

# Convention against Torture, and Optional Protocol to the Convention against Torture

## Background

2.1 The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention) is a substantive human rights instrument that establishes state obligations in relation to prohibitions on torture and other cruel and inhuman or degrading treatment or punishment. The *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Optional Protocol) is designed to be an enforcement and preventative mechanism to further achieve the purposes of the Convention.

2.2 Under article 1 of the Convention, 'torture' refers to

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person

acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

- 2.3 The Joint Standing Committee on Treaties (the Committee) recognises the concept of ‘cruel, inhuman or degrading treatment or punishment’ as stated in the Attorney-General’s Department’s report, *Australia’s Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Australia understands that the acts or conduct encompassed by this expression entail some lesser degree of severity than those defined as ‘torture’, which nevertheless are inconsistent with the inherent dignity and rights of the person. Australia understands that the expression encompasses such acts as excessive punishments out of proportion to the crime committed, or treatment which grossly humiliates and debases a person.<sup>1</sup>

- 2.4 The Attorney-General’s Department’s report further states that Australian domestic law is not constructed around the terms ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment’, and therefore does not distinguish between the two types of conduct. Therefore, for the purposes of this report and in line with the Attorney-General’s Department’s report, the use of the term ‘torture’ encompasses both types of conduct.<sup>2</sup>

## Convention against Torture

- 2.5 The Convention requires State Parties to take effective measures to prevent acts of torture in any territory under its jurisdiction.<sup>3</sup> No exceptional circumstances such as war, internal political instability or any other public emergency, or an order from a superior officer or a public authority may be invoked as a justification for torture.<sup>4</sup>

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1 Attorney-General’s Department, 1999, *Australia’s Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Canberra, p. 3.

2 Attorney-General’s Department, 1999, *Australia’s Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Canberra, p. 3.

3 Articles 2 and 16, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention).

4 Article 2, Convention.

- 2.6 The Convention requires that States, among other things, ensure that
- acts of torture are offences under domestic legislation, and to make these offences punishable by appropriate penalties<sup>5</sup>
  - education and information regarding the prohibition against torture are included in the training of those people involved in the treatment of people subject to arrest, detention or imprisonment<sup>6</sup>
  - interrogation rules, instructions, methods and practices, and custody arrangements are systematically reviewed<sup>7</sup>
  - competent authorities undertake a prompt and impartial investigation of any alleged act of torture<sup>8</sup>
  - in the State Parties legal system the victims of torture or their dependents have an enforceable right to fair and adequate compensation and rehabilitation<sup>9</sup>
  - statements made as a result of torture are not invoked as evidence in proceedings (except against a person accused of torture as evidence that the statement was made).<sup>10</sup>
- 2.7 Under article 8 of the Convention, State Parties are prohibited from returning a person to another State where there are substantial grounds for believing that the person would be at risk of torture. The State must also ensure that the ‘alleged perpetrator of torture present in any territory under their jurisdiction is prosecuted or extradited to another State for the purpose of prosecution’.<sup>11</sup>
- 2.8 The Convention was adopted by the United Nations General Assembly on 10 December 1984 and entered into force generally on 26 June 1987.<sup>12</sup> As at 15 March 2004, there were 134 Parties to the

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5 Article 4, Convention.

6 Article 10, Convention.

7 Article 11, Convention.

8 United Nations, ‘Combating Torture’, Fact Sheet No. 4 (Rev.1), p. 8. See article 12, Convention.

9 Article 14, Convention.

10 United Nations, ‘Combating Torture’, Fact Sheet No. 4 (Rev.1), p. 8. See article 15, Convention.

11 United Nations, ‘Combating Torture’, Fact Sheet No. 4 (Rev.1), p. 8.

12 United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> (15/3/04).

Convention.<sup>13</sup> Australia ratified the Convention on 8 August 1989, and it entered into force for Australia on 7 September 1989.<sup>14</sup>

