷

The size of the Committee equals the number of parties to the Convention.³⁸ The persons selected to the Committee must be of high

31. Nowak, *supra* note 25, at 27-28. Nowak notes further that the UN Commission "decided, in 1986, again to defer consideration of the draft Optional Protocol until its 4th session in the spring of 1989." *Id.* at 28.

32. Rec. 971 of Sept. 28, 1983, reprinted in A. REYNAUD, HUMAN RIGHTS IN PRISONS 191 (1986).

33. Convention, *supra* note 1.

34. *Id.*, art. 19, para. 1, at 1157. The first seven states to ratify the Convention (with date of ratification) were Turkey (Feb. 26, 1988), Malta (Mar. 7, 1988), Ireland (Mar. 14, 1988), Sweden (June 21, 1988), the United Kingdom (June 24, 1988), Luxembourg (Sept. 6, 1988), and Switzerland (Oct. 7, 1988). Subsequent ratifications have been received from the Netherlands (Oct. 12, 1988) and France (Jan. 9, 1989). For an overview of the Convention, see Marie, *La Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants: un instrument pragmatique et audacieux*, 19 REVUE GÉNÉRALE DE DROIT 109 (1988); Cassese, *A New Approach to Human Rights: The European Convention for the Prevention of Torture*, 83 AM. J. INT'L. L. 128 (1989).

35. Convention, *supra* note 1, art. 1, at 1154.

36. *Id.*, art. 2, at 1154. Article 2 states: "Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority." *Id.*

37. *Id.*, art. 3, at 1154. Article 3 states: "In the application of this Convention, the Committee and the competent national authorities of the Party concerned shall co-operate with each other." *Id.*

38. *Id.*, art. 4, para. 1, at 1154.

moral character and either competent in the human rights field or have professional experience in penal detention.³⁹ Only one national from each state may serve on the Committee, and the Committee members shall act independently of any state.⁴⁰ The national delegations of the parties in the Council of Europe's Consultative Assembly will nominate three individuals for Committee membership.⁴¹ The Council's Committee of Ministers will then elect the members of the Committee from the nominated individuals.⁴² Subject to a provision to stagger membership terms, elected members will serve four years on the Committee.⁴³ Except where a party refuses to cooperate or act on Committee recommendations,⁴⁴ Committee decisions will be made by a majority of members present.⁴⁵

The Committee may organize visits periodically or when circumstances require.⁴⁶ At least two members of the Committee shall make a visit, assisted by experts and interpreters when the Committee thinks it necessary.⁴⁷ When the Committee decides to make a visit, it must notify the government of the party of its intention.⁴⁸ The text is ambiguous as to whether the Committee must notify the party of the specific facilities it intends to visit. Article 8 mentions only the Committee's general duty to notify the state of an intended visit, but article 9, paragraph 1 allows the party to "make representations to the Committee against a visit" to a particular place.⁴⁹ The state visited

39. *Id.*, art. 4, para. 2, at 1154.

40. *Id.*, art. 4, paras. 3-4, at 1154.

41. *Id.*, art. 5, para. 1, at 1155.

42. *Id.*

43. *Id.*, art. 5, para. 3, at 1155.

44. See *infra* note 62 and accompanying text.

45. *Id.*, art. 6, para. 1, at 1155. A quorum consists of a majority of the members. *Id.*

46. *Id.*, art. 7, para. 1, at 1155.

47. *Id.*, art. 7, para. 2, at 1155. Article 13 obligates Committee members and the experts, interpreters, and others selected to assist the Committee to maintain the confidentiality of all facts and information gathered while carrying out their responsibilities, both during and after their terms of office. *Id.*, art. 13, at 1156. Experts chosen by the Committee must be knowledgeable and experienced in the fields addressed by the Convention, and such experts are bound to the same obligations of independence, impartiality, and availability as Committee members. The Committee must specify the names of the individuals assisting it when serving notice of a visit governed by article 8. A party may declare that a person chosen to assist the Committee will not be allowed to be a part of the visit in its jurisdiction. *Id.*, art. 14, at 1156-57. Committee members and selected assisting individuals enjoy certain diplomatic privileges and immunities in exercising their duties, as elaborated in article 16 and the attached Annex. *Id.*, arts. 16, annex, at 1157, 1158-59.

48. *Id.*, art. 8, para. 1, at 1155.