## Committee against Torture

- 2.9 Article 17 of the Convention provides for the establishment of a Committee against Torture. Its main function is to ensure that the Convention is observed and implemented.
- 2.10 The Committee against Torture consists of 10 experts of ‘high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity’.<sup>15</sup> It is prescribed that in the election of committee members consideration also be given to equitable geographic distribution and legal experience. As Jastine Barrett’s article (exhibit 5) states, ‘impartiality and integrity are vital for the committee members’ if they are to be effective in achieving their objectives.<sup>16</sup>
- 2.11 The Convention establishes four mechanisms through which the Committee against Torture performs its monitoring functions.<sup>17</sup> Namely, the Committee against Torture shall consider State Party reports (article 19), undertake confidential inquiries (article 20), consider communications from individuals who claim to be victims of a violation of the Convention (article 22), and consider inter-State complaints (article 21). The Committee against Torture can only pursue the two latter mechanisms if the State Party recognises its ability to conduct confidential inquiries.
- 2.12 The Committee against Torture has a reporting mechanism to monitor implementation of the Convention and to supervise State compliance with such obligations. Article 24 requires that the Committee against Torture submit an annual report on its activities to the UN General Assembly and State Parties.

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13 United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> (15/3/04).

14 Attorney-General’s Department, 1991, *Australia’s First Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Canberra, p. 1.

15 Article 17, Convention.

16 *Exhibit*, Jastine Barrett, 2001, ‘The Prohibition of Torture under International Law: Part 1: The Institutional Organisation’ in *The International Journal of Human Rights*, Vol. 5, No. 1, (Spring 2001), Frank Cass, London, p. 7.

17 United Nations, ‘Combating Torture’, Fact Sheet No. 4 (Rev.1), p. 11.

## Inquiry proceedings under article 20

- 2.13 Under article 20 of the Convention, the Committee against Torture is able to conduct investigations if it ‘receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party’. In such cases the Committee against Torture shall invite the State Party to co-operate in the examination of the information, and inquiry process, which may include a visit to the territory of the State Party.
- 2.14 These proceedings are confidential. However following their completion, the Committee against Torture ‘may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report’ to the UN General Assembly and State Parties.<sup>18</sup>
- 2.15 Ms Renee Leon from the Attorney-General’s Department advised the Committee that
- The procedure for contacting a state and seeking consent and wishing to visit is a confidential one... I think the view was probably taken in the drafting of the convention that bilateral dealings with the committee were merely more likely to achieve an outcome than megaphone diplomacy about possible abuses would, so the committee would seek to engage on a confidential basis with other states and to assist a state that might be having difficulties of implementation to resolve its problems between it and the committee.<sup>19</sup>
- 2.16 The competence conferred upon the Committee against Torture by this article is optional, hence at ratification or accession a State Party may declare that it does not recognise it.
- 2.17 The Attorney-General’s Department and the Department of Foreign Affairs and Trade were unable to advise the Committee of the number of States that the Committee against Torture had visited since its inception, due to the confidential nature of its inquiries.<sup>20</sup>

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18 Article 20, the Convention.

19 Ms Renee Leon, *Transcript of Evidence*, 9 February 2004, p. 7.

20 See *Transcript of Evidence*, 9 February 2004, p. 7.

However, according to Jastine Barret's 2001 article, the Committee against Torture conducted one visit in 1990 (to Turkey).<sup>21</sup>

## Optional Protocol to the Convention against Torture

- 2.18 As the Optional Protocol's preamble states, further measures were thought to be necessary to achieve the purposes of the Convention and to strengthen the protection of people deprived of their liberty against torture. Hence, the Optional Protocol seeks to build on the Convention's obligations by developing preventative measures designed to reinforce the protections conferred on people deprived of their liberty.
- 2.19 In accordance with article 1 the objective of the Optional Protocol is to establish a system of regular visits, to be undertaken by independent international and national bodies, to places where people are deprived of their liberty<sup>22</sup> in order to prevent torture. The visits are intended to strengthen, when required, the protection of people deprived of their liberty against torture.<sup>23</sup>
- 2.20 The functions of the Optional Protocol are to be carried out by two main mechanisms, namely the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (the Subcommittee on Prevention, or Subcommittee), and independent national preventative mechanisms.

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21 *Exhibit*, Jastine Barrett, 2001, 'The Prohibition of Torture under International Law: Part 1: The Institutional Organisation' in *The International Journal of Human Rights*, Vol. 5, No. 1, (Spring 2001), Frank Cass, London, p. 13.