49. *Id.*, arts. 8 and 9, para. 1, at 1155-56. According to the International Commission of Jurists, the intention of the original draft was that "[o]nce having notified a state of their intention to make a periodic visit, delegates may visit any place of detention without prior notice, in order to avoid preparatory 'cleaning-up' of particular institutions." *The European Draft Convention Against Torture*, ICJ REV., Dec. 1983, at 51-52. The only explicit limitation on the Committee's visitation rights is article 17, paragraph 3, which states that the Committee will

must provide Committee delegates unrestricted access to its territory and to the facilities the Committee wishes to examine, as well as complete information on such facilities.⁵⁰ The Convention secures the right of the Committee to interview privately persons deprived of liberty and to communicate freely with "any person [the Committee] believes can supply relevant information."⁵¹

Once a visit is completed, the Committee has the option of immediately providing the state visited with its findings.⁵² The Committee will complete a report after each visit.⁵³ The report is not a legal judgment or interpretation evaluating whether torture or other ill-treatment actually took place at the facilities visited. Rather, it sets forth the facts the Committee found during its visit. The Committee will send the report to the state visited with recommendations if needed.⁵⁴ Further, the Committee may consult with the party on how best to improve protection of persons deprived of liberty.⁵⁵ All dealings between the party visited and the Committee are confidential.⁵⁶ Subject to this confidentiality requirement, the Committee will provide the Committee of Ministers of the Council of Europe with a general report of its activities that will be sent to the Consultative Assembly and made public.⁵⁷

Article 9, however, contains a 'general escape clause' that allows parties to forestall a visit by making exceptional "representations" to the Committee that the proposed time and place of the visit conflicts with national defense, public safety, ongoing prison disorder, the medical condition of detainees, or urgent interrogations of a serious crime.⁵⁸ If a party makes such representations, the Convention obliges

not visit places where representatives of protecting powers or the International Committee of the Red Cross visit on a periodic basis under the terms of the four Geneva Conventions of Aug. 12, 1949 and the two Protocols thereto of June 8, 1977. Convention, *supra* note 1, art. 17, para. 3, at 1157. The text of the Geneva Conventions can be found at 75 U.N.T.S. 1, 31, 89, 135 and 287 (1950); the text of the two Protocols is reprinted in 16 I.L.M. 1391, 1442 (1977).

50. Convention, *supra* note 1, art. 8, para. 2, at 1155.

51. *Id.*, art. 8, para. 4, at 1155.

52. *Id.*, art. 8, para. 5, at 1155.

53. *Id.*, art. 10, para. 1, at 1156.

54. *Id.*

55. *Id.*

56. *Id.*, art. 11, para. 1, at 1156. The Committee cannot publish reports of visits or personal information gathered therein without permission of the state visited or individual interviewed. Also, the Committee must publish its report when asked by the party to do so. *Id.*, art. 11, paras. 2-3, at 1156.

57. *Id.*, art. 12, at 1156.

58. *Id.*, art. 9, para. 1, at 1156. The relevant text states:

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

it to consult with the Committee to clarify its position and to seek arrangements that would allow the Committee to undertake the visit nonetheless.⁵⁹ If the Committee wanted to visit a particular individual, the party must provide the Committee information about that person until the visit takes place.⁶⁰

Should a party refuse either to cooperate with the Committee or to improve a situation subsequent to Committee recommendations, the Committee will allow it the opportunity to explain its actions.⁶¹ After such explanation, the Committee by a two-thirds majority may decide to make a public statement concerning the situation.⁶²

For most of the member states of the Council of Europe, the impact of the new Convention will be marginal. Most Western European states enjoy good records in the treatment of prisoners and detainees.⁶³ The new Convention may help Europeans clarify and monitor minimum standards for the treatment of persons deprived of their liberty, but most European states maintain such standards without the need for a supranational watchdog body.⁶⁴

The Convention could have greater impact in the one Council of Europe member state where torture is still a major problem: Turkey. According to Amnesty International, nearly all of the 250,000 political prisoners interrogated by Turkish police since 1980 were tortured.⁶⁵ Although Turkey has joined the new Convention, the Convention's impact on torture in Turkey remains to be seen. Nevertheless, Turkey's record will likely improve—but for reasons

59. *Id.*, art. 9, para. 2, at 1156. The relevant text states:

Following such representations, the Committee and the Party shall immediately enter into consultations in order to clarify the situation and seek agreement on arrangements to enable the Committee to exercise its functions expeditiously. Such arrangements may include the transfer to another place of any person whom the Committee proposed to visit. Until the visit takes place, the Party shall provide information to the Committee about any person concerned.

60. *Id.*

61. *Id.*, art. 10, para. 2, at 1156.

62. *Id.* It is not clear if the Committee's obligation not to publish confidential information under article 11 is relaxed when a state refuses to cooperate with the Committee and the Committee votes to make a public statement on the matter under article 10, para. 2.

63. See AMNESTY INTERNATIONAL, *supra* note 4; AMNESTY INTERNATIONAL, *TORTURE IN THE EIGHTIES* (1984).

64. In 1973, the Council of Europe passed a resolution recommending that member states incorporate Standard Minimum Rules for the Treatment of Prisoners in their national legislation and penal policies. Fawcett, *Reform of the European Convention on Human Rights*, PUB. LAW, Autumn 1983, at 471. The Standard Minimum Rules for the Treatment of Prisoners was created in 1955 by the First UN Congress on the Prevention of Crime and the Treatment of Offenders. The new Committee for the Prevention of Torture might help monitor these standard rules, but it has no authority to declare whether standard rules are being violated. For more on the Standard Minimum Rules for the Treatment of Prisoners, see Clifford, *The Standard Minimum Rules for the Treatment of Prisoners*, 66 AM. J. INT'L. L. 232 (1972); N. RODLEY, *supra* note 2, at 221.