22 For the purposes of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Optional Protocol), pursuant to article 4, 'deprivation of liberty' means 'any form of detention or imprisonment, or the placement of a person in a public or private custodial setting', which they are 'not permitted to leave at will by order of a judicial, administrative or other authority' (eg. police and military holding cells, juvenile and immigration detention centres and closed psychiatric institutions). Under article 4 of the Optional Protocol, 'a place of detention' is any place under state jurisdiction and control, 'where people are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'.

23 Article 4, Optional Protocol.

- 2.21 The text of the Optional Protocol was adopted at the United Nations General Assembly on 18 December 2002.<sup>24</sup> The vote was 127 in favour to 4 against, with 42 abstentions, including Australia.<sup>25</sup>
- 2.22 The Optional Protocol is not yet in force generally, as only three instruments of ratification or accession, of the required 20, have been deposited with the UN Secretary-General. Of the three instruments Albania has acceded, and Malta and the United Kingdom have ratified the Optional Protocol. As at 15 March 2004, there were 23 signatories to the Optional Protocol (see also section on entry into force).<sup>26</sup>

## Subcommittee on Prevention

- 2.23 The Subcommittee on Prevention, established under article 2 of the Optional Protocol, is to consist of 10 members chosen for their 'high moral character, having proven professional experience in the field of the administration of justice' (in particular criminal law, prison or police administration) or other fields relevant to the treatment of persons deprived of their liberty.<sup>27</sup>
- 2.24 The Subcommittee is to conduct regular visits to State Party facilities, regardless of whether there are substantive concerns regarding allegations of torture, to assist the State Party in realising its obligations under the Convention. During a visit, the Subcommittee on Prevention will assess the conditions of places of detention and the treatment of those people deprived of their liberty, and make recommendations and observations concerning their protection.<sup>28</sup>
- 2.25 State Parties will be notified of the Subcommittee on Prevention's programme of regular visits so they may then make the necessary practical arrangements for the visit to be conducted.<sup>29</sup> Pursuant to article 12, State Parties must cooperate with and receive visits by the

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24 United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty16.asp> (15/3/04).

25 Department of Foreign Affairs and Trade, *Exhibit*, p. 6.

26 United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty16.asp> (15/3/04).

27 Article 5, Optional Protocol.

28 Article 11, Optional Protocol.

29 Article 13, Optional Protocol.

Subcommittee. Further, State Parties must allow unrestricted access to information relating to the number of people deprived of their liberty, their treatment and conditions of detention, and the places of detention and their location.<sup>30</sup> The Subcommittee must also be allowed to conduct private interviews with persons deprived of their liberty, in places of their choosing, and with the people it wants to interview.<sup>31</sup>

- 2.26 A State Party can only object to a visit to a particular place of detention on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited, that temporarily prevent a visit.<sup>32</sup>
- 2.27 The reporting mechanisms on the work of the Subcommittee are prescribed in article 16 of the Optional Protocol. Following a visit to a State Party, the Subcommittee's recommendations shall be communicated to the State Party in confidence and, if relevant, to the national preventative mechanisms. The Subcommittee on Prevention will publish a report, together with comments by the State Party, whenever requested to do so by the latter. The Subcommittee on Prevention will present a public annual report on its activities to the Committee against Torture. Notably, if a State Party refuses to cooperate with the Subcommittee, or take steps to improve the situation in light of the Subcommittee's recommendations, the Committee against Torture may decide to make a public statement on the matter or to publish the report of the Subcommittee.

## National preventative mechanisms

- 2.28 Articles 3 and 17 of the Optional Protocol require State Parties to establish one or more independent national preventative mechanisms for the prevention of torture at the domestic level. In doing so, State Parties must ensure that
- the national preventative mechanisms are independent
  - the experts involved have the required capabilities and professional knowledge, gender balance and adequate representation of ethnic and minority groups in the State
  - the national preventative mechanisms have the necessary resources to perform their functions
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30 Article 14, Optional Protocol.