65. *Turks Enjoy More Freedom but Torture Continues*, N.Y. Times, Jan. 14, 1989, at 2, col. 1.

unconnected with the Convention. Turkey wants to join the European Community (EC),⁶⁶ and until it makes progress on human rights, its application for EC membership is unlikely to gain approval.⁶⁷ Any improvement in Turkey's torture record, therefore, should not be credited automatically to the Convention.

Further, if Turkey or any other European state wished to frustrate the Committee's activities, the text of the Convention provides ample loopholes. The biggest loophole is the 'general escape clause' contained in article 9.⁶⁸ The celebrated cases of torture in Europe during the life of the European Convention arose under emergency situations⁶⁹ or in relation to terrorist or violent political offenses.⁷⁰ The loophole in article 9 seems designed to give states freedom of action for dealing with such incidents and emergencies and will blunt the Convention's impact on state responses to such situations. Through this provision, state parties wield considerable discretion over the Committee's right to make visits, undercutting much of the seemingly mandatory language in the Convention.⁷¹

Since torture and other ill-treatment rarely occur in most European states and since the Convention provides states with a generous escape clause, the Convention does not represent the brave step that its proponents' rhetoric would indicate. Gautier, responding to criticism of the Convention, revealed that the major motive for the Convention was that the European example would encourage the prevention scheme to be extended to other regions and international bodies. This motive suggests that the Convention was intended primarily not to prevent torture in Europe but rather as an "act of faith" for the fight against torture in the international system.⁷²

The hope that the Convention will serve as a model and a catalyst for other regional and international action against torture ignores several harsh facts. First, the visitation scheme was available for many years to the United Nations and the Organization of American States (OAS) when both organizations were drafting new conventions against torture. Yet both the United Nations and the OAS adopted conventions that do not include a prevention scheme in any form at all.⁷³

66. See *Turkey Applies to Join The European Community*, MIDDLE EAST EXEC. REP., June 1987, at 20.

67. See *Turks Enjoy More Freedom but Torture Continues*, *supra* note 65.

68. Convention, *supra* note 1, art. 9, para. 1, at 1156.

69. See *supra* note 6 and the cases contained therein.

70. Cassese, *supra* note 34, at 133.

71. As one commentator states, "this provision could still be misused with a view to preventing or at least delaying certain visits." Nowak, *supra* note 25, at 29.

72. See Vargas, *supra* note 25, at 2.

73. See the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 29, and the 1985 Inter-American Convention to Prevent

Further, the United Nations Commission on Human Rights has repeatedly delayed consideration of the prevention scheme contained in the Optional Protocol to the 1984 United Nations Convention against Torture.⁷⁴

Second, the United Nations and other regional international organizations are not renowned for implementing effective enforcement remedies for human rights violations.⁷⁵ In the unlikely event that a visitation scheme is adopted on a global level, it will most likely be watered down considerably from what appears in the new Convention for Europe.

Third, the high degree of cooperation and interdependence between European states make it possible for them to adopt a prevention scheme like the one embodied in the Convention. Such cooperation and interdependence are present in the international community to a much lesser extent, if at all. To create and implement a prevention system, community solidarity must be at a threshold level that the international and various regional communities currently do not approach.

Fourth, Europe's ability to maintain a solid record on torture and to adopt a novel human rights convention has less to do with the power of international human rights law than with the firm convictions shared by the European democracies of the inviolability of individual civil and political rights and of the vigorous rule of law. Such conviction, reflecting the influence of Western values, is unfortunately lacking in many other nations, frustrating and eroding the basis for successful human rights instruments.⁷⁶

In the Convention, European states have challenged the international system to close the gap between rhetoric and action in the fight against torture. The Convention's strategy of preventing torture by creating an independent supranational body to visit detention and penal facilities goes to the heart of the problem with human rights: effective supervision and implementation of human rights standards. The Europeans' forthrightness, however, should not be confused with measureable progress against torture in Europe or the international

and Punish Torture, O.A.S. Treaty Series, No. 67, reprinted in 25 I.L.M. 519 (1986). On the Inter-American Convention, see Nowak, *supra* note 25, at 30-31.

74. See *supra* note 31 and accompanying text.

75. In the words of one scholar:

Despite the vast proliferation of instruments setting standards on human rights, imposing obligations as regards the observance of those standards and establishing procedures to deal with breaches of those obligations, violations of human rights continue, their perpetrators apparently undeterred.

Cassese, *supra* note 34, at 128.

76. "Until national legal systems improve their performance it is naive to put faith in 'progress by international legislation.'" Brownlie, *The Expansion of International Society: The Consequences for the Law of Nations*, in *THE EXPANSION OF INTERNATIONAL SOCIETY* 357, 368 (H. Bull & A. Watson eds. 1984).

system. For the foreseeable future, the Convention will stand for the obvious proposition that prohibiting torture requires better enforcement of human rights norms. It becomes, ironically, another admirable human rights objective against which stand all the harsh realities of domestic and international politics. For Europe and the international system, then, the new Convention is more symbol than substance.

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