31 Article 14, Optional Protocol.

32 Article 14, Optional Protocol.



- consideration is given to the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).<sup>33</sup>
- 2.29 Pursuant to article 19, the national preventative mechanisms must also conduct regular visits to places of detention and make recommendations to the State Party to improve the treatment and conditions of people deprived of their liberty with the view to protect them from the occurrence of torture. State Parties must facilitate the visits by national preventative mechanisms providing similar rights of access to information, people deprived of their liberty and places of detention as those given to the Subcommittee on Prevention.<sup>34</sup>
- 2.30 Article 22 prescribes that the State Party is to examine the national preventative mechanisms recommendations and enter into a dialogue on possible implementation measures.
- 2.31 The national preventative mechanisms can also submit proposals and observations concerning existing or draft legislation.<sup>35</sup>
- 2.32 The method of reporting for national preventative mechanisms, pursuant to article 23, requires State Parties to publish and disseminate the annual reports of the national preventative mechanisms.

## Costs

- 2.33 Article 25 details the financial provisions of the Subcommittee on Prevention. Specifically, the expenditure incurred and the provision of staff and facilities shall be borne by the UN.
- 2.34 Pursuant to article 26 a Special Fund will be established to help finance the implementation of the Subcommittee's recommendations, and the national preventative mechanism's education programmes. State Parties therefore, would be required to financially support most of the functions of the national preventative mechanisms.

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33 Article 18, Optional Protocol. See also Human Rights and Equal Opportunity Commission, *Submission*, p. 5.

34 Article 20, Optional Protocol.

35 Article 19, Optional Protocol.

## Entry into force

- 2.35 The Optional Protocol was available for signature by State Parties to the Convention on 4 February 2003.<sup>36</sup> Instruments of ratification and accession are to be deposited with the UN Secretary-General.<sup>37</sup>
- 2.36 Under article 28, the Optional Protocol will enter into force 30 days after the deposit of the 20<sup>th</sup> instrument of ratification or accession. The Optional Protocol will subsequently enter into force for each ratifying State Party, 30 days after the date of deposit of its own instrument of ratification or accession.
- 2.37 At the time of the Committee's inquiry there were 23 signatories and three parties to the Optional Protocol, as listed in Table 1.
- 2.38 Unlike the Convention, no reservations can be made to the Optional Protocol.<sup>38</sup>

## Postponing implementation

- 2.39 As prescribed in article 24, upon ratification, State Parties may make a declaration postponing the implementation of their obligations under the Mandate of the Subcommittee on Prevention (Part III) or the National Preventative Mechanisms (Part IV) of the Optional Protocol for up to three years. Parties can take action to seek extension of this initial period for an additional two years.

## Amendment

- 2.40 Any State Party may propose an amendment to the Optional Protocol and file it with the UN Secretary-General who will then take the prescribed actions set out in article 34.
- 2.41 Amendments would enter into force once accepted by a two-thirds majority of State Parties to the Optional Protocol in accordance with their respective constitutional processes.

## Denunciation

- 2.42 A State Party may denounce the Optional Protocol at any time by written notification addressed to the UN Secretary-General.

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36 United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty16.asp> (15/3/04).

37 Article 27, Optional Protocol.

38 Article 30, Optional Protocol.

Denunciation would take effect one year after the date of receipt of notification by the UN Secretary-General.<sup>39</sup>

**Table 1 Status of ratification of Optional Protocol**

<b>Participant</b>	<b>Signature</b>	<b>Ratification, Accession (a), Succession (d)</b>
Albania	-	1 October 2003 (a)
Argentina	30 April 2003	
Austria	25 September 2003	
Brazil	13 October 2003	
Costa Rica	4 February 2003	
Croatia	23 September 2003	
Denmark	26 June 2003	
Finland	23 September 2003	
Guatemala	25 September 2003	
Iceland	24 September 2003	
Italy	20 August 2003	
Madagascar	24 September 2003	
Mali	19 January 2004*	
Malta	24 September 2003	24 September 2003
Mexico	23 September 2003	
New Zealand	23 September 2003	
Norway	24 September 2003	
Romania	24 September 2003	
Senegal	4 February 2003	
Serbia and Montenegro	25 September 2003	
Sierra Leone	26 September 2003	
Sweden	26 June 2003	
United Kingdom of Great Britain and Northern Ireland	26 June 2003	10 December 2003*
Uruguay	12 January 2004*	

*Source* United Nations, *Multilateral treaties deposited with the Secretary-General*  
<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/ChapterIV/treaty16.asp> (15/3/04).

\**Source* Attorney-General's Department, the Department of Immigration and Multicultural and Indigenous Affairs, and the Department of Foreign Affairs and Trade, *Submission, Attachment B*.

39 Article 33, Optional Protocol.